



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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NOV - 1 2011

RE: MUR 6504
William E. Gardner
Wisconsin & Southern Railroad Co.

Dear Mssrs. Friebert and O'Neill:

In a letter dated May 28, 2010, you notified the Federal Election Commission ("Commission") of the possibility that your clients, William E. Gardner and Wisconsin & Southern Railroad Co. ("WSOR"), may have violated certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act").

After reviewing the information contained in your clients' submissions and supplements, and based on information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities, the Commission, on October 18, 2011 found reason to believe that William E. Gardner violated 2 U.S.C. §§ 441a(a)(1)(A), 441b and 441f and that Wisconsin & Southern Railroad Co. violated 2 U.S.C. §§ 441b and 441f. Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determination.

Please note that you and your clients have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519. In the meantime, this matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that your clients wish the investigation to be made public.

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Robert H. Friebert, Esq.
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On behalf of the Commission,



Cynthia L. Bauerly
Chair

Enclosures
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

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4 **RESPONDENT:** William E. Gardner
5 Wisconsin & Southern Railroad Co.
6

MUR: 6504

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8 **I. INTRODUCTION**
9

10 This matter was generated based on a *sua sponte* submission filed with the Federal
11 Election Commission ("Commission") and information ascertained by the Commission in the
12 normal course of carrying out its supervisory responsibilities. See 2 U.S.C. § 437g(a)(2).
13 William E. Gardner and the Wisconsin & Southern Railroad Co. ("WSOR") filed a *sua sponte*
14 submission disclosing that Gardner, President and Chief Executive Officer ("CEO") of WSOR,
15 authorized reimbursements of federal contributions totaling \$2,500 with WSOR's corporate
16 funds to Timothy Karp, WSOR's Chief Financial Officer ("CFO"), and Kenneth Lucht, a senior
17 manager at WSOR. These reimbursements occurred in 2007, 2008 and 2010.

18 According to the submission, WSOR discovered these reimbursements during an internal
19 investigation that it conducted after learning that the company's practice of reimbursing political
20 contributions was illegal. Gardner takes full responsibility for the reimbursements but avers that
21 he was not aware at the time that they were illegal. Through a review of relevant disclosure
22 reports, the Commission also discovered an additional 2008 federal contribution of \$2,300 from
23 Gardner's daughter that Respondents confirm Gardner reimbursed, but which was not disclosed
24 in the *sua sponte* submission. WSOR's internal investigation also revealed that Gardner

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1 approved WSOR reimbursements of over \$60,000 in contributions made to state campaigns
2 starting in 2003 and that Gardner reimbursed other state contributions using his personal funds.¹

3 Prior to the Respondents' disclosure of illegal activity to the Commission, the Milwaukee
4 County District Attorney's Office ("DA's Office") and the Wisconsin Government
5 Accountability Board ("GAB") had opened a formal investigation into WSOR's and Gardner's
6 reimbursement of political contributions made to state campaigns. Ultimately, the state
7 investigation into the reimbursements for state campaign contributions resulted in a \$166,000
8 civil forfeiture against WSOR and a criminal guilty plea by Gardner. Based on the available
9 information, the Commission found reason to believe that William E. Gardner violated 2 U.S.C.
10 §§ 441a(a)(1)(A), 441b and 441f and that Wisconsin and Southern Railroad Co. violated
11 2 U.S.C. §§ 441b and 441f.

12 **II. FACTUAL AND LEGAL ANALYSIS**

13 **A. Factual Summary**

14 **1. Sua Sponte Submission**

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16 William Gardner is President and CEO of WSOR, a Wisconsin corporation operating a
17 regional railroad.² In their *sua sponte* submission, Gardner and WSOR state that since 2003,
18 WSOR had a practice of reimbursing political contributions made by Gardner and WSOR
19 employees using corporate funds. In an affidavit attached to the submission, Gardner avers that
20 he did not know at the time that the practice violated campaign finance laws. He states that he
21 learned about the illegality of the reimbursements after WSOR's CFO, Timothy Karp, sought

¹ The *sua sponte* submission states that the company's reimbursement practice was in place since 2003, but the criminal complaint, discussed *infra*, states there was ongoing reimbursement activity spanning from 2005 through 2010.

² See WSOR Website, "About Us," <http://www.wsorrailroad.com/home/about.html>.

1 advice from counsel in April 2010 when an employee questioned the propriety of the company's
2 reimbursement practice. According to the submission, in response to legal advice, the
3 reimbursements ceased and WSOR conducted an internal investigation that revealed that WSOR
4 had reimbursed five federal contributions totaling \$2,500. Specifically, WSOR had reimbursed
5 Karp for two contributions of \$500 each that he made to the Citizens for Tom Petri in March
6 2007 and March 2008, and reimbursed WSOR Community Development Manager, Kenneth
7 Lucht, for three contributions of \$500 each to the same committee in March 2007, March 2008,
8 and March 2010. The internal investigation also uncovered two reimbursements to Lucht for
9 federal contributions that he had not executed and numerous reimbursements for non-federal
10 contributions. The submission stated that Respondents had also disclosed illegal activity to the
11 DA's Office and the GAB.

12 The submission contains copies of internal WSOR accounting documents concerning the
13 reimbursements, including copies of some of the contribution checks, documentation verifying
14 the reimbursements, and copies of "Weekly Travel and Expense Statements" completed by
15 Lucht to obtain reimbursements for the political contributions. Some of the company's expense
16 reports list the political contribution as the purpose of the reimbursement. The submission also
17 contains copies of invitations to Petri fundraising events and completed RSVPs submitted on
18 behalf of Karp and Lucht; the Lucht RSVP includes the handwritten notation "\$1,000 personal
19 contribution." The invitations set forth the various federal contribution limits and state that
20 "[c]orporate contributions are not permitted." While not all of the WSOR's internal
21 documentation categorized the reimbursements, some of the documentation describes the
22 reimbursements issued to Lucht and Karp as being for a "Petri Dona[tion]," "Donation," and
23 "Contributi[on]." Thereafter, Respondents supplemented the submission with copies of the

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1 materials they provided to the GAB concerning WSOR's reimbursement of contributions to state
2 campaigns, and advised that the reimbursement practice stemmed from Gardner's goal to fund
3 candidates who supported the railroad industry. WSOR and Gardner also consented to the
4 district attorney's office providing the Commission with copies of electronic data that had been
5 seized from the company.

6 Because Gardner was aware that individual contribution limits limited his personal
7 ability to support particular candidates, he developed a practice of asking WSOR employees to
8 contribute to various campaigns and promised to reimburse those employees. Karp, or another
9 employee directed by Gardner or Karp, prepared the WSOR reimbursement checks. It appears
10 that WSOR advanced some reimbursements prior to the contributions being made, and
11 reimbursed others after the contribution had been completed. According to his affidavit,
12 Gardner was not aware that corporations could not contribute or reimburse political
13 contributions. According to the submission, the illegality of the reimbursements came to light
14 after Gardner requested that a WSOR employee contribute to a candidate and then seek
15 reimbursement. However, that employee did not want to make the contribution, and asked Karp
16 whether the company's practice was legal. Karp consulted corporate counsel in April 2010 and
17 learned that the practice of reimbursing contributions was illegal. Shortly after Gardner learned
18 of the illegal nature of the practice, he sent a message, dated May 20, 2010, to WSOR employees
19 taking "full responsibility" for "requesting these contributions be made" and indicating that at
20 the time he "did not believe these activities were prohibited." The message references a news
21 article from the same date reporting on WSOR contributions to Scott Walker's campaign for
22 Governor of Wisconsin. In his message, Gardner apologizes to the WSOR employees and notes
23 that upon learning of the illegality of the contributions, "we took it upon ourselves to notify the

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1 Walker campaign, the Wisconsin Government Accountability Board and others,” and “are
2 cooperating with all authorities.” Respondents provided the *sua sponte* submission to the
3 Commission approximately a month after the e-mail communication, and after it had begun
4 cooperating with state law enforcement authorities. The submission provides the Commission
5 with contact information for the GAB and the DA’s Office.

6 In addition to directing \$2,500 in reimbursed contributions from WSOR’s corporate
7 funds, Gardner personally reimbursed a \$2,300 federal contribution that Gardner’s daughter
8 made to Citizens for Robert Abboud, a federal committee, on October 11, 2008.³ Gardner had
9 contributed \$1,000 to the same committee on October 2, 2008; his check register reflects that on
10 October 13, 2008, he wrote a personal check to his daughter in the amount of \$2,300.

11 **2. State Investigation and Prosecution**

12 The GAB and the DA’s Office conducted a joint investigation of Gardner’s and WSOR’s
13 reimbursement of contributions to state political campaigns. Following that investigation,
14 WSOR agreed to pay a civil forfeiture of \$166,900 and each employee who participated in the
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³ The Supplement to the *Sua Sponte* submission included information that Gardner had reimbursed his daughter for contributions to state campaigns, but neither the Supplement nor the original submission indicated that he had also reimbursed her for federal contributions.

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1 contribution scheme agreed to pay a civil forfeiture of \$250.⁴ Gardner pled guilty on May 5,
2 2011, to two state felony criminal charges, "Excessive Political Contributions" (Wis. Stats.
3 §§ 11.26(1), 11.61(1)(b) and 939.05) and "Unlawful Political Contributions"⁵ (Wis. Stats.
4 §§ 11.24(1), 11.61(1)(a) and 939.05).⁶ On July 7, 2011, Gardner was sentenced to a 30-month
5 concurrent prison sentence on both counts, comprised of 15 months imprisonment and 15
6 months of extended supervision (*i.e.*, parole), which was stayed while he complies with 24
7 months of probation supervision. As a condition of probation, Gardner must perform 100 hours
8 of community service.

9 The state investigation involved the review of electronic and documentary evidence,
10 including WSOR corporate records, e-mails, bank records, and witness testimony. Wisconsin
11 state authorities explain that discovery of the reimbursement scheme arose after an individual
12 reported to GAB on April 19, 2010 that Gardner had advanced her \$10,000 in order to make a
13 political contribution to Scott Walker's campaign for Governor of Wisconsin.⁷ GAB and the
14

⁴ See Gardner-WSOR Settlement Agreements, GOVERNMENT ACCOUNTABILITY BOARD, *available at* <http://gab.wi.gov/node/1707>. In their respective settlement agreements, WSOR admits to state violations of making prohibited corporate contributions and contributions in the names of others, while most of the individual employees admit to violating the state prohibition against contributions in the names of others. Wis. Stats. §§ 11.24(1) and 11.38(1).

⁵ "Unlawful Political Contributions" prohibits contributions made in the name of others. See Wis. Stats. § 11.24(1).

⁶ See Case Details Page for *State of Wisconsin v. William E. Gardner*, Washington County Case Number 2011CF000137, WISCONSIN CIRCUIT COURT ACCESS, *available at* <http://www.wicourts.gov/> (last viewed June 20, 2011).

⁷ Criminal Complaint at 2, 6 and 10; Press Release, *G.A.B. and Milwaukee County District Attorney Announce Resolution of Significant Campaign Finance Investigation*, GOVERNMENT ACCOUNTABILITY BOARD (April 11, 2011), *available at* <http://gab.wi.gov/node/1707>; *Re: Video: GAB Announces Charges Against Railroad Executive*, April 11, 2011, TODAY'S TMJ4, <http://www.todaystmj4.com/news/local/19632944.html>. See also Criminal Complaint at 5 (indicating that the complainant's statements were confirmed through a review of bank records).

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1 DA's Office formally commenced an investigation into the reimbursed contributions on May 10,
2 2010, based on the information provided, though investigative efforts appeared to have begun
3 immediately upon receipt of the complaint. Gardner and WSOR contacted GAB concerning
4 their potential state violations on May 18, 2010 and disclosed supplemental information to them
5 later that month.

6 The state investigation revealed that Gardner engaged in a "continuing pattern" of
7 reimbursing WSOR employees and Gardner's daughter for contributions made to state political
8 campaigns with either Gardner's personal funds or WSOR's funds. Specifically, the
9 investigation confirmed that WSOR reimbursed over \$60,000, and that Gardner personally
10 reimbursed over \$12,000, in political contributions made to state political campaigns from 2005
11 through 2010.

12 Additionally, the Criminal Complaint describes evidence demonstrating that Gardner's
13 state violations may have been motivated in part to secure favorable government treatment for
14 WSOR and the railroad industry. It states that Gardner and WSOR "have cultivated an ongoing
15 relationship" with government entities and that Karp testified that state grants and loans were an
16 "essential" revenue source for WSOR. It also states that the same day that Gardner received a
17 refund from the Walker campaign for an unlawful \$5,000 contribution in 2005, he "donated
18 back" the same amount through his daughter. Based on the amounts he contributed to various
19 state candidates and party committees, state investigators infer that "Mr. Gardner was informed
20 as to the law of [state] campaign contribution limits." In fact, Lucht testified that he completed
21 research and drafted a document for Gardner at one point, identifying state contribution limits.
22 Investigators also uncovered e-mails referring to Gardner as having "maxxed out" as to
23 particular campaigns as well as evidence that in response to those e-mails Gardner solicited, on

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1 the same day, contributions to those campaigns from WSOR employees, offering
2 reimbursements. Further, in one e-mail, Gardner writes "[a]nd lets[sic] not blab this around" to a
3 WSOR employee after instructing him to make a \$4,900 contribution to the Scott Walker
4 campaign and obtain a corporate reimbursement. In response, the other individual states "I kinda
5 figure that, my lips are sealed." In his testimony, the conduit explained that he wondered if the
6 reimbursement might be illegal because he "found it all to be quite odd." Gardner, however,
7 indicates that he solicited the employee's "silence out a concern for lavish political spending
8 during tight economic times requiring [WSOR] wage cuts."

9 **B. Analysis**

10 Under the Federal Election Campaign Act of 1971, as amended ("the Act"), for the 2008
11 and 2010 election cycles, an individual's contributions were limited to \$2,300 and \$2,400 per
12 calendar year, respectively, to a candidate and his authorized political committee with respect to
13 any election for Federal office. See 2 U.S.C. § 441a(a)(1)(A). The Act prohibits any person
14 from making a contribution in the name of another person, knowingly permitting his name to be
15 used to effect such a contribution, and from knowingly accepting a contribution made by one
16 person in the name of another person. 2 U.S.C. § 441f. The Commission's regulations further
17 prohibit knowingly helping or assisting any person in making a contribution in the name of
18 another, including "those who initiate or instigate or have some significant participation in a plan
19 or scheme to make a contribution in the name of another[.]" 11 C.F.R. § 110.4(b)(1)(iii);
20 Explanation and Justification for 11 C.F.R. § 110.4(b)(1)(iii) at 54 Fed. Reg. 34,105 (Aug. 17,
21 1989). The Act also prohibits corporations from making any contributions in connection with a
22 federal election and prohibits corporate officers from consenting to such contributions. 2 U.S.C.
23 § 441b(a).

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1 It is undisputed that WSOR, at Gardner's direction, made corporate contributions in the
2 name of another when it reimbursed \$2,500 in contributions to a federal candidate made by Karp
3 and Lucht, WSOR employees. Thus, WSOR and Gardner have each violated 2 U.S.C. § 441f.
4 Additionally, WSOR made, and Gardner consented, as a corporate officer, to the reimbursements
5 of Karp and Lucht from WSOR's corporate treasury funds, in violation of 2 U.S.C. § 441b(a),
6 and Gardner has also acknowledged personally reimbursing his daughter for a \$2,300 federal
7 contribution in 2008, after Gardner had already contributed to the same committee, thereby
8 exceeding the Act's contribution limits at 2 U.S.C. § 441a(a)(1)(A).

9 There is insufficient evidence, however, to demonstrate that Gardner's conduct may have
10 been knowing and willful. See 2 U.S.C. § 437g(a)(5)(B) and 437g(d). The knowing and willful
11 standard requires knowledge that one is violating the law. *Federal Election Commission v. John*
12 *A. Damesi for Congress Committee*, 640 F. Supp. 985, 987 (D. N.J. 1986). A knowing and
13 willful violation may be established "by proof that the defendant acted deliberately and with
14 knowledge that the representation was false." *United States v. Hopkins*, 916 F.2d 207, 214 (5th
15 Cir. 1990). Evidence does not have to show that the defendant had a specific knowledge of the
16 regulations; an inference of a knowing and willful act may be drawn from the defendant's
17 scheme to disguise the source of funds used in illegal activities. *Id.* at 213-15. Although
18 Gardner pled guilty to criminal charges based on similar conduct at the state level, the Wisconsin
19 statutes prohibiting excessive contributions and contributions in the name of another do not
20 require a showing that a defendant had knowledge of the law, only that the defendant intended to
21 commit the illegal act. Wis. Stats. §§ 11.24(1) and 11.26(1).

22 The Commission has not uncovered any information supporting a knowing and willful
23 finding in connection with the federal contributions. Certain information, such as the internal

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1 company records indicating that the reimbursements were for contributions, Gardner's affidavit
2 denying knowledge, and other available information, point to non-knowing and willful conduct.
3 Further, the review of company hard drives did not yield any evidence of possible knowing and
4 willful conduct relative to the federal contributions. It also does not appear that the state
5 investigation encountered any knowing and willful evidence as to the federal contributions.

6 Therefore, there is reason to believe that William E. Gardner violated 2 U.S.C.
7 §§ 441a(a)(1)(A), 441b and 441f and the Wisconsin and Southern Railroad Co. violated 2 U.S.C.
8 §§ 441b and 441f.

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