IN THE SUPREME COURT OF IOWA

NO. 20-0814
Hardin County No. CVCV101474

UNION PACIFIC RAILROAD COMPANY and MIDWESTERN RAILROAD PROPERTIES,
Plaintiffs-Appellees,

vs.

DRAINAGE DISTRICT 67 BOARD OF TRUSTEES, GARY RABE, in his capacity as a member of the Board of Trustees, KEITH HELVING, in his capacity as a member of the Board of Trustees, DENNIS PROCHASKA, in his capacity as a member of the Board of Trustees
Defendants-Appellants,

and

BECCA JUNKER, in her capacity as Hardin County Drainage Clerk, JESSICA LARA in her capacity as Hardin County Auditor,
Defendants.

APPEAL FROM THE IOWA DISTRICT COURT FOR HARDIN COUNTY

THE HONORABLE JAMES A. McGLYNN

APPELLANTS' BRIEF AND REQUEST FOR ORAL ARGUMENT

PROOF COPY

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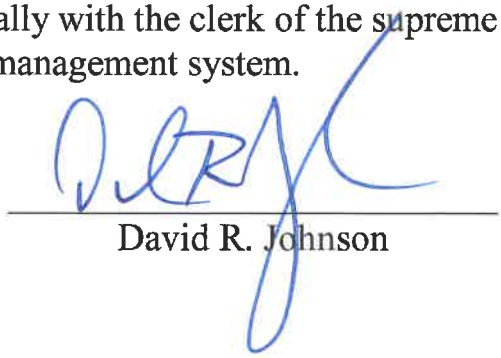
CERTIFICATE OF FILING

I hereby certify that on the 5th day of October, 2020, I submitted this proof brief electronically with the clerk of the supreme court via the electronic document management system.



David R. Johnson

CERTIFICATE OF SERVICE

The undersigned certifies a copy of this notice of appeal was served on this 5th day of October, 2020, upon the following persons and upon the clerk of the supreme court:

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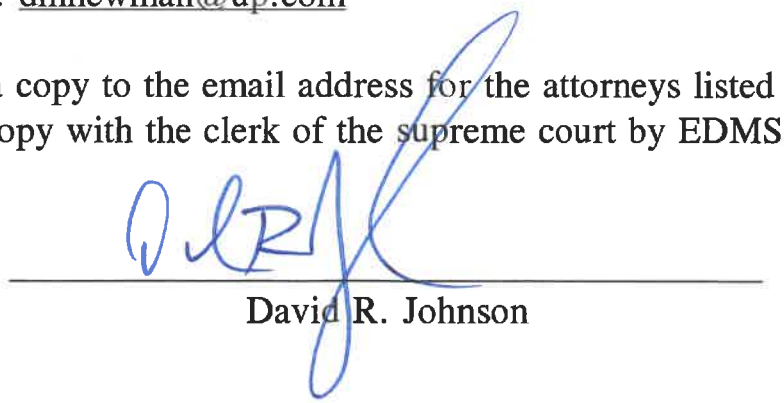
by sending a copy to the email address for the attorneys listed above, and by filing a copy with the clerk of the supreme court by EDMS.



David R. Johnson

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I. The district court erred by granting the railroad's motion for summary judgment and reversing the Board of Trustees' approval of the reclassification commission's report because the railroad did not offer any competent evidence to meet its burden to overcome the presumption the assessing officers did their duty and the reclassification report was correct and in substantial compliance with the drainage code, by a very clear showing of prejudicial error or fraud or mistake, or that the reclassification report was so plainly without foundation or so extravagant as to demonstrate it had been dictated by ignorance, passion or prejudice; yet the district court still ruled, and its ruling was based upon an erroneous interpretation and application of the drainage statutes and caselaw and did so without any evidence upon which to amend or adjust the assessments; and the district court should have granted the Board of Trustee's motion for summary judgment.

Authorities

Iowa Code section 468.91

Hicks v. Franklin County Auditor, 514 N.W.2d 431 (Iowa 1994)

Fitzgarrald v. City of Iowa City, 492 N.W.2d 659 (Iowa 1992)

Ioerger v. Schumacher, 203 N.W.2d 572 (Iowa 1973)

Iowa R. App. P. 6.907

Iowa R. Civ. P. 1.981(3)

Iowa Code section 468.39

Iowa Code section 468.44

Iowa Code section 468.45

Iowa Code section 468.47

Chicago & N.W. Ry. Co., v. Board of Sup'rs of Hamilton County, 162 N.W. 868 (Iowa 1917)

In re Johnson Drainage Dist. No. 9, 118 N.W. 380 (1908)

Chicago, M. & S.P. Ry. Co. v. Monona County, 122 N.W.820 (Iowa 1909)

Chicago, R. I. & P. Ry. Co. v. Wright County Drainage Dist. No. 43 et al., 154 N.W. 888 (1915)

Fardal Drainage Dist. No. 72, in Hamilton County, et al. v. Board of Sup'rs of Hamilton County et al., 138 N.W. 443 (1912)

Chicago & N.W. Ry. Co. v. Board of Sup'rs of Hamilton County, 153 N.W. 110 (Iowa 1915)

Chicago, R.I. & P. Ry. Co. v. Board of Sup'rs of Winnebago County, 188 N.W. 848 (Iowa 1922)

II. The district court erred by ordering the previous classification of benefits reinstated, when the only remedy available was to amend the classification of benefits.

Authorities

Koenigs v. Mitchell County Board of Supervisors, 659 N.W.2d 589 (2003)

Chicago, R. I. & P. Ry. Co. v. Wright County Drainage Dist. No. 43 et al., 154 N.W. 888 (1915)

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Davis v. City of Albia, 434 F. Supp. 2d 692 (S.D. Iowa 2006)

Iowa Code section 468.47

ROUTING STATEMENT

This case should be transferred to the court of appeals because it involves the application of existing legal principles, and presents issues that are appropriate for summary judgment, as provided by Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

In early 2018, the Board of Trustees for Hardin County Drainage District No. 67 ("Board of Trustees") appointed Engineer Lee O. Gallentine, P.E., to investigate repairs to the main tile and a lateral located in the drainage district. Eng. Report, p. 3. Gallentine prepared his *Engineer's Report on Repairs to Main Tile, Drainage District No. 67 Hardin County, 2018* ("Engineer's Report") and signed it on April 4, 2018. Eng. Report, p. 1. The main tile was investigated and he concluded it had "exceeded its useful lifecycle" as evidenced by collapsed and cracking tile, tile that was offset in places, the presence of debris and railroad ballast inside the tile, and concluded it was likely the tile was collapsed under the railroad bed. Eng. Report, p. 5. The Board of Trustees appointed a Reclassification Commission to reclassify the lands within the drainage district. Eng. Report,

p. 3. The Commission prepared its *Reclassification Commission Report for Main Tile, Drainage District 67, Hardin County, Iowa* ("Reclassification Report") and signed it on April 10, 2019. On May 10, 2019, the Board of Trustees scheduled a public hearing on the Reclassification Report for June 4, 2019 at 10:00 a.m. Notice. Notice of the hearing was published and mailed to landowners in the district, including Midwestern Railroad Properties. Notice, Letter.

On June 3, 2019, Union Pacific Railroad Company ("Union Pacific") filed an objection letter with the Hardin County Auditor. Letter, p. 1. On June 4, 2019, at the conclusion of the public hearing, the Board of Trustees approved the Reclassification Report. Minutes. On June 24, 2019, Union Pacific filed a Notice of Appeal and Proof of Bond with the Hardin County Auditor and filed an "Appeal" in the Iowa District Court for Hardin County. Appeal. Union Pacific then filed an Amended Appeal on July 1, 2019. Amend Appeal.

The Board of Trustees accepted service of original notice on August 5, 2019, and filed its Answer on August 23, 2019. Answer. A three-day non-jury trial was set for May 12, 2020. Order. On March 13, 2020, Union Pacific filed a motion for summary judgment and accompanying pleadings.

Motion. The motion was set for hearing on April 27, 2020. Order.

The Board of Trustees filed an application to extend its deadline to file a resistance to April 7, 2020, and it was granted by the district court. Application, Order. The Board of Trustees filed Defendants' Resistance to Plaintiffs' Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment and the accompanying pleadings on April 7, 2020. Resistance. Union Pacific filed a Reply Brief in Support of their Motion for Summary Judgment. Reply.

The hearing on the motions was held by telephone on April 27, 2020. Order. On May 15, 2020, the district court entered its Order Granting Plaintiffs Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment. Order. The Board of Trustees filed a Notice of Appeal with the district court on June 3, 2020. Notice.

STATEMENT OF THE FACTS

The Engineer's Report signed by Lee O. Gallentine, P.E., on April 4, 2018. defined the scope of work as:

> "SCOPE OF WORK - The District Trustees, requested Clapsaddle-Garber Associates to investigate and report concerning repairs to the Main tile of Drainage District No. 67.

> This report will summarize the history of improvements and repairs, investigate the **necessity and feasibility** of said repairs, and present opinions of probable construction costs associated with said repairs. As a result, on February 13, 2018 the District Trustees requested Clapsaddle-Garber Associates move ahead with an investigation and report concerning repairs to the Main tile."

Eng. Report, p. 2 (bold added herein). The Engineer's Report describes the District History going back to the petition for the establishment of the drainage district dated July 6, 1915. Eng. Report, p. 4. The history includes, without limitation, the following:

1916, Apr. 4	Tile Contract with Eldora Pipe and Tile Company for ***$533.82*** for supplying tile was entered.
1916, Apr. 13	Construction contract with L.P. Debe for ***$652.78*** for construction of drainage district facilities was entered.
1916, Apr. 27	Signed contract between the CRIP Railroad and Drainage District Trustees for construction of the railroad crossing. Said contract indicated that CRIP Railroad ***may supply 30 feet of cast iron pipe for installation directly under the railroad tracks and embankment.*** It also indicated that the drainage district would install said cast iron pipe, keep the district tile in "good repair", and assess the expense for repairs to "all parties" within the drainage district.

Eng. Report, p. 4 (emphasis added herein). The project was completed some time before January 15, 1917 when the Notice of Assessment of Benefits was published. Eng. Report, p. 4. It also shows minor repairs were performed in the 1950's, 1974 and 1979. Eng. Report, p. 4.

The "Plat of Bullis Drainage District No. 67" shows the sections and roads. Plat DD67. It is attached to Gallentine's Affidavit in support of the Board of Trustees' Resistance/Motion for Summary Judgment. Affdavit. The Engineer's Report also includes the Investigation Map, Appendix A, showing the drainage district. (When it was filed electronically with the district court, the map was folded when it was scanned, so another copy will have to be filed with the Appendix.). The Engineer's Report also describes in detail the location of the Main tile from the point of discharge, where it empties into another district tile, then upgrade. Eng. Report, p. 3. Thus, the water drains to the north.

The investigation consisted of field and office investigation, visual observation with excavation, and the CCTV inspection of approximately 1,125 feet of the Main tile (approximately 30% of the total). Eng. Report, p. 5. The Engineer's Report includes pictures and coordinates in Appendix B, the CCTV inspection tabulation and reports in Appendix C, and exact

locations of CCTV inspection contained in Investigation Map included in Appendix A. Eng. Report, p. 5. It includes the following Discussion and Conclusions:

> DISCUSSION AND CONCLUSION - Based on the above, it is obvious that the Main tile ***in the areas of investigation*** has exceeded its useful lifecycle. Much, if not all the existing VCP tile is cracked which is definitely an indication of nearing the end of lifecycle. More concerning are the many issues listed that restricted drainage and expose the district to potential liability from a tile collapse under the existing railroad tracks. These are an indication of the pipe exceeding its useful lifecycle. Said CCTV inspection and visual observations identified the following key issues:
>
> - 1 full collapsed tile.
> - 1 radially cracked tile.
> - 10 partially collapsed tile.
> - 30 offset joints with voids, rocks, or soil visible.
> - 48' of previous repair with single wall HDPE. 5' of this is deformed.
> - 609' +/- of soil and debris in flowline.
> - Unable to CCTV inspect under railroad tracks due to debris. Said debris appears to be entering under said railroad tracks, which could indicate a tile collapse under said railroad tracks.
>
> If repairs are not performed, the ***lower end*** of the Main tile will continue to deteriorate/collapse and will continue to allow soil to enter the Main tile. All of this will manifest itself as more sinkholes and soil infiltration. When all these issues are combined, it will lead to further reduced drainage and liability exposure by the drainage district.

Eng. Report, p. 5 (emphasis added herein). It also includes "Tabulated Defects" describing defects and their frequency or length as: top crack (566 feet), side crack (50 feet), bottom crack (6 feet), partial or imminent collapse (10), full collapse (1), debris (609 feet), offset joint (74), soil/voids visible in the offset joint (30), single wall HDPE (non-deformed)(43 feet), single wall HDPE (deformed)(5 feet), CMP (rusty)(0 feet), holes (non-fixed)(0), holes (fixed)(0), roots (195 feet) and radial cracks (1 foot). Eng. Report, p. 17.

There are still photos from the televised inspection, the first group is from the "south side of the tracks west of I Avenue" traveling downstream. Eng. Report, pp. 18-23. The second group is "DD67 upstream from Williams hole on south side of tracks" traveling upstream". Eng. Report, p. 19-33. It shows the clay pipe and the HDPE pipe. *Id.* The small photos have information to the right side, and are followed by the larger photos. *Id.*

There are photos from the inspection from "DD67 Downstream from McDowell Hole on North side of tracks" traveling downstream. Eng. Report, pp. 34-56. Based on the comments to the right of the small photos, they show "continuous top crack, rocks from railroad grade to south, large piece of broken tile in flowline, wide joint, wide joint - soil showing, severe offset, roots, continuous offsets, wide/soil showing, wide, large void, and the

end of the inspection because they were unable to go any further because something under the water and mud was stopping the tractor. *Id.*

There are photos from the inspection of "DD67 Upstream from McDowell Hole on North side of tracks, going under the railroad" showing the following problems: "continuous top crack, continuous debris in flowline, roots, large amount of railroad ballast in pipe, will not be able to get past, end of investigation, tile is plugged with railroad ballast." Eng. Report, pp. 57-60. See, in particular the large photos showing the "Large amount of railroad ballast in pipe, will not be able to get past this." and "End of investigation. Tile is plugged with railroad ballast." *Id,* p. 60.

The Engineer's Report sets forth two options: a spot repair at a cost of $127,650 and a tile replacement at a cost of $142,140.00 and describes the tile replacement as follows:

- For the lower end of the Main tile, remove and replace the existing tile for the entire length of investigation.
- The above repairs would be in the same location as the existing Main tile in order to preserve connections with private tile. The exception to this would be the railroad crossing, where the location of the Main tile would be dictated by railroad standards. For reference, the route and locations are shown on the map included in Appendix E.

Eng. Report, p. 6 (underline in original).

The Engineer's Report also included the Engineer's Opinion of Probable Construction Cost attached as Appendices F & G (which are not included with the report filed by Union Pacific with its Appendix in support of motion for summary judgment, so this exhibit may have to be supplemented for the Appendix).

The Engineer's Report set forth the repair methods including spot repairs and tile replacement and several notes including, without limitation, the following notes:

- For both the above options, the current railroad crossing would not be removed, but would be abandoned and ***a new crossing will be installed at a location dictated by railroad standards***.
- The above repairs are for the ***identified lower portion of the Main tile only. No repairs are proposed for the remainder of the existing Main tile.***

Eng. Report, p. 6 (emphasis added herein).

The Board of Trustees appointed a Reclassification Commission to reclassify the lands within the district boundaries of Drainage District 67. Eng. Report, p. 3. The Reclassification Report was signed by the Commissioners on April 10, 2019. Reclass Report. Attached to the Reclassification Report is the Tile Boundary Map and it should be pointed out that North is to the right on that map, and the water drains from South to

North where the tile goes underneath the railroad tracks and embankment, then goes on to discharge into neighboring Drainage District No. 3. Reclass. Report, p. 10; Eng. Report, p. 3. The map also includes the blue line showing "the **entire** main tile per original map" which is not the same as the 1,125 feet of the main tile that was investigated. Eng. Report.

In addition to reviewing lands with the district, the Reclassification Commission also looked at the Existing Classification, Soil Surveys from USDA website, Map of Boundaries and Facilities, Aerial/Tract Maps from the Hardin County GIS website, and Recorded Boundary Surveys from the Hardin County Recorder's Office. Reclass. Report, p. 4. The Commission gathered information about tract verification, acreage verification, acreage generation, soil type determination, proximity determination. Reclass. Report, p. 4. The Commission evaluated and determined benefits using the Soil Factor, Facility Proximity Factor, Combined Factor, % Benefit, Units Assessed, % Units Assessed, Percent Levy, Assessment for Project (entire tract basis) and Assessment for Project (per acre basis). Reclass. Report, p. 5. The Commission set forth two exceptions to the reclassification. The first was for tract numbers 13 and 14 for having highly irregular shapes and are highlighted on the reclassification sheet in red. Reclass. Report. The second

exception is set forth as follows:

> 4.2 For tract 12, approximately 50% of the construction costs in the recent bid letting for the currently proposed project were associated with requirements by the Union Pacific Railroad to prevent erosion on their property and the resulting protection of the Union Pacific Railroads facilities. As such, the Commissioners felt that tract 12 is the 100% benefited tract for the currently proposed project and should pay 50% of the total reclassification.

Reclass. Report, p. 6. The tract owned by Union Pacific (Midwestern Railroad Properties) is number 12 and is highlighted in yellow. Reclass. Report, p. 11. It should be pointed out here, and will be argued in more detail below, that Iowa Code section 468.44 provides, in relevant part, the report of the commissioners shall set forth: (2) the amount of benefits to railroad property and the percentage of benefits to each of said other tracts, and the apportionment and amount of assessment of cost and expense against each (d) for **erosion protection and control or flood control**; and (4) **Any specific benefits other than those derived from the drainage of agricultural lands shall be separately stated.**

The Reclassification Commissioners also stated in their Conclusion:

> 5.0 CONCLUSION: - Using all the above, the Reclassification Commission generated reclassification sheets **for the entire Main tile.** For reference, copies are included in Appendix C. It is recommended moving forward that the District Trustees, should take action to accomplish the following:

- Approve the Reclassification Report.
- Hold the required hearing.
- **Adopt the Reclassification Report as the basis of payment for the currently proposed project.**
- **As projects arise in the future, determine on an individual basis if the Reclassification Commission Report is equitable based on item 4.2 from the EXCEPTIONS section above.**

Reclass Report, p. 5.

It is true, when drainage districts are originally established, Iowa Code section 468.49 provides the classification of land for drainage, erosion or flood control purposes, when finally adopted, shall remain the basis of all future assessments for the purpose of the district. But it also continues with: "... unless revised by the board in the manner provided for reclassification." And Iowa Code section 468.65 provides that, after a drainage district has been established, if there has been a material change as to lands occupied by highway or railroad right-of-way, or in the character of the lands benefited by the improvement; or when a repair, improvement or extension has become necessary, the board may consider whether the existing assessments are equitable as a basis for payment of the expense of maintaining the district and of making the repair, improvement or extension. If they find the same to be inequitable in any particular, they shall by resolution express such finding and order the reclassification. Iowa Code section 468.65.

Using the described evaluation method, the Commissioners generated a reclassification sheet for the **entire** Main Tile, a copy of which is attached as Appendix C. Reclass. Report, p. 11. Based on a sample construction cost of $250,000.00, the Commissioner's report would result in an assessment to the Midwestern Railroad Properties parcel number 12 in the amount of $125,000.00. Reclass. Report, p. 11; Gallentine Aff., p. 5.

The Reclassification Report also includes Certificates signed by the Reclassification Commissioners: Lee O. Gallentine, P.E., Dennis Friest and Chuck Walters. Reclass Report, pp. 7-9. No objections were filed by Midwestern Railroad Properties, Union Pacific or any other landowners challenging the qualifications of the Reclassification Commissioners.

On or around May 10, 2019, the Hardin County Auditor notified the Plaintiffs by publication and letter that the Board of Trustees set a hearing on the Reclassification Report for June 4, 2019 at 10:00 a.m. Notice, Letter. On June 3, 2019, Union Pacific emailed to the Hardin County Auditor an objection letter stating: "Union Pacific specifically reserves its rights under Iowa Code section 468.5 to designate the appropriate location for the system to cross the railroad right of way. Letter. It should be pointed out here that Iowa Code section 468.5 provides (bold and italics added herein):

> When any such ditch or drain crosses any railroad right-of-way, ***it shall when practicable*** be located at the place of the natural waterway across such right-of-way, ***unless*** said railroad company ***shall have provided*** *another place in the* ***construction of the roadbed*** *for the flow of the water*; and if located at the place provided by the railroad company, such company shall be estopped from afterwards objecting to such location on the ground that it is not at the place of the natural water.

In this case, there appears to be no evidence Union Pacific offered to "provide another place in the construction of the roadbed for the flow of water". Union Pacific objected to the reclassification commission report. Letter.

At the public hearing held on June 4, 2019 none of the landowners personally present filed objections. Minutes. The Board approved the Reclassification Report. Minutes. On June 24, 2019, Union Pacific emailed and mailed a "Notice of Appeal and Proof of Bond for appeal of Hardin County Drainage District 67's Reclassification of Benefits" to the Hardin County Auditor. On June 24, 2019, Union Pacific filed in the Iowa District Court for Hardin County an "Appeal Under Iowa Code Section 468.83 and Petition for Declaratory and Injunctive Relief" with Exhibits A-E on June 24, 2019, naming the Defendants as members of the Board of the Hardin County Supervisors.

Gary Rabe, Keith Helving and Dennis Prochaska serve as "private trustees" or "landowner trustees" of Hardin County Drainage District No. 67. See Iowa Code chapter 468, Subchapter III, "Management of Drainage or Levee Districts by Trustees." Sections 468.501 through 468.537, provide that a drainage district may be placed under the control and management of a board of trustees to be elected by the persons owning land in the district. Iowa Code section 468.500. Each trustee must be a citizen of the United States not less than eighteen years of age and be a bona fide owner of *agricultural land* in the election district for which the trustee is elected, and a resident of the county in which that district is located, or owners of *non-agricultural land* may qualify under subparagraphs (2), (3) or (4) if a certain percentage of the district is located within the corporate limits of a city, which is not the case here. Iowa Code section 468.506(1) (italics added herein). Subchapter III provides landowner trustees shall have the control, supervision, and management of the district for which they are elected and shall be clothed with all of the powers now conferred on the board of supervisors for the control, management and supervision of drainage districts under the laws of the state. Iowa Code section 468.526.

On July 1, 2019, Union Pacific filed an "Amended Appeal Under Iowa Code Section 468.83 and Petition for Declaratory and Injunctive Relief", before any responsive pleadings were filed, naming the Defendants as members of the Drainage District 67 Board of Trustees.

The Board of Trustees accepted service of original notice on August 5, 2019, and filed its Answer on August 23, 2019. Answer. A three-day non-jury trial was set for May 12, 2020. Order. On March 13, 2020, Union Pacific filed a motion for summary judgment, memorandum of authorities, statement of undisputed facts, and appendixes in support of the motion. Motion, Memo, Statement, Appendix. The motion was set for hearing on April 27, 2020. Order. The Board of Trustees filed an application to extend its deadline to file a resistance to April 7, 2020, and it was granted by the district court. Application, Order.

The Board of Trustees filed "Defendants' Resistance to Plaintiffs' Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment" on April 7, 2020. Resistance. The Board of Trustees also filed a Memorandum of Authorities, Statement of Undisputed Facts, and an Affidavit signed by Lee O. Gallentine, P.E., along with Exhibits 1, 2A, 2B, 3, 4, 5, 6, 7, 8, 9, 10 and 11. Memo, Statement, Affidavit, Exhibits. Union

Pacific filed a Reply Brief in Support of their Motion for Summary Judgment, and a "Declaration of Chris Vokt, P.E." referencing Exhibit J. Reply, Declaration.

The district court ordered the hearing to be conducted by telephone conference call and it was held on April 27, 2020. Order. On May 15, 2020, the district court entered its Order Granting Plaintiffs Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment. Order. The Board of Trustees filed a Notice of Appeal with the district court on June 3, 2020. Notice.

Early in its order, the district court found "as a matter of law that the Reclassification Commission and the Board *went outside the lines* and based their decision on matters which were *not benefits* or were otherwise *not proper subjects of consideration* in making the reclassification, and in doing so acted inequitably." Order, p. 7 (italics added herein). The district court spent the next four pages exhibiting its misunderstanding of Iowa drainage law. It wrote: "The fundamental problem facing the engineer and the Drainage District Trustees with the drain tile repair project was that they believed it was so expensive the cost-benefit ratio was negative, yet the Drainage District was mandated to complete the project. Refusing to

complete the project was not an option." Order, p. 8. The district court acknowledged: "It is obvious that the cost of the repair was high and that the high costs of the repair will result in painfully large assessments to the landowners in the district." Order, p. 8. However, the district court went on to conclude this is a scenario contemplated by the drafters of Iowa Drainage Law at Chapter 468. Order, p. 8. The district court cited the safety valve for the establishment of a district, or improvements thereto, is the right of remonstrance but, by contrast, there is no right of remonstrance for a repair, so once a drainage improvement has been constructed, districts have a "positive mandate to keep the drainage system in such condition that it will function properly and perform the service for which it was intended." Order, p. 8-9, citation omitted. It also wrote: "The concept urged by the defense that a repair must be "reasonable and **affordable**" for the landowners does not appear anywhere in the drainage code." Order, p. 9 (bold added herein). It concluded this line of reasoning with: "Thereafter, the improvements must be maintained regardless of any subjective opinion that the cost and expense of a repair create a greater burden than should justly be borne by the lands benefitted. The district court then boldly, but incorrectly, announced:

> In effect, a decision was made over a hundred years ago that the continuing **value** of the improvements of this drainage district ***is and always will be greater than the cost of any repair***. The legislative scheme recognizes that a drainage district cannot afford to allow the valuable improvements to languish in disrepair and that it would be unreasonable to allow that to happen, to the point that a mandamus action can be filed to compel the repair. This means that the question of whether the cost of a repair is objectively reasonable and affordable ***was decided long ago***. If a repair is *necessary and capable of being done*, ***then whatever the cost***, it is *reasonable and affordable* and must be made. That is so, because otherwise the improvement will be lost. The complaints that the repairs in this case are **unreasonable and unaffordable** may be understandable, but they are subjective opinions, not fact.

Order, pp. 9-10.

The district court's incorrect statements and summary of Iowa Code chapter 468 regarding drainage law, as well as the erroneous findings and conclusions of law set forth in the remainder of its order that will be discussed below, make it easy to see how it erred, as a matter of law and procedure, in granting the Defendant's motion for summary judgment and denying the Plaintiff's motion.

The district court completely overlooked the applicable sections in chapter 468 providing a repair cannot be approved if it is not **feasible**. Iowa Code section 468.126 governs repairs and improvements. Subparagraphs (1) through (3) deal with repairs, and subparagraph (4) deals with

improvements. Subparagraph (1)(b) provides:

> The board may at any time obtain an engineer's report regarding the **most feasible means** of repairing a drainage or levee improvement and the probable cost of making the repair. * * *

Subparagraph 1(d) provides if a hearing is required under paragraph "c" the board shall order an engineer's report and at the hearing the board shall hear objections to the **feasibility** of making the proposed repair. Subparagraph (1)(e) provides:

> Following a hearing, if required in paragraph "c", **the board shall determine whether the repair is necessary or desirable, and feasible.**

Iowa Code section 468.126. It goes without saying, then, that if a proposed repair is not necessary or desirable AND feasible, it cannot be approved by the Board of Trustees. To do so would violate the law and the trustees' fiduciary duty to the landowners to avoid excessive assessments to their lands. If a repair is not feasible, the action to be taken by the board of trustees is to direct the engineer to seek alternative repairs. If the engineeer cannot find a proposed repair that is feasible, the repair cannot be made and the improvement may have to be abandoned.

The district court did not recognize Iowa Code section 468.250, subparagraph (1) of which provides:

> Drainage or levee districts may be dissolved and abandoned or assimilated by the procedure prescribed by this part.
>
> 1. When any drainage or levee district is free from indebtedness and it shall appear that the necessity therefore no longer exists or that the expense of the continued maintenance of the ditch or levee is in excess of the benefits to be derived therefrom, the board of supervisors or board of trustees, as the case may be, shall have power and jurisdiction, upon petition of a majority of the landowners, who, in the aggregate, own sixty percent of all lands in such district, to abandon the same and dissolve and discontinue such districts in the manner prescribed by section 468.251 through 468.255. Nothing in this subsection shall prevent the board from eliminating land from a drainage district as permitted under section 468.188.

The average assessment per acre for all the tracts, based upon the commission's recommendations, are listed in the last column of the reclassification sheet. Reclass. Report, p. 11. If the reclassification report is reversed and the previous assessment reinstated, as ordered by the district court, the assessments on the agricultural land would roughly double, resulting in assessments per acre for the following tracts:

Tract 1.	$1,638.66/acre
Tract 2	$1,633.70/acre
Tract 3	$2,000.20/acre
Tract 4	$2,282.60/acre
Tract 5	$1,246.56/acre
Tract 9	$2,413.35/acre
Tract 10	$1,398.12/acre

The district court even acknowledged these would be "painfully large assessments." Order, p. 8.

The district court ordered "the previous classification of benefits is reinstated." As shown from the caselaw that is cited below, the district court cannot just void the reclassification report. Union Pacific, the movant, had the burden of providing the district court with the assessment schedule that should be approved under these circumstances. That Union Pacific did not provide the district court with sufficient competent evidence is confirmed by the fact the district court did not, because it could not, modify or adjust the assessments.

But, for the sake of reviewing the sections of Chapter 468 that could apply, assume the jurisdiction of this matter is returned to the Board of Trustees with orders to "reinstate the previous classification of benefits". Order, p. 20. The board of trustees would have to hold a hearing to decide whether to approve the repair or replacement set forth in the Engineer's Report. The board of trustees could find both proposed repairs are not necessary or desirable and **feasible**.

Additionally, a majority of the owners of the agricultural land could file a petition to dissolve the district and abandon the improvements because

they are too expensive to maintain, as provided by Iowa Code section 468.250. The irony, or hypocrisy of this, is that the railroad would then probably object and resist a petition to dissolve and abandon. And, if such a petition were granted by the board, the railroad would probably appeal that decision to the district court, claiming it is necessary to repair the tile under its railroad tracks and embankments. The railroad would be changing its tune about the "necessity" of the main tile moving water from the south side of its tracks and embankment to the north side so it can be discharged into the neighboring drainage district. The railroad would argue how badly it needs the abandonment of the old tile and the replacement with new tile, casing and joints, in another location designated by it. If the railroad successfully appealed the board of trustees' decision to dissolve and abandon the drainage district, jurisdiction would then return to the board. The railroad would then, presumably, file a petition for writ of mandamus, under Iowa Code chapter 661 to force the board to complete either the repair or replacement recommended in the Engineer's Report. The board might then find the proposed repair is not necessary or desirable AND feasible.

If the old tile below the railroad tracks and embankment is not abandoned (physically by filling it in) and collapses, the railroad could not

sue the drainage district because it is exempt from suit for monetary damages as recently reaffirmed by the supreme court in *Board of Water Works Trustees of City of Des Moines v. Sac County Board of Supervisors*, 890 N.W.2d 50 (Iowa 2017). If the man-made tile beneath the railroad collapses (because it has not been physically abandoned by filling it in) it would not be construed a separate "force of nature". Surface water would no longer pass through it and in times of heavy rainfall the agricultural land on the upgrade side of the railroad tracks and embankment would flood, thereby reversing the objective of the drainage district.

Iowa Code section 468.188(1) provides:

> 1. If it should develop that any type of public improvement, other than the forces of nature, has caused such a change in the district as to effectively sever and cut off some of the land in the district from other lands in the district and from the improvements in the district in such a way as to deprive the land of any further benefits from the improvement, or in some manner to divide the benefits that may be derived from two separated portions of the improvement, then the board of supervisors or the board of trustees in charge may upon notice to interested parties and hearing as provided by this subchapter, parts 1 through 5, for the original establishment of a district make an order to remove lands so deprived of benefits from the district without any reclassification, or may subdivide the district into two separate entities if the public improvement splits the district into two separate units, each of which may still derive some separate benefits from the separated portions of the district.

As a result, the agricultural land upgrade from the railroad tracks and embankment would be removed from the district and would no longer be assessed for any future repairs, leaving only the railroad and the small number of acres downgrade from the railroad right of way to where the main tile discharges into the adjoining drainage district. The end result would be the railroad, and a very small number of other landowners of agricultural land downgrade from the right of way, would be assessed for the entire repair.

The sections of chapter 468 set forth above were never discussed, considered or relied upon by the Reclassification Committee or the Board of Trustees. It is simply submitted by the undersigned to set forth all of the sections in Chapter 468 that can come into play with a proposed repair that is unfeasible. This discussion was begun to show how the district court erred in its conclusion that all repairs must be completed at any cost, which simply is not the law. If a proposed repair is not feasible, a board of trustees, as provided by chapter 468 and their fiduciary duty to the landowners, must refuse to approve it. The district court was simply wrong on this matter of law and it results in a critical error in the rest of its reasoning, findings and conclusion of law.

This district court's order sounds like it was written by the railroad because it does not want these drainage tile lines to break (and cause damage to its railroad tracks and embankments). And it wants a precedent that will force drainage districts to use any and all methods and materials it demands, or are required by law - either way it does not matter - that allow them to continue their business of railroading. If the district court's ruling is affirmed, the railroads will be given carte blanche to demand whatever specifications they believe are necessary and the owners of agricultural lands will have no choice but to write a blank check for the cost, in addition to the amount they are being assessed for the general benefits to all the lands, some of which are already at $1,206.75 per acre. Reclass Report, p. 11.

The district court made a lot of disparaging statements about the Board of Trustees and their counsel in this part of its ruling. They are obvious. They evidence a bias in favor of the railroad and against the Board of Trustees. And they do not deserve further comment herein. After reciting caselaw from the Supreme Court of Nebraska regarding equity, the district court eventually found:

> Although there is no evidence of actual fraud, the Court FINDS as a matter of law that this reassessment was made for the ***inequitable purpose*** of supporting a ***subjective opinion*** regarding the cost of the repair ***rather than following the law***,

and that the reassessment was based on **prejudice, gross error and mistake** in the following particulars:

1. Costs of construction are not "benefits of a character" which are "a proper subject of consideration in a reclassification."

2. The costs of complying with federal standards are not benefits and are not of a character which are a proper subject of consideration in a reclassification.

3. The methods used by the Reclassification Commission and the Board of Trustees is contrary to the holding of the District 55 Case.

4. The reclassification cannot be based upon the railroad's ability to pay the assessment.

Order, pp. 10, 12, 14, 17.

1. "Costs of construction are not 'benefits of a character' which are 'a proper subject of consideration in a reclassification.'" Order, p. 10. In this section, the district court asserted its research found two cases on point. But those cases are not on point. The first case involved a comparison of the assessments between agricultural lands - not a comparison of the benefits assessed to a railroad right of way versus agricultural land in the district. In the first case, one tract of agricultural land was assessed more than the others because the contractor had to go nine feet deep on his land to install the tile, but not as deep on the other lands. The supreme court found all the land in

the district benefited similarly from having the tile installed in that manner so it was not equitable to assess the one tract of agricultural land higher than the others.

In the second case, the language quoted by the district court was dicta, and it did not involve the direct appeal of an assessment of benefits by a railroad. The cases set forth below in this brief provide the applicable precedent. The Board of Trustees respectfully disagree with the assertion they want to create new law rather than follow existing law, and submit they did not commit a gross error and mistake. Admittedly, neither counsel for the Board of Trustees nor counsel for Union Pacific provided the district court with the applicable and controlling authorities set forth below. But that does not excuse the district court's error in relying upon two cases that0 are not on point.

2. "The costs of complying with federal standards are not benefits and are not of a character which are a proper subject of consideration in a reclassification." Order, p. 12. It is irrelevant whether the specifications demanded by the railroad were mandated by federal standards or not. The question is whether the methods and materials benefited the railroad bed and embankment or not. The district court even admitted: "It may be that

compliance with buildings codes provides a better quality structure for the owner..." Order, p. 13.

3. "The methods used by the Reclassification Commission and the Board of Trustees is contrary to the holding of the District 55 Case." Order, p. 14. The Board of Trustees disagrees with the district court's finding it is obvious that the District's strategy in this case was to circumvent the holding in the District 55 case. Order, p. 14. Said case did not involve the review of a reclassification commission's report of benefits. As it relates to this case, it simply ruled the procedures set forth in Iowa Code chapter 468 must be followed for assessing the benefits and levying the assessments. In this case, the Reclassification Commission and the Board of Trustees substantially complied with all of the applicable procedures. The Board of Trustees disagrees with the district court's assertion about the Drainage District 55 ruling being circumvented, or that the "defense ploy is transparent" or that it would "rig" the assessment process. Order, p. 15. The Board of Trustees disagrees with the district court's characterization this was a "charade"; it disagrees with the assertion it provided no statute or caselaw which supports its argument. Order, p. 16. The district court did not even mention or discuss

the requirements set forth at Iowa Code section 468.44(2)(d) that the reclassification report set forth the amount of benefits to railroad property and the percentage of benefits for erosion protection and control or flood control; and the requirement in subparagraph (4) that any specific benefits other than those derived from the drainage of agricultural lands shall be separately stated.

The district court concluded the DD 55 case must be read as prohibiting the Reclassification Commission from considering the costs of repairing an artificial drain tile as a benefit or as any other proper subject in a reclassification under section 468(1)(b). Not only does this sound like the exact finding the railroad would like to have announced, the Board of Trustees does not know to which section of chapter 468 the district court is referring. The Board of Trustees and undersigned do take exception to the district court accusing it of trying to discriminate against the railroad for having deeper pockets. This assertion is baseless and offensive.

4. "The reclassification cannot be based upon the railroad's ability to pay the assessment." Order, p. 17. This concept was not relied upon by the Reclassification Commission or the Board of Trustees. The ability of the

railroad to earn income from its roadbed and embankment was referred to by counsel during arguments, but counsel was trying to describe the differences in using lands for a railroad right of way versus farming, which has been recognized as relevant evidence by the supreme court in cases set forth below.

ARGUMENT

I. The district court erred by granting the railroad's motion for summary judgment and reversing the Board of Trustees' approval of the reclassification commission's report because the railroad did not offer any competent evidence to meet its burden to overcome the presumption the assessing officers did their duty and the reclassification report was correct and in substantial compliance with the drainage code, by a very clear showing of prejudicial error or fraud or mistake, or that the reclassification report was so plainly without foundation or so extravagant as to demonstrate it had been dictated by ignorance, passion or prejudice; yet the district court still ruled, and its ruling was based upon an erroneous interpretation and application of the drainage statutes and caselaw and did so without any evidence upon which to amend or adjust the assessments; and the district court should have granted the Board of Trustee's motion for summary judgment.

Preservation of Error. The district court filed its Order on May 15, 2020. Order. The Board of Trustees filed a Notice of Appeal with the district court on June 3, 2020. Notice. The issues raised in this appeal have been properly preserved for appeal.

Scope and standard of review.

Iowa Code section 468.91 provides all appeals from orders or actions of the board, except for fixing compensation or damages, shall be triable in equity. Actions involving the direct appeal from the board's proceedings are tried as equitable proceedings. *Hicks v. Franklin County Auditor*, 514 N.W.2d 431, 435 (Iowa 1994) citing Iowa Code section 468.91; *Fitzgarrald v. City of Iowa City*, 492 N.W.2d 659, 663 (Iowa 1992); *Ioerger v. Schumacher*, 203 N.W.2d 572, 574 (Iowa 1973).

Iowa R. App. P. 6.907 provides the review in equity cases shall be de novo and in all other cases the appellate courts shall constitute courts for correction of errors at law, and findings of fact in jury-waved cases shall have the effect of a special verdict.

According to the supreme court in *Koenigs v. Mitchell County Board of Supervisors*, 659 N.W.2d 589 (2003)(bold added herein):

> In this case, however, the appeal is a result of the district court's grant of summary judgment. Although the nature of the action is equitable, we "cannot find facts de novo in an appeal from summary judgment." *Keokuk Junction Ry. v. IES Indus., Inc.*, 618 N.W.2d 352, 355 (Iowa 2000) (quoting *Moser v. Thorp Sales Corp.*, 312 N.W.2d 881, 886 (Iowa 1981)). The proper scope of review of a case in equity resulting in summary judgment is for correction of errors of law. *Id.* We will uphold the grant of summary judgment if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3).

Argument.

Iowa Code section 468.39 is entitled "Duties - time for performance - scale of benefits" and provides (bold added herein):

> At the time of appointing said commissioners, the board shall fix the time within which said assessment, classification, and apportionment shall be made, which may be extended for good cause shown. Within twenty days after their appointment, they shall begin to inspect and classify all the lands within said district, or any change, extension, enlargement, or relocation thereof in tracts of forty acres or less according to the legal or recognized subdivisions, in a graduated scale of benefits to be numbered according to the benefits to be received by each such tracts from such improvement, and pursue said work continuously until completed and, when completed, shall make a full, accurate and detailed report thereof and file the same with the auditor. The lands receiving the greatest benefit shall be marked on a scale of one hundred, and those benefited in a lesser degree with such percentage of one hundred as the benefits received bear in proportion thereto. They shall also make an equitable apportionment of the costs, expenses, fees, and damages computed on the basis of the percentages fixed.

Iowa Code section 468.44 is entitled "Report of commissioners" and provides (bold added herein):

> The commissioners, within the time fixed or as extended, shall make and file in the auditor's office a written verified report in tabulated form as to each forty-acre tract, and each tract of less than forty acres, setting forth:

1. The names of the owners thereof as shown by the transfer books of the auditor's office or the reports of the engineer on file, showing said entire classification of lands in said district.

2. **The amount of benefits** to highway and **railroad property** and the percentage of benefits to each of said other tracts and the apportionment and amount of assessment of cost and expense, or estimated cost or expense, against each:

a. **For main ditches**, and settling basins.
b. For laterals.
c. For levees and pumping stations.
d. **For erosion and protection and control or flood control.**

3. The aggregate amount of all assessments.

4. **Any specific benefits other than those derived from the drainage of agricultural lands shall be separately stated.**

Iowa Code section 468.45 requires the Board fix a time for hearing on the report of the commissioners and prescribes the form of notice to landowners. Iowa Code section 468.46 provides (bold added herein):

> At the time fixed or at an adjourned hearing, the board shall hear and determine all objections filed to said report and shall fully consider the said report, and may affirm, increase or diminish the percentage of benefits **or the apportionment of costs and expenses** made in said report against any body or tract of land in said district **as may appear to the board to be just and equitable.**

Iowa Code section 468.47 is entitled "Evidence - conclusive presumption" and provides (bold added herein):

> At such hearing, the board may hear evidence both for and against the approval of said report or any portion thereof, **but it shall not be competent to show that any of the lands in said district assessed for benefits or against which an apportionment of costs and expenses has been made will not be benefited by such improvement in some degree.** Any interested party may be heard in argument in person or by counsel.

In *Hicks v. Franklin County Auditor*, 514 N.W.2d 431 (Iowa 1994), the supreme court found the board substantially complied with the statutory notice requirement involving a repair of the improvement in a drainage district. The supreme court stated, at 435-436 (bold added herein):

> When reviewing drainage proceedings of boards of supervisors we have applied three principles: **the drainage statutes shall be liberally construed for the public benefit**; strict compliance with statutory provisions is required to establish a drainage district, **while substantial compliance is sufficient as to repairs or improvements; and the procedural requirements should not be too technically construed.**" *See Voogd v. Joint Drainage Dist. No. 3-11*, 188 N.W.2d 387, 390 (Iowa 1971).
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> **"Substantial compliance" means compliance to the extent necessary to assure that the reasonable objectives of the statue are met.** *Stanfield,* 492 N.W.2d at 652. ... **Liberal construction is possible only where there has been sufficient**

> **effort towards compliance.** *See Voogd*, 188 N.W.2d at 392-93 (board failed to comply with notice provision after discovery of cost estimate error)...

In *Chicago & N.W. Ry. Co., v. Board of Sup'rs of Hamilton County*, 182 Iowa 60, 162 N.W. 868 (Iowa 1917), the railroad objected to and appealed the assessment of its right of way in the district. The supreme court found the record did not overcome the **presumption the assessing officers did their duty and the list made and returned to them was correct**; the presumption can be overcome only by a **very clear showing of prejudicial error or fraud or mistake**; and it will not overrule or interfere with it unless it be so **plainly without foundation or so extravagant as to demonstrate it has been dictated by ignorance, passion or prejudice**. It also stated, at 877 (bold added herein):

> We are not so much concerned in what may have been in the minds of the commissioners and supervisors in estimating benefits and levying the tax, as we are in the question whether the result they reached is **substantially correct**, and, as it comes to us with a **presumption of correctness** in its favor, the final inquiry is **whether the testimony offered on the trial below is sufficient to overcome that presumption** and compel us to intervene with the levy.

Over 110 years ago, in *In re Johnson Drainage Dist. No. 9*, 118 N.W. 380 (1908), the railroad tried arguing their property could be assessed only for the actual benefits accruing thereto from the improvement, **because of the drainage**, and in the proportion that other property is assessed; and that the assessment was grossly excessive. The supreme court observed the differences between railroad property and agricultural land and found they receive entirely different benefits:

> Neither railroad property nor highways are used as lands are ordinarily used, and hence the benefits to be derived by such property from the improvement are of an entirely different character from those conferred upon agricultural lands.

Id., at 382. The supreme court did not agree with the railroad's argument that their benefits could only be based on the benefits received from the drainage, recognized the railroad received a benefit to its roadbed and track, and affirmed the assessment. It held, at 382-383 (bold added herein):

> In support of their sixth and eighth propositions, the appellants urge that their property can be assessed only for the actual benefits accruing thereto from the improvement, **because of the drainage**, and in the proportion that other property is assessed, and that the assessment is grossly excessive. These two contentions may be disposed of together, for they involve **questions of fact only**; it being well settled that an assessment can be made for actual benefits only. *Zinser v. Board of Supervisors* (Iowa) 114 N. W. 51.

> On the questions of fact there was a diversity of opinion. If some of the appellants' witnesses were correct in their opinions, the improvement might be said to be a damage to the appellants' road rather than a benefit. But such estimates are not decisive of the question, and we think the evidence as a whole fairly sustains the trial court's finding that the assessment was not in substantial excess of the **benefits to be derived therefrom in the way of the betterment of the roadbed and track**, and not out of proportion to the assessments on the lands within the district. The presumption is in favor of the assessment established by the board, and the burden is on the appellants to overcome the same. *Temple v. Hamilton County*, 134 Iowa, 706, 112 N. W. 174. On the whole case we conclude that the judgment should be affirmed.

One year later, in *Chicago, M. & S.P. Ry. Co. v. Monona County*, 122 N.W.820 (Iowa 1909), the supreme court again recognized the unique benefits received by the railroad right of way. It ruled, at 822-23 (emphasis added herein):

> Under the evidence in this court as presented by the record, we cannot say that the railway property is not substantially benefited by the drainage. The right of way through the district extends along low lands of a wet character and subject to overflow, and, although the appellant has raised its embankment and protected it with rip–rapping to avoid damage from this source, **it is not an unreasonable conclusion that *additional drainage which aids in any appreciable degree* to hasten the discharge of the flood waters and the drainage of the soil on which the embankment rests must be of *material benefit* to such property and add another element of safety to the road as a highway of travel and commerce.** We are therefore of the opinion that the board of supervisors and the district court were right in holding the property to be chargeable with its just

proportion of the **cost** of the improvement. Nor are we able to see that the assessment is in the least excessive. Some five miles or more of the railroad's right of way is included in the drainage district, and the **cost** of the improvement aggregates a large sum, and, if the appellant is to be assessed anything, the sum of $182.47 with which it has been charged does not seem to be inequitable or oppressive.

The supreme court ruled, in *Chicago, R. I. & P. Ry. Co. v. Wright County Drainage Dist. No. 43 et al.*, 154 N.W. 888 (1915):

> If therefore we reject as incompetent the evidence adduced by the plaintiff that its property was not benefited by the improvement, there is little, if anything, left in the record on which to base a finding that the assessment is excessive or is materially out of proportion to the benefits. **True, if figured out on a mere acreage basis, the amount assessed is materially greater than the average assessment laid upon the farm lands in the district, but that in itself is quite manifestly an insufficient ground for setting aside or reducing the assessment, for the statute does not contemplate the treatment of the right of way solely as a mere fraction of the agricultural area in which it is found.** Upon it is placed the plaintiff's road over which commerce is carried on. Upon it are the graded roadbed, the ties, rails, bridges, culverts, fences, and whatever more is found convenient in caring for and promoting the business to which it is devoted. **That it was competent** for the board of supervisors, notwithstanding the denial by plaintiff's witnesses, to take all these matters into consideration and to find that **the solidity and safety of the roadbed, the effective life of the ties, the maintenance of the tracks, culverts, bridges, and fences would be materially promoted by drainage of the swamp and surface waters from its right of way and from the immediately adjacent premises, cannot be doubted.** Then, too, the right to assess is not dependent upon a showing

> of benefits in the shape of an immediate increase in **market** values, but **actual values, intrinsic value or worth**. *Camp v. Davenport*, 151 Iowa, 38, 130 N. W. 137, and cases there cited.
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> **Nor is an assessment necessarily invalid because the evidence shows that the assessment exceeds the benefits**. *Jackson v. Supervisors*, 159 Iowa, 676, 140 N. W. 849; *Collins v. Board*, 158 Iowa, 322, 138 N. W. 1095. **The thing which the boards is to effectuate in an assessment is an "equitable apportionment" of the costs and expenses of the project** (see Supp. 1913, § 1989a [12]), **and while the fact, if it be shown, that the assessment is greater than the benefit, is doubtless a legitimate item of evidence to be considered with all other competent testimony in determining whether the apportionment is inequitable, it is in itself no ground for relief on appeal from the action of the board.**

Contrary to the conclusion reached by the district court as a result of its research, the supreme court has upheld the assessment of the cost of tile to the specific land in which it is installed. In *Fardal Drainage Dist. No. 72, in Hamilton County, et al. v. Board of Sup'rs of Hamilton County et al.*, 138 N.W. 443 (1912):

> The record shows that **the cost of the main tile, in what is termed the "tile area," was taxed wholly to that area, and not spread over the whole district,** and that the entire district was then taxed for the general benefit.
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> * * *
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> **Under this statute, we believe it to be entirely within the power of the commissioners to make any classification, in addition to that specifically required by the statute**, which

> will aid them in finally accomplishing the end sought, to wit, an equitable apportionment. **If they find that such an apportionment requires them to tax certain lands a certain part of the cost of the improvement in addition to a just proportion of the general cost, we see nothing in the law to prevent such action. Indeed, we think the statute requires that very thing to be done where an equitable apportionment demands it.**

The procedure and factors to be used in assessing the benefits to railroad right of ways versus agricultural land was further developed by the supreme court in *Chicago & N.W. Ry. Co. v. Board of Sup'rs of Hamilton County*, 153 N.W. 110 (Iowa 1915) where it held:

> We have no precedent which enumerates all the elements which may be taken into consideration in considering the benefits to a railroad company or to its property from an improvement of this kind, nor have we any recognized or settled rule by which such benefits may be measured in money with mathematical exactness, nor even with the proximate approach to the measure of exactness which may be applied to farm property or town lots. In cases of the latter kind the benefits, if any, may to some extent be indicated by showing an increase in market value resulting or reasonably to be anticipated from the improvement. But railroads have no market value, in the ordinary sense of that term. They are rarely bought and sold as other property is dealt with on the market, or, if so sold, the things which go to influence their money value, their purchase and sale, are of such magnitude and such character that the existence or nonexistence of a drainage system in any given district would be an entirely negligible circumstance, and this is no less true if the benefit to the railway from such system is so clear and undisputed that no one can be found to question it. **But the fact that the rule applicable to the assessment of benefits upon real property**

of another character, or rather property subject to other uses, is found inapplicable to the property of a railway company, is no reason for holding the statute inoperative as to property devoted to railroad purposes. The law presumes that all the real property within the district is benefited by the drainage, and the business of the board is to fix its proportionate liability for the expense. In the court below and in this court the board of supervisors adopted **the theory that the benefits of the drainage to the railway are to be ascertained by reference to the greater ease and lessened expense of maintaining the way, the greater permanence and security of the fills and embankments, the increased life of ties, posts, and other wooden material, the opportunity afforded the railroad company to substitute pipe for trestles, and thereby give its track a safer foundation with decreased outlay for upkeep, and other things of that nature.** There was evidence also tending in some degree to show the difference which the changed conditions would make in **the expense of maintaining the road and right of way**. That these conditions, so far as they are found to exist, do afford a foundation for a fair estimate of the benefits, **is a reasonable conclusion**. That there are still other conditions which in a proper case may be considered in estimating such benefits is, no doubt, true; for example, the benefit to the right of way as a mere matter of acreage without special reference to the present use being made of it. *See Railroad Co. v. Centerville*, 153 N. W. 106, decided at this term of court. If the property of a railway company were being subjected to a complete and itemized valuation to ascertain a basis upon which to regulate its schedules of rates, it would naturally and properly insist that its right of way be estimated upon **the present value of the lands so occupied**, for it could not reproduce its road at the present time except on the basis of present land values, and, if so, then it would seem that **the improvements which clearly tend to increase such value is a tangible benefit to the company and its property.**

But, taking this case as made by the evidence, we think the judgment below may be affirmed. The commissioners who made the original estimate, and upon whose testimony the defendant largely relies, testify, in substance, that the figure named by them represents the total actual benefit accruing to the railway company. In other words, if the railway company should pay the assessment of $1,500, it will have paid in tax the full amount of the benefits it has received. The evidence also tends to show that the increased value of the farm lands upon which has been laid the heaviest burden of the cost of drainage is two or more times greater than the amount of the tax on the same lands. In other words, assuming the evidence to be correct, the assessment upon the railroad absorbs all the benefit thereto, while the assessments upon the farm lands is only about one-half or less than one-half of their benefits. **This is not what the law contemplates. It is not enough to estimate the amount of benefits derived by any particular piece of property, and from that basis alone determine that the figure so found represents the proper tax. Ordinarily, it is to be expected that the benefits to the property of the district will exceed the tax; otherwise there would be no strong inducement to make the improvement.** The true theory of apportionment would require the ascertainment of the full amount of benefit to each and every piece of real property in the district, also the total cost of the improvement. If it be found that the total cost equals the aggregate of all the benefits, then, of course, each piece of property will be taxed the full amount of its benefits; **but, if the total cost be less than the total benefits, then the tax in each particular case will bear the same proportion to the individual benefits as the total cost bears to the total benefits.** We think the record in this case indicates that the benefits to the entire district were considerably in excess of the cost, and, the full benefit found to accrue to the railroad company being ascertained to be $1,500, it was proper for the trial court to scale down the assessment in proportion to that excess.

In this case on review, the last column on the reclassification sheet attached to the Reclassification Report shows the assessments on a per acre basis assuming a construction cost of $250,000. Reclass Report, p. 11. Under the reclassification, three agricultural tracts would be assessed over $1,000 per acre. *Id.* Six tracts would be assessed between $623 and $822. *Id.* Three tracts would be assessed between $120 and $445. *Id.* Union Pacific did not provide the district court with any evidence the amounts assessed to the agricultural tracts were less than, equal to, or in excess of the benefits they received from repairing 30% of the main tile. And Union Pacific did not provide the district court with any evidence to establish whether the railroad was assessed in excess of, equal to, or less than the benefits they would receive from the repair. One could estimate the value of farmland and argue the assessment equals a certain percentage of the value of the farmland, or that the repair would increase the value of the farmland by a certain amount, but Union Pacific did not offer any evidence to support any such findings.

As a result, Union Pacific did not provide an assessment/benefit ratio for the railroad right of way versus an assessment/benefit ratio for the agricultural land. It therefore did not provide a way to compare the relative

assessment/benefit ratios between the two land uses. The district court criticized counsel for the Board of Trustees for interchanging the words "cost" and "benefit". But the supreme court has used those words similarly, as set forth above in *Chicago, R. I. & P. Ry. Co. v. Wright County Drainage Dist. No. 43 et al.*, 154 N.W. 888 (1915). Furthermore, the cost of materials that produce the desired benefit may be the best and only way to approximate the amount of benefit the railroad right of way receives.

For example, if you put $200 tires on your vehicle, you get the benefit of those tires - not the owners of the other vehicles. Why should the owners of other vehicles have to pay for the cost of your tires? In this case, the agricultural lands are being assessed. They appear to be very substantial and equitable assessments for replacing 1,125 feet of the lower end of the main tile, including the installation of the tile, casing and other materials under the railroad right of way at a location designated by Union Pacific. Union Pacific offered no evidence to overcome the presumption the assessments to the agricultural lands were less than the benefits they received. And there is no evidence that Union Pacific offered to construct the new location at their cost as implied by Iowa Code section 468.5

In *Chicago, R.I. & P. Ry. Co. v. Board of Sup'rs of Winnebago County*, 188 N.W. 848 (Iowa 1922), the supreme court ruled:

> **Furthermore, it is apparent that it is a difficult matter, indeed impossible, in assessing benefits to a railway company and its right of way, to determine with exactness just what the assessment should be. An approximation is, in the very nature of the case, the best that can be done. An acreage basis, comparing acre for acre, of right of way, and farm lands, is manifestly not a fair test.** *C., R. I. & P. Ry. v. District,* 175 Iowa, 417, 420, 154 N. W. 888; *Interurban Ry. Co. v. Board of Supervisors*, 189 Iowa, 35, 42, 175 N. W. 743. There was no other right of way where the conditions were similar, with which comparisons could be made. In the instant case, if figured on an acreage basis, the amount assessed against the railway is greater than the average district, **but on plaintiff's right of way is placed its roads, over which commerce is carried on. Upon it are the graded roadbed, ties, bridges, culverts, fences, etc. That it is competent for the board of supervisors and the court to take all these matters into consideration, and to find that the solidity and safety of the roadbed, the life of the ties, maintenance of the track, culverts, bridges, and so on, would be materially promoted by drainage of the swamp and surface water from its right of way, and from the immediate adjacent premises.** *C., R. I. & P. Ry. Co. v. Drainage District*, 175 Iowa, 417, 154 N. W. 888.

In *Chicago & N.W. Ry. Co. v. Board of Sup'rs of Monona County*, 194 N.W.2d 213 (1923) the supreme court ruled:

> **No accurate basis exists for the comparison of agricultural lands and the roadbed and right of way of a railroad company. In reviewing any assessment of benefits against a**

> **railroad company, the superior advantages of the commissioners to ascertain and fix the relative proportion of benefits to land and other property cannot be disregarded by this court.** Possibly, in some cases, the presumption in favor of such classification after same has been approved by the board of supervisors may be somewhat less conclusive in character **where the question is as to the relative aggregate benefits to agricultural lands and a railroad right of way and roadbed for the reason that the classification does not depend upon the relative character and improvement of similar contiguous tracts**. The question in this case is almost wholly one of fact.

CONCLUSION

Union Pacific did not offer any competent evidence to meet its burden to overcome the presumption the assessing officers did their duty, and the reclassification report was correct and in substantial compliance with the drainage code, by a very clear showing of prejudicial error or fraud or mistake, or that the reclassification report was so plainly without foundation or so extravagant as to demonstrate it had been dictated by ignorance, passion or prejudice. Therefore, the district court erred when it granted Union Pacific's motion for summary judgment. The district court also erred when it based its ruling on an erroneous interpretation and application of the drainage statutes and caselaw. It did so without any evidence upon which to amend or adjust the assessments. And the district court erred when it did not grant the Board of Trustee's motion for summary judgment.

II. The district court erred by ordering the previous classification of benefits reinstated, when the only remedy available was to amend the classification of benefits.

Preservation of Error.

Same as for Issue I set forth above.

Scope and standard of review.

According to the supreme court in *Koenigs v. Mitchell County Board of Supervisors*, 659 N.W.2d 589 (2003):

> In this case, however, the appeal is a result of the district court's grant of summary judgment. Although the nature of the action is equitable, we "cannot find facts de novo in an appeal from summary judgment." *Keokuk Junction Ry. v. IES Indus., Inc.*, 618 N.W.2d 352, 355 (Iowa 2000) (quoting *Moser v. Thorp Sales Corp.*, 312 N.W.2d 881, 886 (Iowa 1981)). The proper scope of review of a case in equity resulting in summary judgment is for correction of errors of law. *Id.* We will uphold the grant of summary judgment if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3).

Argument.

As the supreme court stated in *Chicago, R. I. & P. Ry. Co. v. Wright County Drainage Dist. No. 43 et al.*, 154 N.W. 888, 888-889(1915):

> Under the presumption of benefits derived from a local improvement constructed by statutory authority, after due notice to the property owner, and under the inhibition of evidence to the effect that no benefits have in fact been received, neither the district court nor this court is authorized to set aside the levy, ***and the utmost relief which it can grant in any case is to modify or reduce a given assessment***. Nor can this measure of relief be given **except upon clear and satisfactory showing that, after considering the various elements which may properly enter into the estimate, the court is satisfied that the assessment has been inequitably apportioned. If such showing is not made, the assessment must stand.**

The supreme court in *Chicago, R.I. & P. Ry. Co. v. Board of Sup'rs of Winnebago County*, 188 N.W. 848 (Iowa 1922) set forth the burden of proof:

> As sustaining our conclusions, see, in addition to the cases already cited, *Schropfer v. Hamilton County*, 147 Iowa, 63, 68, 125 N. W. 992; *Guttormsen v. District*, 153 Iowa, 126, 128, 133 N. W. 326, to the point that **plaintiff has the burden** to show that its assessment, in comparison with other assessments, was proportionately higher, **and to furnish data as to what the lower assessment should be.** Also, *In re Farley Drainage District*, 140 Iowa, 339, 341, 118 N. W. 432; *Thielsen v. Board of Supervisors*, supra, that it was incumbent upon appellant to show that its assessment, in comparison with others was inequitable. See, also, *Chicago G. W. Ry. Co. v. Board of Supervisors*, 176 Iowa, 690, 158 N. W. 553; *Interurban Co. v. Board of Supervisors, supra*.

In reviewing the evidence presented, the court is to "consider only admissible evidence and disregard portions of various affidavits and depositions that were made without personal knowledge, consist of hearsay, or purport to state legal conclusions as fact." *Davis v. City of Albia*, 434 F. Supp. 2d 692, 697 (S.D. Iowa 2006). And Iowa Code section 468.47 provides, at hearings on reports of classification commissioners, it shall not be competent to show that any of the lands in the district assessed for benefits or against which an apportionment of costs and expenses have been made will not be benefited by such improvement in some degree.

In its motion for summary judgment, Union Pacific asserted there are no disputes of material facts and "the undisputed evidence is that the Railroad's property is the least benefited land in the District." Motion, p. 6. The Board of Trustees submits there are disputes of material fact and the only evidence submitted by Union Pacific is not competent or reliable.

In support of its motion for summary judgment, Union Pacific submitted Plaintiffs' Statement of Facts in Support of Motion for Summary Judgment. Statement. The first fifteen paragraphs simply set forth the basic facts and drainage district proceedings. Only the last paragraph, number 16, offered any evidence in an attempt to overcome the presumption of

correctness of the reclassification report. It simply referenced the *unverified* technical memo prepared by its expert, Chris Vokt, P.E., of Olsson, Inc., who opined: "Tile drains collecting surface runoff water within the drainage area are transporting water below the surface of the ground to UPPRR's Right-of-Way that would not otherwise arrive to UPPRR's Right-of-Way. Moreover, it is Olsson's opinion that UPRR receives the least benefit of any tract within the District. Statement, para. 16.

Vokt prepared an unsworn, unverified "Technical Memo" dated January 10, 2020. Memo, p. 1. According to the introduction, it was prepared in response to counsel's request "for an evaluation and determination of the benefit, if any," UPRR receives from the main tile of the drainage district. Memo, p. 1. It sets forth the "site inspection and drainage characteristics", the "topography", "soil surveys" and the reclassification.

Vokt's only conclusion was:

> UPRR's Culvert 143.06 is conveying precipitation-generated runoff that arrives at the culvert as surface water runoff with no evidence of drainage deficiency. **In the absence of tile drains**, the nearly level topography and poorly drained soils within the drainage area of Culvert 143.06 would result in slow infiltration of precipitation-generated runoff along nearly flat swales and within depressions, a seasonably high water table and reducing the amount of runoff conveyed to Culvert 143.06. **Tile drains**

> **collecting surface water runoff within the drainage area are transporting water below the surface of the ground to UPRR's Right-of-Way that would not otherwise arrive at UPRR's Right-of-Way.** Moreover, it is Olsson's opinion that UPRR receives the least benefit of any tract within the District."

Vokt's conclusion was useless to the district court. First, he argued, like the railroads have tried to argue the past 100 years, that they receive little or no benefit from the drainage tiles. Second, he admitted the railroad receives a benefit because, without the drain tiles, the rain would infiltrate slowly into the ground based upon the topography and soil types; and the drain tiles are transporting water below the railroad right of way that would "otherwise arrive" at the right of way - in other words the water would "pond" at the railroad tracks and embankment. Memo.

Third, Vokt does nothing that resembles the studies, evaluations and comparison of all the lands within the district to determine the 100 percent benefited property, and the benefit percentage of all the other properties in the district relative to that 100 percent-benefited property as required by Iowa Code section 468.39. Vokt did not provide the district court with any competent or relevant evidence upon which to overcome the presumption of correctness or to modify the assessment of benefits.

The conclusion set forth in Vokt's technical memo, as it purports to provide the district court with any evidence or opinion regarding the unique benefits received by the railbed and embankment versus the agricultural land in the district, was useless to the district court

To the contrary, the Board of Trustees submitted the signed and *verified* 14-page Affidavit of Lee O. Gallentine, P.E., in Support of Defendant's Resistance to Motion for Summary Judgment. Gallentine is the drainage district's engineer who prepared the Engineer's Report, and was appointed as one of the three Reclassification Commissioners who prepared the Reclassification Report. Reclass. Report.

In his affidavit, Gallentine testifies to the following:

1. Gallentine explains why several assertions in the Plaintiff's Motion for Summary Judgment are incorrect. Affidavit, p. 1-3.

2. Gallentine explains why several statements made in Plaintiff's Argument and Authorities are incorrect. Affidavit, pp. 4-6.

3. Gallentine completely refutes Union Pacific's argument in its motion for summary judgment regarding the holding of Hardin County Dist. 55. Affidavit, p. 3.

4. Gallentine gives several reasons why Vokt's inspection was limited

to the railroad's Culvert 143.06 and did not inspect the other properties, the soil types, the topography and patterns of the entire drainage district boundaries. Affidavit, p. 7.

5. Gallentine explains how Union Pacific is mixing percent of benefit and original assessment amounts interchangeably, even though they are not the same. Affidavit, p. 7-8.

6. Gallentine refutes the Plaintiff's assertion that the reclassification will apply to all future assessments, explains how chapter 468 provides for reclassifications in the future, and how the reclassification commission stated that as projects arise in the future, the Board should determine on an individual basis if the Reclassification Report is equitable. Affidavit, p. 8.

7. The remainder of Gallentine's affidavit explains how several of Vokt's statements are incorrect or misleading; how Vokt did not review any drainage district documents or records; Vokt's misunderstanding of the main tile drainage system; and other misunderstandings or errors made by Vokt. Affidavit, pp. 9-14.

Surprisingly, the district court never referred to the Vokt memo in support of its ruling. Presumably because the district court discerned it was not competent evidence per Iowa Code section 468.47. So the district court

did not even refer to the only "evidence" offered by Union Pacific to meet its burden to overcome the presumption the reclassification report was correct. And probably because, in his fourteen-page affidavit, to which the district court never referred, Gallentine impeached the railroad's motion for summary judgment paragraph by paragraph and did the same thing with Vokt's "technical memo". Gallentine explained how Vokt did not properly or completely investigate all the lands within the drainage district, which made Vokt's conclusion baseless, incompetent and useless to the court.

Union Pacific attempted to make the same argument railroads have been making for years when challenging assessments - that it does not receive any benefit from the drainage district - which the supreme court has clearly recognized is statutorily prohibited by Iowa Code section 468.47 when appealing a reclassification of benefits report.

On the other hand, the Board of Trustees offered competent evidence at the hearing on motions for summary judgment. Gallentine explained in great detail the contract that Union Pacific's predecessor entered into with the drainage district on March 4, 2016 whereby the railroad agreed to "furnish on the ground" the 12-inch cast iron pipe during the original construction of the drainage district. Affidavit, p. 5. Contract.

Gallentine's affidavit testimony about how the predecessor railroad contributed this cost to the drainage district was ignored by the district court. It was evidence showing the predecessor signed a contract waiving its claim for damages in exchange for the drainage district constructing the drain through its right of way. Affidavit, p. __. In exchange, the predecessor railroad agreed to contribute valuable material and transportation to the project, not like any owner of agricultural land contributed to the project. Affidavit, p. __. The current Reclassification Commission may have been thinking the same way as the predecessor railroad - that the railroad received a valuable benefit in a solid and secure railbed and embankment. It is difficult to assess benefits, but the cost of the material attributed to the project is a valid measure to consider in calculating the benefits of the railroad compared to the general benefits received by the agricultural lands.

CONCLUSION

The bottom line is, the unverified memo was the only "evidence" submitted by Union Pacific and it was not competent to overcome the presumption of correctness of the reclassification commission's report. Vokt did not go through the statutory procedure for classifying all the lands in the

district and preparing an assessment of benefits. As a result, Union Pacific did not provide the district court with any sufficient, competent or reliable evidence upon which to modify or adjust the reclassification report.

The district court erred when it simply ordered: "The previous classification of benefits is reinstated." Order, p. 20. This is proof Union Pacific did not provide the district court with any clear and convincing evidence to overcome the presumption of correctness. The district court erred when it simply reinstated a previous assessment from 1917.

REQUEST FOR ORAL ARGUMENT

Upon submission of this cause, counsel for the Appellants hereby requests to be heard in oral argument.

COST CERTIFICATE

I hereby certify that the actual cost for printing and copying the requisite number of copies of the foregoing Appellant's Brief, consisting of ___ pages, was the sum of $_____, exclusive of service tax, delivery and postage.

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