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June 3, 2014

VIA FEDEX PRIORITY OVERNIGHT

236151

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

ENTERED
Office of Proceedings
June 4, 2014
Part of
Public Record



Re: Wichita Terminal Association, BNSF Railway Company & Union Pacific
Railroad Company (the "WTA") – Petition for Declaratory Order
Finance Docket No. 35765 – The WTA's Document Production

Dear Ms. Brown:

Pursuant to the Board's May 20, 2014 decision regarding the Petition for Declaratory Order filed by the WTA, the following documents are enclosed:

- (1) Trial and hearing transcripts, journal entries, and oral or written orders and decisions by the Kansas District and Appellate courts dated after the February 20, 2007 bench trial on the first remand,¹ and
- (2) A complete set of pleadings submitted to the Kansas District and Appellate courts by either or both parties after the February 20, 2007 bench trial and before the August 1, 2008 journal entry.

The above-mentioned documents are submitted via compact disc along with two sets of hard copies.

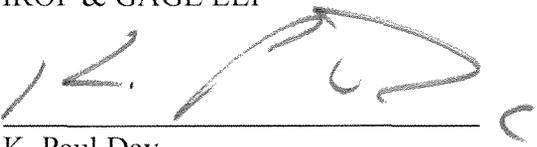
¹ The only outstanding document is a transcript of the May 15, 2009 hearing before Kansas District Court Judge Timothy Henderson regarding the WTA's Motion for Relief From Judgment or Order Under K.S.A. § 60-260(b). The Kansas District Court official reporter for the hearing informed us that she could not transcribe the hearing before the June 4 deadline. She indicated she could have the transcript to us by mid-June. Once we receive the transcript, we will immediately submit it to the Board in order to make this a complete set.

Document Production Pursuant to May 20, 2009 Decision
June 3, 2014
Page 2

Please contact me if you have any questions or need further information. Thank you for your attention to this matter.

Very truly yours,

LATHROP & GAGE LLP

By: 
K. Paul Day

KPD/wa

Enclosures

cc: Wyatt A. Hoch
Charles R. Curran
James Oliver

The following documents are trial and hearing transcripts, journal entries, and oral or written orders and decisions by the Kansas District and Appellate courts dated after the February 20, 2007 bench trial on the first remand. The transcript from a May 15, 2009 hearing before Kansas District Court Judge Timothy Henderson regarding the WTA's Motion for Relief From Judgment or Order Under K.S.A. § 60-260(b) has not yet been submitted to the Board. Once the Kansas District Court official reporter transcribes the hearing on or before mid-June, the WTA will immediately submit it to the Board to make this a complete set.

Sedgwick County District Court Search - Case Display

Case Number: 3688

Case Year: 2002	Case UID: 2002-CV-003688-OT
Case Type: CV	Filed: 2002-11-06
Case Sub-type: Other	
Advisement Date:	Remand Date: 2013-08-08
Appealed: N	Appealed Date: 2012-02-14
Status Code: 3	Status Date: 2013-12-18
Status Description: Closed	

Defendants

Party 1

Defendant Number: 1		
Last Name (or Business Name): F Y G Investments Inc		
First Name:	Middle:	Suffix:

Description

Sex: U	Race:
Height:	Weight:

Defense Attorney 1

Last Name: Dwire	First: Edgar	Middle: Wm (Deceased)
Primary Attorney: N	Court Appointed: N	Conflict Attorney: N
Withdrawn: N	Send Notices: Y	
Practice or Office: Malone Dwire & Thompson LLC		

Defense Attorney 2

Last Name: Hoch	First: Wyatt	Middle: A
Primary Attorney: Y	Court Appointed: N	Conflict Attorney: N

Hearing 18

Hearing Number: 18	Jury Hearing: N
Hearing Type: Bench Trial (Ch 60)	
Starts: 2006-09-18 at 09:00:00	
Court Room Number: Courtroom 8-2	
Ends: 2006-09-18 at 09:00:00	Results Code: CONT
Hearing Results: Hearing result for Bench Trial (Ch 60) held on 09/18/2006 09:00 am: Continued to 11-21-06 per Warren Jones 9-6-06;	
Hearing Comments: 1-2 days re: Mandate Issue	

Judge

Last Name: Bribiesca, Div. 22	First: Joseph	Middle:	Suffix:
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Hearing 19

Hearing Number: 19	Jury Hearing: N
Hearing Type: Bench Trial (Ch 60)	
Starts: 2006-11-21 at 09:00:00	
Court Room Number: Courtroom 6-3	
Ends: 2006-11-21 at 09:00:00	Results Code: CONT
Hearing Results: Hearing result for Bench Trial (Ch 60) held on 11/21/2006 09:00 am: Continued to 2-20-2007 @ 9:00am @ request of Pltf atty & ok'd by Judge 11-1-06;	
Hearing Comments: (2nd setting) 1-2 days re: Mandate Issue	

Judge

Last Name: Friedel	First: Karl	Middle: W	Suffix:
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Hearing 20

Hearing Number: 20	Jury Hearing: N
Hearing Type: Bench Trial (Ch 60)	
Starts: 2007-02-20 at 09:00:00	
Court Room Number: Courtroom 8-2	
Ends: 2007-02-20 at 09:00:00	Results Code: BTH
Hearing Results: Hearing result for Bench Trial (Ch 60) held on 02/20/2007 09:00 AM: Civil Bench Trial Held	

Hearing Comments: (3rd setting) 1-2 days re: Mandate Issue
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Judge

Last Name: Bribiesca, Div. 22	First: Joseph	Middle:	Suffix:
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Hearing 21

Hearing Number: 21	Jury Hearing: N
Hearing Type: Civil Special Set Motion	
Starts: 2007-09-19 at 14:30:00	
Court Room Number: Courtroom 6-3	
Ends: 2007-09-19 at 14:30:00	Results Code: HEARHELD
Hearing Results: Hearing result for Civil Special Set Motion held on 09/19/2007 02:30 PM: Hearing Held	
Hearing Comments: Status Conference	

Judge

Last Name: Friedel	First: Karl	Middle: W	Suffix:
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Hearing 22

Hearing Number: 22	Jury Hearing: N
Hearing Type: Motion Docket (Civil)	
Starts: 2008-02-22 at 09:00:00	
Court Room Number: Jury Room	
Ends: 2008-02-22 at 09:00:00	Results Code: OFFDOC
Hearing Results: Hearing result for Motion Docket (Civil) held on 02/22/2008 09:00 am: Off Docket/ no appearance/ no objection	
Hearing Comments: Defts' Atty (James Thomas)/ Motion to Withdraw as Atty for Defts, F.Y.G. Investments, Inc. & TreatCo, Inc.	

Judge

Last Name: Friedel	First: Karl	Middle: W	Suffix:
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Hearing 23

Hearing Number: 23	Jury Hearing: N
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Hearing Type: Motion Docket (Civil)	
Starts: 2009-04-10 at 09:00:00	
Court Room Number: Courtroom 10-4	
Ends: 2009-04-10 at 09:00:00	Results Code: SUSTAIN
Hearing Results: Hearing result for Motion Docket (Civil) held on 04/10/2009 09:00 am: Sustained	
Hearing Comments: D1 & D2 Atty (Wyatt Hoch)/ Defts, F.Y.G. Investments, Inc & Treatco, Inc.'s- Motion for Order to Appear & Show Cause on Wichita Terminal Assoc. & Union Pacific Railroad Co	

Judge

Last Name: Pullman, Div. 16	First: Terry	Middle: L	Suffix:
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Hearing 24

Hearing Number: 24	Jury Hearing: N
Hearing Type: Motion Docket (Civil)	
Starts: 2009-05-15 at 09:00:00	
Court Room Number: Courtroom 9-1	
Ends: 2009-05-15 at 09:00:00	Results Code: CONTSPEC
Hearing Results: Hearing result for Motion Docket (Civil) held on 05/15/2009 09:00 am: Continued to Special Set 6-8-09 Div 24	
Hearing Comments: Defts Atty (CharlesCurran)/ Order for Railroads to Appear & Show Cause for Contempt of Court	

Judge

Last Name: Henderson, Div. 24	First: Timothy	Middle: H	Suffix:
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Hearing 25

Hearing Number: 25	Jury Hearing: N
Hearing Type: Motion Docket (Civil)	
Starts: 2009-05-15 at 09:00:00	
Court Room Number: Courtroom 9-1	
Ends: 2009-05-15 at 09:00:00	Results Code: CONTSPEC
Hearing Results: Hearing result for Motion Docket (Civil) held on 05/15/2009 09:00 am: Continued to Special Set 6-8-09 Div 24	

Hearing Comments: Pltfs' Atty (Patrick Fanning)/ Motion for Relief From Judgment or Order Under K.S.A. 60-260(B)
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Judge

Last Name: Henderson, Div. 24	First: Timothy	Middle: H	Suffix:
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Hearing 26

Hearing Number: 26	Jury Hearing: N
Hearing Type: Civil Special Set Motion	
Starts: 2009-06-08 at 09:00:00	
Court Room Number: Courtroom 9-1	
Ends: 2009-06-08 at 09:00:00	Results Code: DENIED
Hearing Results: Hearing result for Civil Special Set Motion held on 06/08/2009 09:00 am: Denied	
Hearing Comments: Defts Atty (CharlesCurran)/ Order for Railroads to Appear & Show Cause for Contempt of Court	

Judge

Last Name: Henderson, Div. 24	First: Timothy	Middle: H	Suffix:
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Hearing 27

Hearing Number: 27	Jury Hearing: N
Hearing Type: Civil Special Set Motion	
Starts: 2009-06-08 at 09:00:00	
Court Room Number: Courtroom 9-1	
Ends: 2009-06-08 at 09:00:00	Results Code: GRANTED
Hearing Results: Hearing result for Civil Special Set Motion held on 06/08/2009 09:00 am: Granted	
Hearing Comments: Pltfs' Atty (Patrick Fanning)/ Motion for Relief From Judgment or Order Under K.S.A. 60-260(B)	

Judge

Last Name: Henderson, Div. 24	First: Timothy	Middle: H	Suffix:
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Hearing 28

Hearing Number: 28	Jury Hearing: N
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Hearing Type: Civil Discovery Conference	
Starts: 2011-05-09 at 10:30:00	
Court Room Number: Courtroom 6-4	
Ends: 2011-05-09 at 10:45:00	Results Code: DCH
Hearing Results: Hearing result for Civil Discovery Conference held on 05/09/2011 10:30 am: Civil Discovery Conference Held	
Hearing Comments:	

Judge

Last Name: Lahey, Div. 8	First: Timothy	Middle: G	Suffix:
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Hearing 29

Hearing Number: 29	Jury Hearing: N
Hearing Type: Civil Special Set Motion	
Starts: 2011-09-19 at 09:00:00	
Court Room Number: Courtroom 8-2	
Ends: 2011-09-19 at 09:00:00	Results Code: OFFDOC
Hearing Results: Hearing result for Civil Special Set Motion held on 09/19/2011 09:00 am: Off Docket Motion already heard 6/8/2011.	
Hearing Comments: Motion hearing date set at Disc Conf hearing 5-9-2011 per Judge Lahey	

Judge

Last Name: Bribiesca, Div. 22	First: Joseph	Middle:	Suffix:
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Hearing 30

Hearing Number: 30	Jury Hearing: N
Hearing Type: Bench Trial (Ch 60)	
Starts: 2011-11-21 at 09:00:00	
Court Room Number: Courtroom 8-2	
Ends: 2011-11-21 at 09:00:00	Results Code: CONTCRT
Hearing Results: Hearing result for Bench Trial (Ch 60) held on 11/21/2011 09:00 am: Continued by Court to 12-12-11	
Hearing Comments:	

Judge

Last Name: Bribiesca, Div. 22	First: Joseph	Middle:	<u>Suffix:</u>
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Hearing 31

Hearing Number: 31	Jury Hearing: N
Hearing Type: Bench Trial (Ch 60)	
Starts: 2011-12-12 at 09:00:00	
Court Room Number: Courtroom 8-2	
Ends: 2011-12-12 at 09:00:00	Results Code: HEARHELD
Hearing Results: Hearing result for Bench Trial (Ch 60) held on 12/12/2011 09:00 am: Hearing Held	
Hearing Comments:	

Judge

Last Name: Bribiesca, Div. 22	First: Joseph	Middle:	<u>Suffix:</u>
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Case Judge

Last Name: Bribiesca, Div. 22	First: Joseph	Middle:	<u>Suffix:</u>
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Registry of Actions**Action 1**

Action Date: 2002-12-27	Action Type: ANS
Action Agent: Richard T Ballinger, Div. 13	
Description: Deft FYG Invest: Answer to pltf's second amended petition; counterclaim by atty Edgar Wm Dwire &	

Action 2

Action Date: 2002-12-27	Action Type: DJT
Action Agent: Richard T Ballinger, Div. 13	
Description: Deft FYG Invest: Demand for Jury Trial	

Description: Subpoena: Subpoena Served/Returned on 2/16/2007 on Witness: Pruitt, Pat PS
2/16/2007

Action 92

Action Date: 2007-02-20	Action Type: MIN
Action Agent: Joseph Bribiesca, Div. 22	
Description: Minutes Entry Hearing type: Bench Trial (Ch 60) Hearing date: 2/20/2007 Time: 9:00 am Court reporter: Becky Fitzmier	

Action 93

Action Date: 2007-02-20	Action Type: BTH
Action Agent: Joseph Bribiesca, Div. 22	
Description: Hearing result for Bench Trial (Ch 60) held on 02/20/2007 09:00 AM: Civil Bench Trial Held (3rd setting) 1-2 days re: Mandate Issue	

Action 94

Action Date: 2007-02-20	Action Type: ROH
Action Agent: Joseph Bribiesca, Div. 22	
Description: Record of Hearing (Bench Trial) Court grants an injunction to provide ingress and egress (see file); Ed Dwire prepare je/ord reflecting ct's action: 2-20-07 s/J. Bribiesca (record taken by Becky Fitzmier)	

Action 95

Action Date: 2007-02-21	Action Type: MEM
Action Agent: Richard T Ballinger, Div. 13	
Description: Memorandum of Law for Remand Hearing by d/atty, E. W. Dwire	

Action 96

Action Date: 2007-02-21	Action Type: M
Action Agent: Richard T Ballinger, Div. 13	
Description: Proposed Findings of Fact and Conclusions of Law for Journal Entry on Remand Hearing by d/atty, E. Wm. Dwire	

Action 97

Action Date: 2007-08-21	Action Type: HEAR
Action Agent: Karl W Friedel	
Description: Hearing Scheduled (Civil Special Set Motion 09/19/2007 02:30 pm) Status Conference	

Action 98

Action Date: 2007-09-19	Action Type: HEARHELD
Action Agent: Karl W Friedel	
Description: Hearing result for Civil Special Set Motion held on 09/19/2007 02:30 PM: Hearing Held Status Conference	

Action 99

Action Date: 2007-09-19	Action Type: MMO
Action Agent: Karl W Friedel	
Description: Motion Minutes Order (Status Conf.) Counsel directed to confer forthwith & attempt to agree upon the JE (of evidentiary hrg before Judge Bribiesca since remand from Ct of Appeals). If not in agreement upon JE, counsel shall then request hrg for Judge Bribiesca to settle JE (see file); this doc shall serv as ct's ord w/o further je/ord: 9-19-07 s/K. Friedel (no record taken)	

Action 100

Action Date: 2008-02-11	Action Type: NOT
Action Agent: Richard T Ballinger, Div. 13	
Description: Notice of Service of Journal Entry Under Rule 170 by G. D. Young, Jr.	

Action 101

Action Date: 2008-02-12	Action Type: HEAR
Action Agent: Karl W Friedel	
Description: Hearing Scheduled (Motion Docket (Civil) 02/22/2008 09:00 am) Defts' Attys (James Thompson / Ed Dwire)/ Motion to Withdraw as Attys for Defts, F.Y.G. Investments, Inc. & TreatCo, Inc.	

Action 102

Action Date: 2008-02-19	Action Type: EOA
Action Agent: Richard T Ballinger, Div. 13	

Description: Entry of Appearance of Wyatt Hoch as counsel for deft Treatco Inc D/ Atty Wyatt Hoch

Action 103

Action Date: 2008-02-22	Action Type: OFFDOC
Action Agent: Karl W Friedel	
Description: Hearing result for Motion Docket (Civil) held on 02/22/2008 09:00 am: Off Docket/ no appearance/ no objection Defts' Atty (James Thomas)/ Motion to Withdraw as Atty for Defts, F.Y.G. Investments, Inc. & TreatCo, Inc.	

Action 104

Action Date: 2008-02-25	Action Type: EOA
Action Agent: Richard T Ballinger, Div. 13	
Description: Entry of Appearance of Wyatt Hoch as counsel for deft FYG Investments Inc D/ Atty Brad Mirakian	

Action 105

Action Date: 2008-08-01	Action Type: JEJCV
Action Agent: Richard T Ballinger, Div. 13	
Description: Journal Entry On Remand and Permanent Injunction - See Judgment Window for Details s/ J Fleetwood for s/ J Bribiesca (see JE filed 7/20/09 updated)	

Action 106

Action Date: 2008-10-23	Action Type: NOT
Action Agent: Richard T Ballinger, Div. 13	
Description: Notice Of Filing: Give notice that on this date, Plaintiffs posted a \$250,000 Supersedeas Bond with the Clerk of the District Court (attached)	

Action 107

Action Date: 2009-03-16	Action Type: EOA
Action Agent: Richard T Ballinger, Div. 13	
Description: Entry of Appearance of Atty K. Paul Day as counsel for pltfs Burlington Northern & Santa Fe Railway Company kna BNSF Railway Company; Wichita Terminal Association; & Union Pacific Railroad Company P/Atty K. Paul Day	

Action 108

Action Date: 2009-04-02	Action Type: HEAR
Action Agent: Timothy G Lahey, Div. 8	
Description: Hearing Scheduled (Motion Docket (Civil) 04/10/2009 09:00 am) D1 & D2 Atty (Wyatt Hoch)/ Defts, F.Y.G. Investments, Inc & Treatco, Inc.'s- Motion for Order to Appear & Show Cause on Wichita Terminal Assoc. & Union Pacific Railroad Co (exhbs attach)	

Action 109

Action Date: 2009-04-10	Action Type: MIN
Action Agent: Terry L Pullman, Div. 16	
Description: Minutes Entry Hearing type: Civil Special Set Motion Dfts' Motion to Apper Hearing date: 4/10/2009 Time: 10:42 am Court reporter: Julie Macera	

Action 110

Action Date: 2009-04-10	Action Type: SUSTAIN
Action Agent: Terry L Pullman, Div. 16	
Description: Hearing result for Motion Docket (Civil) held on 04/10/2009 09:00 am: Sustained D1 & D2 Atty (Wyatt Hoch)/ Defts, F.Y.G. Investments, Inc & Treatco, Inc.'s- Motion for Order to Appear & Show Cause on Wichita Terminal Assoc. & Union Pacific Railroad Co	

Action 111

Action Date: 2009-04-10	Action Type: MMO
Action Agent: Terry L Pullman, Div. 16	
Description: Motion Minutes Order (D1 & D2 Atty (Wyatt Hoch)/ Defts, F.Y.G. Investments, Inc & Treatco, Inc.'s- Motion for Order to Appear & Show Cause on Wichita Terminal Assoc. & Union Pacific Railroad Co) Sustained for reasons stated on record. All Plaintiff's ordered to appear and show cause ast time/ dat set by Judge Lahey. Parties allege some issues revolve around interpretation of 8-1-08 order by Judge Bribiesca. If possible, hearing should be with Judge BribiescaThat Curran prepare a journal entry/ order reflcting the court's action. That this document shall serve as the court's order without further journal entry/ order: 4-10-09 s/ T L Pullman (Record taken by J Macera)	

Action 112

Action Date: 2009-04-21	Action Type: AOR
Action Agent: Richard T Ballinger, Div. 13	

Description: Defendant: Treatco Inc Attorney of Record Charles R Curran

Action 113

Action Date: 2009-04-21	Action Type: AOR
Action Agent: Richard T Ballinger, Div. 13	
Description: Defendant: F Y G Investments Inc Attorney of Record Charles R Curran	

Action 114

Action Date: 2009-04-21	Action Type: HEAR
Action Agent: Timothy G Lahey, Div. 8	
Description: Hearing Scheduled (Motion Docket (Civil) 05/15/2009 09:00 am) Defts Atty (CharlesCurran)/ Order for Railroads to Appear & Show Cause for Contempt of Court s/ T Pullman	

Action 115

Action Date: 2009-05-11	Action Type: M
Action Agent: Richard T Ballinger, Div. 13	
Description: P-Pltf's Combined Suggestions in Opposition to Defts' Motion for an Order of Contempt & Suggestions in Support of Motion for Relief From Judgment or Order Under K.S.A. 60-260(B) by Atty/ Patrick Fanning (fax)	

Action 116

Action Date: 2009-05-11	Action Type: HEAR
Action Agent: Timothy G Lahey, Div. 8	
Description: Hearing Scheduled (Motion Docket (Civil) 05/15/2009 09:00 am) Pltfs' Atty (Patrick Fanning)/ Motion for Relief From Judgment or Order Under K.S.A. 60-260(B) (atty to file a not of hrg for 5-15-09) (fax)	

Action 117

Action Date: 2009-05-13	Action Type: NH
Action Agent: Richard T Ballinger, Div. 13	
Description: P-Notice of Hearing on Pltf's Motion for Relief from Judgment or Order Under K.S.A. 60-260(b) set: 5-15-09 @9:00 am by Atty/ K. Paul Day(same firm) (fax)	

Action 118

Action Date: 2009-05-15	Action Type: MIN
Action Agent: Timothy H Henderson, Div. 24	
Description: Minutes Entry Hearing type: Motion Docket (Civil) Hearing date: 5/15/2009 Time: 4:12 pm Court reporter: belinda westerfield	

Action 119

Action Date: 2009-06-05	Action Type: M
Action Agent: Richard T Ballinger, Div. 13	
Description: F.Y.G's Brief in Support of Contempt Citation and Sanctions by d/atty, C. R. Curran	

Action 120

Action Date: 2009-06-08	Action Type: CONTSPEC
Action Agent: Timothy H Henderson, Div. 24	
Description: Hearing result for Motion Docket (Civil) held on 05/15/2009 09:00 am: Continued to Special Set 6-8-09 Div 24 Defts Atty (CharlesCurran)/ Order for Railroads to Appear & Show Cause for Contempt of Court	

Action 121

Action Date: 2009-06-08	Action Type: CONTSPEC
Action Agent: Timothy H Henderson, Div. 24	
Description: Hearing result for Motion Docket (Civil) held on 05/15/2009 09:00 am: Continued to Special Set 6-8-09 Div 24 Pltfs' Atty (Patrick Fanning)/ Motion for Relief From Judgment or Order Under K.S.A. 60-260(B)	

Action 122

Action Date: 2009-06-08	Action Type: HEAR
Action Agent: Timothy H Henderson, Div. 24	
Description: Hearing Scheduled (Civil Special Set Motion 06/08/2009 09:00 am) Defts Atty (CharlesCurran)/ Order for Railroads to Appear & Show Cause for Contempt of Court	

Action 123

Action Date: 2009-06-08	Action Type: HEAR
Action Agent: Timothy H Henderson, Div. 24	

Description: Hearing Scheduled (Civil Special Set Motion 06/08/2009 09:00 am) Pltfs' Atty (Patrick Fanning)/ Motion for Relief From Judgment or Order Under K.S.A. 60-260(B)
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Action 124

Action Date: 2009-06-08	Action Type: DENIED
Action Agent: Timothy H Henderson, Div. 24	
Description: Hearing result for Civil Special Set Motion held on 06/08/2009 09:00 am: Denied Defts Atty (CharlesCurran)/ Order for Railroads to Appear & Show Cause for Contempt of Court	

Action 125

Action Date: 2009-06-08	Action Type: GRANTED
Action Agent: Timothy H Henderson, Div. 24	
Description: Hearing result for Civil Special Set Motion held on 06/08/2009 09:00 am: Granted Pltfs' Atty (Patrick Fanning)/ Motion for Relief From Judgment or Order Under K.S.A. 60-260(B)	

Action 126

Action Date: 2009-06-08	Action Type: MMO
Action Agent: Richard T Ballinger, Div. 13	
Description: Motion Minutes Order (P/Motion for Relief from Judgment or Order Under KSA 60-260(B) and D/Order for Railroads to Appear & Show Cause for Contempt of Court - both rulings on one minute sheet) Petition for relief granted; Motion in Contempt Denied; deft's atty prepare je/ord reflecting ct's action: 6-8-09 s/T. Henderson (record taken by Belinda Westerfield)	

Action 127

Action Date: 2009-06-08	Action Type: MIN
Action Agent: Timothy H Henderson, Div. 24	
Description: Minutes Entry Hearing type: Civil Discovery Motion Hearing date: 6/8/2009 Time: 5:13 pm Court reporter: belinda westerfield	

Action 128

Action Date: 2009-06-26	Action Type: NOT
Action Agent: Richard T Ballinger, Div. 13	
Description: Notice of Filing Pursuant to Supreme Court Rule 170 by C. R. Curran	

Action 129

Action Date: 2009-07-06	Action Type: CERT
Action Agent: Richard T Ballinger, Div. 13	
Description: Certificate of Service of Pltfs' Combined Objections in Opposition to the Proposed Journal Entry From the June 8, 2009 Hearing by Atty/ K. Paul Day (fax)	

Action 130

Action Date: 2009-07-20	Action Type: JE
Action Agent: Richard T Ballinger, Div. 13	
Description: Journal Entry Granting The Railroads Motion For Relief From Judgment and Denying FYG'S Request For A Contempt Citation s/T Henderson	

Action 131

Action Date: 2009-07-20	Action Type: M
Action Agent: Richard T Ballinger, Div. 13	
Description: Plaintiffs' Combined Objections in Opposition to the Proposed Journal Entry from the Jun & 2009 Hearing by p/atty, K. Paul Day	

Action 132

Action Date: 2009-08-12	Action Type: NAP
Action Agent: Richard T Ballinger, Div. 13	
Description: Notice of Appeal, pltf appeals all rulings of the court contained in the journal entry filed on 7-290-09, filed by K. Paul Day, atty	

Action 133

Action Date: 2009-08-12	Action Type: STATUS
Action Agent: Richard T Ballinger, Div. 13	
Description: Case Status Change: On Appeal	

Action 134

Action Date: 2009-08-13	Action Type: REQ
Action Agent: Richard T Ballinger, Div. 13	
Description: Request for copies, sent 8-24-09	

Action 135

Action Date: 2009-08-25	Action Type: CERTS
Action Agent: Richard T Ballinger, Div. 13	
Description: Certificate of Completion of Transcript by Belinda K. Westerfield, C.S.R.	

Action 136

Action Date: 2009-08-25	Action Type: TS
Action Agent: Richard T Ballinger, Div. 13	
Description: Transcript Of Motions on 6-9-09, Judge Timothy Henderson, Div. 24 (pgs 1-190)	

Action 137

Action Date: 2009-09-03	Action Type: NAP
Action Agent: Richard T Ballinger, Div. 13	
Description: Notice of Cross Appeal, def't's (F.Y.G.) Investments, Inc. and Treatco, Inc. cross appeal from Journal entry granting the Railroads' motion for relief from judgment and denying F.Y.G's request for contempt citation, with the clerk on 7-20-09, including all findings and rulings included adverse to the defendants, filed by James Oliver, atty	

Action 138

Action Date: 2009-09-04	Action Type: APN
Action Agent: Richard T Ballinger, Div. 13	
Description: Appellate Docketing Notice, Appellate Court No.: (09-103015-A) record due 9-18-09	

Action 139

Action Date: 2009-09-16	Action Type: TBLROA
Action Agent: Richard T Ballinger, Div. 13	
Description: Table of Contents, Record on Appeal, Vols. 1-11 (misc. docs) & 12 (ts) (09-103015-A)	

Action 140

Action Date: 2009-09-17	Action Type: AOR
Action Agent: Richard T Ballinger, Div. 13	
Description: Plaintiff: Wooster, Ronnie Attorney of Record K Paul Day	

Action 141

Action Date: 2009-09-17	Action Type: MOT
Action Agent: Richard T Ballinger, Div. 13	
Description: P-Motion to Dismiss Cross-Appeal for Lack of Jurisdiction by Atty/ K. Paul Day (exhb attach) (no not of hrg filed) (fax)	

Action 142

Action Date: 2009-09-30	Action Type: APN
Action Agent: Richard T Ballinger, Div. 13	
Description: Appellate Docketing Notice, Appellate Court No.: (09-103015-A) cross appeal, record due 10-14-09	

Action 143

Action Date: 2009-10-05	Action Type: TBLADD
Action Agent: Richard T Ballinger, Div. 13	
Description: Table of Contents, Addition to the Record, Vol. 11 (Cross-Appeal filed 9-3-09) (09-103015-A)	

Action 144

Action Date: 2009-10-05	Action Type: ORD
Action Agent: Richard T Ballinger, Div. 13	
Description: Order, appellant's motion to stay pending appeal without supersedeas bond is granted, appellees' request to proceed without a supersedeas bond is denied, s/b Judge Stephen Hill	

Action 145

Action Date: 2009-10-23	Action Type: BND
Action Agent: Richard T Ballinger, Div. 13	
Description: Supersedeas Bond (see order filed 10-20-11, orig. bond pulled & returned to P/atty per the court order) (see add. note on order line dated 10-20-11)	

Action 146

Action Date: 2009-10-23	Action Type: NOT
Action Agent: Richard T Ballinger, Div. 13	

Description: Notice Of filing: Pltf's posted a \$250,000 Supersedeas Bond with the Clerk of the District Court (see order dated 10-20-11)

Action 147

Action Date: 2009-11-12	Action Type: REQ302
Action Agent: Richard T Ballinger, Div. 13	
Description: Request under KS supreme court rule 3.02 for supplementing the record, various exhibits, filed by K. Paul Day	

Action 148

Action Date: 2009-11-20	Action Type: TBLADD
Action Agent: Richard T Ballinger, Div. 13	
Description: Table of Contents, Addition to the Record Vol. 13 (pltf exh) 11 (misc docs) (3.02 request filed 11-12-09 is complete) (103015)	

Action 149

Action Date: 2009-12-08	Action Type: REQ302
Action Agent: Richard T Ballinger, Div. 13	
Description: Rule 3.02 request, transcript of 2-20-07 bench trial, filed by Wyatt Hoch	

Action 150

Action Date: 2009-12-08	Action Type: CERTS
Action Agent: Richard T Ballinger, Div. 13	
Description: Certificate of Completion of Transcript by Becky Fitzmier, CSR	

Action 151

Action Date: 2009-12-08	Action Type: TS
Action Agent: Richard T Ballinger, Div. 13	
Description: Transcript of bench trial, on 2-20-07, before Judge Joseph Bribiesca, Div. 22, (pgs 1-65)	

Action 152

Action Date: 2009-12-28	Action Type: TBLADD
Action Agent: Richard T Ballinger, Div. 13	

Description: Table of Contents, Addition to the Record, Vol. 14--ts--vol. 11 (misc docs) (3.02 letter requesting ts be added on 12-8-09 is complete) (103015)

Action 153

Action Date: 2010-07-22	Action Type: ORDR
Action Agent: Richard T Ballinger, Div. 13	
Description: Order for Records from the Appellate Court, Sent: 14 vols. (103,015)	

Action 154

Action Date: 2011-02-13	Action Type: ROH
Action Agent: Joseph Bribiesca, Div. 22	
Description: Record of Hearing (Bench Trial) 11-21-11 Trial commenced; continued to 12-12-11; 12-12-11 Judg for deft per the record;	

Action 155

Action Date: 2011-03-22	Action Type: RAP
Action Agent: Richard T Ballinger, Div. 13	
Description: Mandate from Court of Appeals, affirmed in part, reversed in part and remanded with directions, (09-103015-A)	

Action 156

Action Date: 2011-03-22	Action Type: REIM
Action Agent: Richard T Ballinger, Div. 13	
Description: Memorandum Opinion - Case Reinstated, we reverse the portion of the order in which the district court sua sponte ordered a remedy that was neither proposed by the parties nor supported by the evidence and remand with directions as set forth, FYH's cross-appeal is dismissed as moot (09-103015-A)	

Action 157

Action Date: 2011-03-22	Action Type: STATUS
Action Agent: Richard T Ballinger, Div. 13	
Description: Case Status Change: Pending/Reopened	

Action 158

Action Date: 2011-03-25	Action Type: JUDAR
Action Agent: Jeffrey E Goering	
Description: Judge: Administrative Reassign	

Action 159

Action Date: 2011-03-25	Action Type: EOA
Action Agent: Jeffrey E Goering	
Description: P001/ P002/ P003 Entry of Appearance by atty Jeffrey R King for plts, Wichita Terminal Association, Burlington Northern & Santa Fe Railway Company and Union Pacific Railroad Company (fax)(

Action 160

Action Date: 2011-03-25	Action Type: AOR
Action Agent: Joseph Bribiesca, Div. 22	
Description: Plaintiff: Wooster, Ronnie Attorney of Record Jeffrey R King	

Action 161

Action Date: 2011-03-25	Action Type: AOR
Action Agent: Joseph Bribiesca, Div. 22	
Description: Plaintiff: Burlington Northern & Sante Fe Railway Co Attorney of Record Jeffrey R King	

Action 162

Action Date: 2011-04-12	Action Type: HEAR
Action Agent: Timothy G Lahey, Div. 8	
Description: Hearing Scheduled (Civil Discovery Conference 05/09/2011 10:30 am)	

Action 163

Action Date: 2011-05-09	Action Type: DCH
Action Agent: Timothy G Lahey, Div. 8	
Description: Hearing result for Civil Discovery Conference held on 05/09/2011 10:30 am: Civil Discovery Conference Held	

Action 164

Action Date: 2011-05-09	Action Type: JUDAR
Action Agent: Joseph Bribiesca, Div. 22	
Description: Judge: Administrative Reassign	

Action 165

Action Date: 2011-05-09	Action Type: HEAR
Action Agent: Joseph Bribiesca, Div. 22	
Description: Hearing Scheduled (Civil Special Set Motion 09/19/2011 09:00 am) Motion hearing date set at Disc Conf hearing 5-9-2011 per Judge Lahey	

Action 166

Action Date: 2011-05-09	Action Type: SCHORD
Action Agent: Timothy G Lahey, Div. 8	
Description: Scheduling Order filed 5/9/2011 Plft Expert Disc 8/1/2011 Def Expert 8/22/2011 Motion hearing 9/19/2011 @ 9am per Judge Lahey s/Lahey	

Action 167

Action Date: 2011-05-25	Action Type: AOR
Action Agent: Joseph Bribiesca, Div. 22	
Description: Plaintiff: Union Pacific Railroad Company Attorney of Record Jeffrey R King	

Action 168

Action Date: 2011-08-09	Action Type: MOT
Action Agent: Joseph Bribiesca, Div. 22	
Description: P-Pltf's Unopposed Motion for Continuance by Atty K Paul Day (no not. of hrg filed) (fax)	

Action 169

Action Date: 2011-08-09	Action Type: M
Action Agent: Joseph Bribiesca, Div. 22	
Description: Plaintiffs Disclosure of Expert Witnesses p/atty	

Action 170

Action Date: 2011-08-10	Action Type: MOT
Action Agent: Joseph Bribiesca, Div. 22	
Description: Motion	

Action 171

Action Date: 2011-09-16	Action Type: OFFDOC
Action Agent: Joseph Bribiesca, Div. 22	
Description: Hearing result for Civil Special Set Motion held on 09/19/2011 09:00 am: Off Docket Motion already heard 6/8/2011. Motion hearing date set at Disc Conf hearing 5-9-2011 per Judge Lahey	

Action 172

Action Date: 2011-09-16	Action Type: HEAR
Action Agent: Joseph Bribiesca, Div. 22	
Description: Hearing Scheduled (Bench Trial (Ch 60) 11/21/2011 09:00 am)	

Action 173

Action Date: 2011-10-20	Action Type: ORD
Action Agent: Joseph Bribiesca, Div. 22	
Description: Order: the Clerk of the District Court is hereby ordered to return the original supersedeas bond (filed 10-23-09) to counsel for pltfs in care of Safeco Insurance Company of America s/J. Bribiesca (orig. bond pulled & returned to P/Atty Paul Day 10-27-11, the pleading the clerk had clocked in did not have orig. signatures, atty is aware of this per call on 10-27-11)	

Action 174

Action Date: 2011-10-28	Action Type: M
Action Agent: Joseph Bribiesca, Div. 22	
Description: Plaintiff's Amended Disclosure of Expert Witness P/Atty	

Action 175

Action Date: 2011-11-07	Action Type: N
Action Agent: Joseph Bribiesca, Div. 22	

Description: Note- Bench Trial Letter sent to atty Jeffrey R King to Overland Park and Independence KS addresses
--

Action 176

Action Date: 2011-11-21	Action Type: M
Action Agent: Joseph Bribiesca, Div. 22	
Description: F.Y.G. and Treatco's Hearing Brief on Remand d/atty	

Action 177

Action Date: 2011-11-25	Action Type: MMSG
Action Agent: Joseph Bribiesca, Div. 22	
Description: Motion Minute Sheet: Granted. Signed by Judge.	

Action 178

Action Date: 2011-12-12	Action Type: MIN
Action Agent: Joseph Bribiesca, Div. 22	
Description: Minutes Entry Hearing type: Bench Trial (Ch 60) Hearing date: 11/21/2011 Time: 9:00 am Court reporter: Becky Fitzmier	

Action 179

Action Date: 2011-12-12	Action Type: MIN
Action Agent: Joseph Bribiesca, Div. 22	
Description: Minutes Entry Hearing type: Closings Argument and Court's Ruling Hearing date: 12/12/2011 Time: 10:30 am Court reporter: Becky A. Fitzmier	

Action 180

Action Date: 2011-12-12	Action Type: HEARHELD
Action Agent: Joseph Bribiesca, Div. 22	
Description: Hearing result for Bench Trial (Ch 60) held on 12/12/2011 09:00 am: Hearing Held	

Action 181

Action Date: 2011-12-13	Action Type: ROH
Action Agent: Joseph Bribiesca, Div. 22	

Description: Record of Hearing (Bench Trial) 11-21-11 Trial commenced; continued to 12-12-11, 12-12-11 Judgment for debt per the record; that Wyatt Hoch prepare a je/ord reflecting the ct's action: 12-12-11 s/J Bribiesca

Action 182

Action Date: 2011-12-13	Action Type: HEAR
Action Agent: Joseph Bribiesca, Div. 22	
Description: Hearing Scheduled (Bench Trial (Ch 60) 12/12/2011 09:00 am)	

Action 183

Action Date: 2012-01-25	Action Type: JEJCV
Action Agent: Joseph Bribiesca, Div. 22	
Description: Journal Entry on Second Remand & Permanent Injunction s/J. Bribiesca	

Action 184

Action Date: 2012-01-25	Action Type: STATUS
Action Agent: Joseph Bribiesca, Div. 22	
Description: Case Status Change: Disposed	

Action 185

Action Date: 2012-02-03	Action Type: CONTCRT
Action Agent: Joseph Bribiesca, Div. 22	
Description: Hearing result for Bench Trial (Ch 60) held on 11/21/2011 09:00 am: Continued by Court to 12-12-11	

Action 186

Action Date: 2012-02-07	Action Type: M
Action Agent: Joseph Bribiesca, Div. 22	
Description: NID letter returned to court	

Action 187

Action Date: 2012-02-07	Action Type: M
Action Agent: Joseph Bribiesca, Div. 22	
Description: NID letter returned to court	

Action 188

Action Date: 2012-02-14	Action Type: REQTS
Action Agent: Joseph Bribiesca, Div. 22	
Description: Request for Transcript	

Action 189

Action Date: 2012-02-15	Action Type: NAP
Action Agent: Joseph Bribiesca, Div. 22	
Description: Notice of Appeal	

Action 190

Action Date: 2012-02-15	Action Type: STATUS
Action Agent: Joseph Bribiesca, Div. 22	
Description: Case Status Change: on appeal	

Action 191

Action Date: 2012-02-29	Action Type: ORDTS
Action Agent: Joseph Bribiesca, Div. 22	
Description: Order for Transcript	

Action 192

Action Date: 2012-02-29	Action Type: CERTS
Action Agent: Joseph Bribiesca, Div. 22	
Description: Certificate of Completion of Transcript by Becky A. Fitzmier, CSR	

Action 193

Action Date: 2012-02-29	Action Type: TS
Action Agent: Joseph Bribiesca, Div. 22	
Description: Transcript of Bench Trial before Judge Bribiesca Div 22 on 11-21-11, Becky Fitzmier, pgs 1-164	

Action 194

Action Date: 2012-02-29	Action Type: TS
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Action Agent: Joseph Bribiesca, Div. 22
Description: Transcript of Closing Arguments and Courts Ruling Regarding Bench Trial before Judge Bribiesca Div 22, Becky Fitzmier, pgs 1-26

Action 195

Action Date: 2012-03-08	Action Type: APN
Action Agent: Joseph Bribiesca, Div. 22	
Description: Appellate Docketing Notice, Appellate Court No.: (12-107666-A) record due 3-21-12	

Action 196

Action Date: 2012-03-20	Action Type: TBLROA
Action Agent: Joseph Bribiesca, Div. 22	
Description: Table of Contents, Record on Appeal, Vols. 1-12 (misc. docs), 13-16 (ts) (12-107666-A)	

Action 197

Action Date: 2012-03-30	Action Type: ORD
Action Agent: Joseph Bribiesca, Div. 22	
Description: Court of Appeals Order (107666)	

Action 198

Action Date: 2012-04-26	Action Type: BND
Action Agent: Joseph Bribiesca, Div. 22	
Description: (Fax) Supersedeas Bond (Bond No. 022027271) in the amt of (\$250,000.00) filed by BNSF Railway Company, Wichita Terminal Association & Union Pacific Railroad Company	

Action 199

Action Date: 2012-04-26	Action Type: NOT
Action Agent: Joseph Bribiesca, Div. 22	
Description: (Fax) Notice of Filing of Supersedeas Bond P/Atty K. Paul Day	

Action 200

Action Date: 2012-04-30	Action Type: BND
Action Agent: Joseph Bribiesca, Div. 22	

Description: (Hard Copy) Supersedeas Bond (Bond No. 022027271) in the amt of (\$250,000.00) filed by BNSF Railway Company, Wichita Terminal Association & Union Pacific Railroad Company (**This original pleading pulled, voided & returned to P/atty per Court Order filed 8-9-13)

Action 201

Action Date: 2012-05-08	Action Type: MOT
Action Agent: Joseph Bribiesca, Div. 22	
Description: Motion	

Action 202

Action Date: 2012-05-18	Action Type: REXH
Action Agent: Joseph Bribiesca, Div. 22	
Description: Receipt for Returned Exhibits	

Action 203

Action Date: 2013-01-10	Action Type: ORDR
Action Agent: Joseph Bribiesca, Div. 22	
Description: Order for Records from the Appellate Court, Sent:	

Action 204

Action Date: 2013-08-08	Action Type: RAP
Action Agent: Joseph Bribiesca, Div. 22	
Description: Mandate from Court of Appeals, judgment of the District Court is affirmed in part, vacated in part, and remanded with directions. Copy of Syllabus by the court attached (12-107666-A)	

Action 205

Action Date: 2013-08-08	Action Type: REIS
Action Agent: Joseph Bribiesca, Div. 22	
Description: Syllabus by the Court - Case Reinstated	

Action 206

Action Date: 2013-08-08	Action Type: STATUS
Action Agent: Joseph Bribiesca, Div. 22	
Description: Case Status Change: Pending/Reopened	

Action 207

Action Date: 2013-08-09	Action Type: ORD
Action Agent: Joseph Bribiesca, Div. 22	
Description: Order: the clerk of the district court is hereby ordered to return the original supersedeas bond in the amount of \$250,000.00 filed on 4-26-12 to counsel for pltf s/J. Bribiesca (original bond pulled, voided & returned in SASE to P/Atty Paul Day Lathrop & Gage LLP by civil clerk on 8-9-13/actually went out in mail on Monday 8-12-13, AM run)	

Action 208

Action Date: 2013-08-21	Action Type: ORD
Action Agent: Joseph Bribiesca, Div. 22	
Description: Order on Third Remand s/J Bribiesca	

Action 209

Action Date: 2013-10-07	Action Type: NOT
Action Agent: Joseph Bribiesca, Div. 22	
Description: Notice of Mailing p\atty (fax)	

Action 210

Action Date: 2013-10-18	Action Type: NOT
Action Agent: Joseph Bribiesca, Div. 22	
Description: Notice of Filing (fax) p/atty	

Action 211

Action Date: 2013-12-16	Action Type: 408
Action Agent: Joseph Bribiesca, Div. 22	
Description: Journal Entry of Dismissal for Lack of Prosecution s/J Fleetwood	

Action 212

Action Date: 2013-12-18	Action Type: TERMSTAT
Action Agent: Joseph Bribiesca, Div. 22	
Description: Civil Case Termination Termination Date: 12/16/2013 Termination Type: Dismissed for Lack of Prosecution	

Action 213

Action Date: 2013-12-18	Action Type: STATUS
Action Agent: Joseph Bribiesca, Div. 22	
Description: Case Status Change: dismissed	

Action 214

Action Date: 2013-12-18	Action Type: STATUS
Action Agent: Joseph Bribiesca, Div. 22	
Description: Case Status Change: closed	

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EIGHTEENTH JUDICIAL DISTRICT
CIVIL DEPARTMENT
MOTION MINUTES ORDER

FILED
APP DOCKET NO. W

2007 FEB 20 P 3:17

CLERK OF THE DISTRICT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KANSAS
W

CASE: 2002-CV-003688-OT

PLAINTIFF: Wichita Terminal Association
VS.

DEFENDANT: F Y G Investments Inc, etal.

DATE: 2/20/2007 TIME: 09:00 am JUDGE: Karl W Friedel, Div. 1

MOTION: Bench Trial (Ch 60)

REASON: (3rd setting) 1-2 days re: Mandate Issue

ROH

ATTORNEYS:

FOR PLAINTIFF: Glenn D Young Jr

FOR DEFENDANT: Edgar Wm Dwire, Edgar Wm Dwire, Edgar Wm Dwire,

DISPOSITION IN ALL CASES

- ① 25th street east of Broadway is a public street.
- ② WTA has an obligation under section 2 of Wichita city ordinance #5436, section 2, to provide ingress and egress over the tracks.
- ③ W.T.A.'s obligation is also based on common law.
- ④ Court grants an injunction to provide ingress and egress.

ORDER

DATE: 2-20-07

IT IS ORDERED:

THAT Ed Dwire PREPARE A JOURNAL ENTRY/ORDER REFLECTING THE COURT'S ACTION

THAT THIS DOCUMENT SHALL SERVE AS THE COURT'S ORDER WITHOUT FURTHER JOURNAL ENTRY/ORDERS

Betsy Fitzmaier
RECORD TAKEN BY

JL SLO
JUDGE, DIVISION 22

APPROVED: ATTORNEY-PLAINTIFF

APPROVED: ATTORNEY-DEFENDANT

1 Edgar Wm. Dwire and Mr. Warren G. Jones, III, of Malone,
2 Dwire & Jones, 305 W. Central, P.O. Box 2082, Wichita,
3 Kansas 67201.

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1 THE COURT: Are the parties ready?

2 MR. YOUNG: We are.

3 MR. DWIRE: Ready, Your Honor.

4 THE COURT: All right. This is the case of
5 Wichita Terminal Association vs. FYG Investments,
6 Inc., et al, 02 C 3688. Let's have appearances,
7 please.

8 MR. YOUNG: Glenn D. Young, Jr., appearing
9 for the Wichita Terminal Association, Burlington
10 Northern Santa Fe Railway Company and the Union
11 Pacific Railroad Company.

12 MR. DWIRE: Edgar Dwire and Warren Jones
13 appearing for FYG Investments and Treatco,
14 Incorporated.

15 THE COURT: For the record, we're here for a
16 hearing to address two very specific issues which the
17 Court of Appeals remanded the matter for this Court to
18 decide. My question to the parties is: Do you have
19 any evidence you wish to present, other than oral
20 argument? Do you have any evidence you wish to
21 present?

22 MR. YOUNG: Your Honor, as I mentioned in
23 chambers, I think it would be of benefit to the Court
24 if I put on evidence through Danny Miller, who is
25 the -- the man who runs the Wichita Terminal

1 Association, and his name -- and his title is manager.

2 DANNY MILLER: Superintendent.

3 MR. YOUNG: Superintendent, who would
4 testify briefly, Your Honor, on what would be involved
5 if -- if the street were built in accordance with the
6 City's directions, as the defendants have submitted a
7 declaration to the City, what would be involved, what
8 kind of protection would be necessary, and -- and
9 what -- what kind of construction would be needed over
10 the crossing, over the tracks themselves.

11 THE COURT: Well, just so that everyone is
12 on the same page, though, let me just say for the
13 record that on remand, the Court remanded the matter
14 to Sedgwick County for the Court to determine, number
15 one, is 25th Street a public street, and secondly, if
16 the Court determines that it is a public street, if an
17 injunction is appropriate to provide ingress and
18 egress. And those are the two -- basically, the two
19 issues that are before the Court this morning.

20 Now, based on discussions with counsel off the
21 record, the Court was left with the impression that we
22 have a stipulation as to the issue of whether or not
23 25th Street is, in fact, a public street. At least
24 I -- I was left with the impression that the parties
25 did agree that it is a public street. Am I mistaken,

1 Mr. Young?

2 MR. YOUNG: Well, I think it would be
3 important to the Court to have the -- the defendants
4 have a witness here from the -- from the City, who
5 maintains that street, and -- and I think it would
6 probably be appropriate to hear his testimony.

7 THE COURT: Okay. So can I interpret what
8 you just said to mean that you don't stipulate that
9 25th is a public street? Is that what you're saying?

10 MR. YOUNG: That's correct, Your Honor.

11 THE COURT: All right. We don't -- we don't
12 have a stipulation, then. So we'll need some
13 testimony, then, because I can't make the decision
14 based on just argument. We'll need some testimony on
15 those -- on those two issues. So, Mr. Young, let me
16 begin with you, since you're representing the
17 plaintiff, do you -- do you have a witness here you
18 want to put on the stand?

19 MR. YOUNG: We had -- we'd -- we do have a
20 witness, Your Honor. But -- but he will not address
21 the issue of whether 25th Street North is a -- in
22 fact, a public street.

23 THE COURT: All right. Well, ordinarily, we
24 begin with the plaintiff, but you're saying --

25 MR. YOUNG: I --

1 THE COURT: -- saying that you would like
2 for me to begin with the defense at this time, so --

3 MR. YOUNG: Well, I will.

4 THE COURT: Mr. Dwire, do you have a problem
5 with that?

6 MR. DWIRE: I don't have a problem with
7 that, Your Honor. But I -- I do want the record to
8 show that I would certainly object to Mr. Miller's
9 testimony. That's not one of the issues for remand.
10 It is a surprise. I wasn't aware he was going to be
11 wanting to testify to something like that till this
12 morning. I don't think it's -- I don't think it's the
13 issue before the Court, and I don't think it's
14 material and would strongly object to testimony coming
15 into the record which is just a smoke screen.

16 We do have the witness on -- we have Mr. Pat
17 Pruitt, who is the street maintenance supervisor for
18 the City of Wichita, to testify, who has been
19 subpoenaed in regards to the issues of 25th Street,
20 whether it's a public street and whether or not, it's
21 maintained by the City, et cetera.

22 THE COURT: Why don't you go ahead and call
23 him.

24 MR. DWIRE: Thank you, Your Honor. I'd
25 appreciate that, so that he can be released.

1 Mr. Pruitt, would you come forward and be sworn
2 before the court reporter.

3 PATRICK PRUITT,
4 called as a witness on behalf of the Defendants, having
5 first been duly sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY MR. DWIRE:

8 Q. Would you state your name and employment for the City,
9 please -- excuse me, for the Court.

10 A. My name is Patrick Pruitt. I'm the street maintenance
11 supervisor for the City of Wichita Public Works
12 Department.

13 Q. How long have you been so employed, sir?

14 A. Thirty years.

15 Q. Are you acquainted with 25th -- 25th Street North
16 located -- going east of Broadway?

17 A. Yes, I am.

18 Q. In your position, is that considered a public street?

19 A. Yes, it is.

20 Q. Is the 25th Street North treated by the public as a
21 thoroughfare?

22 A. Yes, it is.

23 Q. Does the City of Wichita have charge of the
24 maintenance of 25th Street North?

25 A. Yes, it does.

- 1 Q. Does the City of Wichita maintain signage on 25th
2 Street North designating it as 25th Street?
- 3 A. Yes. The only sign that's designated as 25th is the
4 east portion at 26th Street. There -- the other
5 street name sign that says 25th is on the west side of
6 the street, south -- south -- southwest corner.
- 7 Q. All right.
- 8 A. But we do maintain the sign that's on the east end
9 that says 25th and 26th.
- 10 Q. Okay. And 26th joins in to 25th --
- 11 A. That is correct.
- 12 Q. -- correct?
- 13 A. That is correct.
- 14 Q. And is that located in front of Pearson Excavating?
- 15 A. Yes, it is.
- 16 Q. Are there two businesses located along 25th Street?
- 17 A. Yes, there are.
- 18 Q. And could you tell us what those businesses are,
19 please.
- 20 A. All I can recollect is just one. I know it's
21 Glickman. It's one of the business there. And I
22 think further to the east is some kind of maybe grain
23 elevator or some kind of elevator.
- 24 Q. All right. And is Pearson Excavating designated as
25 821 East 25th Street?

1 A. Yes, it is.

2 Q. Okay. And on 25th Street, is the -- are the railroad
3 tracks located on the south side of 25th Street?

4 A. That is correct.

5 Q. Would you tell me what the maintenance of 25th Street
6 consists of.

7 A. Portion of it is asphalt mat street. The other
8 majority of the portion is a dirt street, which we
9 grade approximately 12 times a year.

10 Q. Thank you.

11 THE COURT: Cross?

12 MR. YOUNG: Just briefly, Your Honor.

13 CROSS-EXAMINATION

14 BY MR. YOUNG:

15 Q. Good morning, Mr. Pruitt.

16 A. Good morning. How ya doing today?

17 Q. Great.

18 A. That's good.

19 Q. Now, what -- what is the width, if you know, of 25th
20 Street North, that you've --

21 A. I believe a portion on the west end is about 30 feet
22 wide. Then it gets about -- gets a little wider,
23 maybe up to 60 feet towards the east.

24 Q. Okay. And -- and it's -- would it be fair to state
25 that that's sort of a wash -- washboard street? I

1 drove up -- up through there Sunday night, and it
2 was --

3 MR. DWIRE: I object to counsel's testimony
4 as to his --

5 MR. YOUNG: Well, I'm going to ask him a
6 question.

7 MR. DWIRE: Okay.

8 THE COURT: Well, refrain from testifying.

9 MR. YOUNG: I'll try.

10 THE COURT: We'll have to put you under
11 oath, Mr. Young.

12 MR. JONES: Don't want that.

13 Q. (By Mr. Young) I drove up through there Sunday
14 night --

15 A. Okay.

16 Q. -- and -- and I was a little concerned that -- that
17 the -- that the street was safe for me to drive
18 through, because --

19 A. Okay.

20 Q. -- it was so washboard condition -- such a washboard
21 condition. When is the last time there was any
22 maintenance on that street, if you know?

23 A. November 28th of '06.

24 Q. Okay. How do you maintain it?

25 A. With motor graders.

1 Q. Okay. Now, is it your understanding that the railroad
2 tracks -- the two railroad tracks, they go up through
3 there, that they are a part of the street, or -- or is
4 the street all to the north of -- of the railroad
5 tracks?

6 A. I do know there is railroad tracks there on the south.
7 As far as the total history of it, I'm not for sure of
8 it.

9 Q. Okay. Are you aware that there is any plans to
10 develop that part of the -- the city --

11 A. I'm not --

12 Q. -- from -- from your position as --

13 A. I'm not for sure.

14 Q. -- street maintenance?

15 MR. YOUNG: I believe that's all, Your
16 Honor.

17 THE COURT: Redirect?

18 MR. DWIRE: No, Your Honor.

19 THE COURT: All right.

20 MR. DWIRE: May this witness be excused?

21 THE COURT: Mr. Young?

22 MR. YOUNG: He may as far as I'm concerned.

23 THE COURT: All right. Mr. Pruitt, you're
24 free to go. Thank you.

25 THE WITNESS: Thank you.

1 MR. DWIRE: Thank you very much for your
2 cooperation, sir.

3 THE WITNESS: Everybody have a good day.

4 THE COURT: Mr. Young, are you ready to
5 proceed?

6 MR. YOUNG: I am, Your Honor.

7 THE COURT: All right. Call your witness.
8 I don't know what he's going to say, but I'll listen.

9 MR. YOUNG: We'll call Danny Miller.

10 THE COURT: And Mr. Dwire's objection is
11 noted.

12 **DANNY R. MILLER,**
13 called as a witness on behalf of the Plaintiffs, having
14 first been duly sworn, testified as follows:

15 **DIRECT EXAMINATION**

16 **BY MR. YOUNG:**

17 Q. Would you state your name and address for the record,
18 please, Mr. Miller.

19 A. Danny R. Miller, superintendent for the Wichita
20 Terminal Association.

21 MR. DWIRE: May it please the Court: Before
22 he proceeds, I've previously made an objection. I
23 think the Court has noted that my objection stands so
24 that I do not have to continue to re-make those
25 objections to his testimony.

1 THE COURT: That's correct.

2 MR. DWIRE: All right. Thank you, Your
3 Honor. I just wanted to clear up the record.

4 Q. (By Mr. Young) And you're familiar with the -- what
5 is before the Court today, a request by FYG
6 Investments and Treatco for access to 25th Street --

7 A. Yes, I am.

8 Q. -- is that correct? As you have discussed this matter
9 with the -- the defendants, who did you -- who did you
10 talk to about their particular needs?

11 A. Ken Thomas, I'm not sure his title, with Treatco. I
12 was not present, but he met several years back with
13 Larry Tobar, FRA representative, and Don Mai, BNSF
14 train master. Ken Thomas agreed to put a private
15 crossing in at the west end on the single track.

16 MR. DWIRE: Please the Court: I believe
17 this is -- goes into hearsay, and -- and I don't think
18 I had that in my objection, and I'd like to
19 incorporate that, also.

20 THE COURT: Well, unless that person is
21 here, available for cross, that'll be sustained.

22 Q. (By Mr. Young) Was a private crossing afforded to
23 Treatco at some time in the past?

24 A. Yes, it was.

25 Q. About when did that occur?

1 A. Without looking at the record, I would guess 2001
2 or 2.

3 Q. And where was that private crossing?

4 A. Across the Santa Fe track, the west end of 25th
5 Street, where there is single track, there is a wooden
6 crossing.

7 Q. Is that where the Santa Fe track curves into a
8 straight line of trackage that goes east and west?

9 A. Yes, it is.

10 Q. Okay. Why was Treatco -- why did Treatco want a
11 private crossing at that location?

12 A. I'm not sure why they wanted the private crossing, but
13 that's where Ken Thomas agreed to --

14 Q. Okay.

15 A. -- have the crossing installed.

16 Q. You didn't know what they were going to use it for?

17 A. No.

18 Q. Okay. What happened ultimately to that private
19 crossing?

20 A. After several years, they did not use it, and it was
21 removed.

22 Q. And how was that private crossing constructed and
23 maintained?

24 A. Wooden crossing planks between the rail and AB-3
25 approach on north and south of the crossing.

1 Q. What's an AB-3 approach?

2 A. It's a limestone crushed dirt.

3 Q. And this went over the single Santa Fe track?

4 A. Yes, it did.

5 Q. Now, we've been talking about the two parallel tracks
6 that are in the right of -- railroad right of way to
7 the south of what has been designated as 25th Street
8 as Wichita Terminal tracks, is that correct?

9 A. Yes.

10 Q. Okay.

11 A. The single track on the west end is BNSF ownership.

12 Q. Okay. BNSF Santa Fe?

13 A. Right.

14 Q. All right. Did someone with Treatco or FYG come to
15 you directly at some point in time and say -- and ask
16 you for a private crossing further to the east of the
17 crossing that they had in 2001 or 2002?

18 A. Not to me directly.

19 Q. But you understand that they were asking for a private
20 crossing?

21 A. The first of my knowledge of a private crossing was
22 after they learned of the 1916 city ordinance that the
23 tracks had a right to be there, and that's when the
24 private crossing came up.

25 Q. Okay. For the benefit of the Court, what is the --

1 what are the problems that arise in your railroad
2 operation from providing a private crossing over your
3 two tracks?

4 A. Historically, on a private crossing, the landowner
5 assumes all liability. If a person is leaving their
6 property and is hit by a train, they assume all
7 liability on a private crossing. Therefore, the
8 railroads normally do not like to issue private
9 crossing agreements.

10 In that particular case, with the street and the
11 tracks, they're right -- the north track is the south
12 edge of the gravel road, that is rough. It's not a
13 matter of if an accident is going to happen. It's
14 when it's going to happen.

15 Q. Well, let's forget about for the time being, what
16 would happen on a -- on a private crossing there. Do
17 you understand that -- that Treatco and FYG have now
18 presented papers to the City of Wichita for the
19 declaration of a -- a street that -- that starts at
20 your railroad right of way on the north and proceeds
21 south to what appears to be like a cul-de-sac? Are
22 you familiar with -- with that --

23 A. Yes.

24 Q. -- request that was submitted to the City?

25 A. Yes, I am.

1 Q. And the City, as you understand, has accepted and
2 approved that street designation?

3 A. Yes.

4 Q. Or has approved the filing of that declaration of --
5 of a -- papers to -- to construct the street?

6 A. Yes.

7 Q. All right. Taking that situation, what would be
8 involved with the -- as far as the WTA is concerned,
9 with the City building a street which starts in the
10 FYG property and heads across and crosses over your
11 two parallel tracks onto this gravel road?

12 A. To start with, those tracks are interchange tracks and
13 then the railroad. That's the only way BNSF can get
14 cars that come into town or leave town to the WTA, and
15 the WTA also delivers cars to the Union Pacific
16 Railroad that the BNSF gives to them and vice versa,
17 we give to the UPN, so those are not storage tracks.
18 Those are live tracks. They have movement on 'em 24
19 hours a day, they potentially have movement.

20 Safety protection, if there is a street there, my
21 opinion, you would need cantilevers and gates to
22 protect the traffic, because we -- we move 110-car
23 grain trains in and out during wheat harvest. We will
24 handle several thousand cars in a month of June and
25 July across those tracks. And if it's not protected,

1 since you turn right onto the street, the northbound
2 vehicle trying to turn eastbound on 25th cannot turn
3 into that eastbound lane. He has to move out. You
4 have Glickman up there that has scrap trucks coming
5 in. You -- barely two cars can pass anyway with the
6 washboard. We've had cars into the side of the car or
7 automobiles into the side of the cars, you have --

8 Q. Railroad cars?

9 A. Yes. You have the Cargill elevator that during
10 harvest or all year long have grain trucks across that
11 25th Street. So to properly protect that, like I
12 said, we need cantilevers and gates.

13 Q. Okay. I want the Court to understand from the
14 railroad's protect -- perspective, you're concerned
15 with a crossing over interchange tracks. How much on
16 a -- on a typical week, what would be the traffic --
17 railroad traffic on those inter -- interchange tracks
18 bordering 25th Street?

19 A. 30 to 40 cars a day.

20 Q. Would be moved?

21 A. The -- on our interchange rules, we deliver to those
22 tracks, and then the BNSF will come and get the cars,
23 vice versa, they would give to us and we'd get 'em, so
24 there is some stationary time for the cars on those
25 tracks. So during wheat harvest, there may be as many

1 as 100, 150 a day.

2 Q. Okay. When you say "we," the WTA maintains some
3 equipment to handle that interchange movement, is that
4 correct?

5 A. That's correct.

6 Q. What is that equipment?

7 A. You talking about loc -- like a locomotive?

8 Q. Yes.

9 A. We -- we run with two locomotives, and we actually
10 have no rail cars. They come in and out from the
11 owners, the BNSF, the Union Pacific.

12 Q. So the WTA actually switches cars between the
13 railroads, in other words, cars that -- that come in
14 on the Burlington Northern Santa Fe, the WTA would be
15 responsible for switching them over to another
16 carrier, is that right?

17 A. That's correct.

18 Q. And that's one of your primary functions --

19 A. That's one of them.

20 Q. -- is that correct?

21 A. That's correct.

22 Q. Now, do you have other interchange tracks physically
23 similar to the situation that you've got at the 25th
24 Street area?

25 A. That is the only interchange track the WTA has left.

1 Q. Do you -- okay. And -- and the real problem, as I
2 understand it, in listening to your testimony, is
3 putting a street through those interchange tracks
4 would disrupt the operation of the WTA, is that
5 correct?

6 A. Yes, it would.

7 Q. And it would -- in effect would affect interstate
8 commerce in the movement of that traffic, is that
9 correct?

10 A. Yes, it would.

11 Q. Okay. Okay. I want -- I want to discuss a little bit
12 physically what would need to be constructed through
13 the -- through the direction of the City of Wichita
14 and any federal agencies in the construction of a
15 crossing over your two tracks there at -- on 25th
16 Street. What would be involved?

17 A. There is three alternatives to a crossing surface,
18 that's wood, rubber or concrete planks.

19 Q. Who -- who designates what you would use, or -- or is
20 it something the railroad determines?

21 A. Naturally, if -- the railroad really determines it's
22 probably wood is the least expensive, but that would
23 be in negotiations with the City, I assume.

24 Q. All right. And --

25 A. Traffic volume, automobile traffic volume would be a

1 major concern.

2 Q. And would you anticipate that this would be low volume
3 traffic out of Treatco?

4 A. I have no idea. You have a cul-de-sac to a field.
5 I'm not sure that there would be any volume. There
6 wasn't in the crossing we had before.

7 Q. Okay. All right. We talked about the surface over
8 your physical tracks going into what's been designated
9 as 25th Street.

10 THE COURT: Mr. Young, would you hold on a
11 minute, please.

12 MR. YOUNG: Sure.

13 (Off-the-record.)

14 THE COURT: Go ahead, Mr. Young.

15 Q. (By Mr. Young) What else would be involved in the
16 opening up of a crossing through your interchange
17 tracks?

18 A. In the construction of the street, they would have to
19 have a header, which would be part of the street that
20 butts up to your crossing.

21 Q. Describe, if you will, what a header is.

22 A. It's basically a foundation like you would have on a
23 house. It's thicker concrete that butts up to your
24 crossing, so that you have less settling in your
25 street. It's thicker. They're usually a foot wide,

1 maybe a foot deep, the length of the width of the
2 street.

3 Q. And that's made out of what?

4 A. Concrete.

5 Q. Concrete. Okay.

6 A. And then the approach, I'm not sure if there is a
7 ditch on the south side of the tracks, but if there is
8 a ditch, they would have to do something for drainage.
9 The City would -- I don't know, I'm not a street
10 builder, so I'm not sure.

11 Q. And -- and this -- this work would be done in
12 coordination with the City -- City personnel on --
13 on -- on the kind of crossing that would be involved?

14 A. That's my understanding.

15 Q. Okay. Now, you've mentioned protection that would be
16 necessary to the public. And -- and I think you've
17 mentioned that there would be cantilevers and gates,
18 is that correct?

19 A. That would be my preference.

20 Q. Okay. Explain to the Court what's involved in the
21 installation of cantilevers and what they are, what
22 they look like and so on for the record.

23 A. Cantilevers are the vertical posts that have the
24 horizontal beams with your red lights. The gates are
25 just ordinary crossing gates. To install those, you

1 have to have electricity, you have to have your
2 backup, and then you have to re-modify in the track,
3 you have to put a circuit, so that it will activate
4 the gates or deactivate the gates, whatever the case
5 is.

6 Q. Now, I think in the declaration papers that were
7 presented to the City of Wichita and acted on by the
8 city commission, the defendants contemplate a 64-foot
9 street coming out of the Treatco property and
10 intersecting with 25th Street North. Is that your
11 understanding?

12 A. Yes, it is.

13 Q. Okay. Now, what about the -- you had mentioned
14 cantilevers and gates. The cantilevers would be
15 facing 25th Street and facing to the south as well, is
16 that correct? Would they be on both sides?

17 A. For sure on the south side. I'm not sure how they
18 would signalize for notification. Yes, you would
19 have -- you would have gates and lights on the north
20 side, also, but you'd have to have advance protection
21 warnings.

22 Q. Is there any other agency that will be involved in --
23 in approving or making recommendations on -- on
24 traffic protection besides the City of Wichita?

25 A. In history, the State has been involved in that, also.

1 They're very expensive, so naturally, cities and
2 states, they try to get all the help they can get when
3 it comes to signalization of a crossing.

4 Q. Is there any federal agency involved?

5 A. The Federal Railroad Administration, I'm not sure that
6 they will make a determination, but they will make a
7 recommendation.

8 Q. Okay. And --

9 A. And all of the signaling has to be within their
10 guidelines.

11 Q. The Federal --

12 A. Railroad --

13 Q. -- Railroad --

14 A. -- Administration?

15 Q. -- Railroad Administration?

16 A. Yes.

17 Q. So regardless of -- if the City has an ordinance that
18 says that the City is going to provide the kind and
19 type of protection for its streets at railroad
20 crossings, the Federal Railroad Administration has a
21 voice in making that determination?

22 A. Their -- the State or the City, with my dealings, are
23 not going to. Now, they may get the advice of the
24 Federal Railroad Administration, but the proposal will
25 be within those guidelines.

1 Q. Okay. Now, if you continue, let's just assume for the
2 moment that the street -- that the City authorizes a
3 street to intersect with 25th Street. What -- how
4 will that -- and -- and there is protection in place
5 and so on, and there are actually trucks or traffic
6 going into this cul-de-sac, presuming that it -- that
7 that area is developed, how will that affect your
8 interchange operations?

9 A. With or without traffic, if there is a grade crossing
10 there, both tracks will have to be cut sufficient
11 room, 200, 250 feet on each side of the crossing will
12 have to be -- it'll have to get by your insulated
13 joints, which the insulated joints tells the signal to
14 work. So you will take a 44 -- the two tracks will
15 hold 44 cars, and you will eliminate probably 16 car
16 lengths of room, additional three man-hours a day to
17 pull and deliver, to receive and deliver cars, because
18 you'll have to couple up, uncouple, make your cuts or
19 to couple up.

20 Q. On those double tracks now, how many feet of rail on
21 each of the tracks is available for your interchange
22 operation, if you know?

23 A. Well, if someone has a calculator, we can get 44 cars
24 on the two tracks at 65 feet a car.

25 Q. Okay.

1 A. So my math is not that good, but without a
2 calculator --

3 Q. All right. And --

4 A. -- 2600 feet, approximately.

5 Q. And this isn't the storage of 44 railroad cars; this
6 is the constant movement of the cars on that
7 interchange track daily, is that correct?

8 A. That's correct. There are times that cars may stay
9 there longer than others, because once -- the way
10 you -- when the cars are put there by one road, there
11 is electronic data transmitted to the other road, and
12 then they get that data, and then they pull those
13 cars. There may be a time lapse, depending on the
14 time they're delivered or received. But they're
15 also -- we meet -- the BNSF will bring a 110-car grain
16 train in, we go to the west end of the interchange,
17 get the cars and drag all 110 back, so those cars are
18 never actually stopped on the interchange. They'll go
19 right through the tracks.

20 Q. What is the WTA's hours of service in actually
21 performing this interchange movement?

22 A. We work five days a week from 8:00 a.m. to 4:00 p.m.,
23 seven days a week, midnight to 8:00 a.m. and various
24 other times if business warrants. I can call an extra
25 engine in the afternoon or on the weekends.

1 Q. So it's pretty much a 24/7 operation or close to that?

2 A. Close. Not exact. There is some -- there are some
3 void times.

4 Q. And are there times during the year when that
5 interchange operation would be more active than some
6 other time of the year?

7 A. Yes. From -- normally from June, July, August,
8 September, October, because the grain movement, March,
9 April and May, there is large grain movement.

10 Q. Would it be fair to state that by having a crossing
11 right in the middle of your interchange tracks is
12 going to seriously disrupt the WTA's interchange
13 operation?

14 A. Yes, it will.

15 Q. Will it also affect -- ultimately inter -- effect --
16 affect interstate commerce and the movement of those
17 cars?

18 A. There will be an inherent delay in all cars.

19 Q. And as -- would it be fair to state that that's the
20 primary concern that WTA has with the City building a
21 street right through the middle of your interchange
22 operation?

23 A. That's one of the concerns. The people familiar with
24 the City of Wichita, they're elevating the tracks
25 through downtown to eliminate grade crossings. I am

1 not sure why the City wants to put another grade
2 crossing in, but a grade crossing is an accident
3 waiting to happen. They're going to happen. So my
4 concern by the way you have to dump into 25th Street,
5 if it's ever developed, we hit trucks and cars, or
6 they hit us, either way, my experience of 40 years
7 railroading, more traffic accidents are motorists
8 going around gates, so my -- my largest concern is
9 somebody will get hurt there. We chase kids off the
10 cars now.

11 Q. Has the WTA, through your guidance and leadership, met
12 with the City of Wichita to determine whether there is
13 a alternate solution for this particular problem?

14 A. Yes, I have.

15 Q. Tell the Court, if you will, what -- what has
16 transpired.

17 A. The most efficient way --

18 MR. DWIRE: Please the Court, again, this is
19 hearsay and had no notice of it.

20 THE COURT: Well, this is hearsay,
21 Mr. Young.

22 MR. YOUNG: Well, Your Honor, this is a
23 trial. This is a remand back to the Court for
24 retrial. And -- and if he has been directly involved
25 with the City in any way, I think he can testify as to

1 what he did, not necessarily what they told him and so
2 on. I realize that's hearsay, but --

3 THE COURT: Well, if he can answer your
4 question without saying anything about any statements
5 that were made by other people, but I frankly doubt
6 whether he can do that.

7 MR. YOUNG: Okay.

8 THE COURT: Can you answer that question,
9 sir, without alluding to anything anyone else said?

10 THE WITNESS: I can give you my
11 recommendation.

12 THE COURT: And what's that based on?

13 THE WITNESS: The best solution for ingress
14 and egress, a secondary ingress and egress for
15 Treatco.

16 THE COURT: And that has nothing to do with
17 what may have transpired between you and the City
18 employee at a meeting?

19 MR. YOUNG: Well, let's just go with your
20 recommendation. Can we do that, Judge?

21 THE COURT: Answer my question.

22 THE WITNESS: Well, that was -- that -- the
23 concern was safety of motorists.

24 THE COURT: Yeah. You've made that clear,
25 sir.

1 THE WITNESS: But that was my recommendation
2 to how to -- to solve it. I -- I'm not sure how you
3 want me to answer that. They asked me a
4 recommendation. That was my recommendation.

5 THE COURT: You have a recommendation just
6 based on your knowledge of the area and your working
7 there every day?

8 THE WITNESS: Yes.

9 THE COURT: All right. Go ahead and give us
10 that recommendation.

11 THE WITNESS: The same cul-de-sac could exit
12 to the east onto stockyard's property, a road, you'd
13 have the same ingress and egress through the old
14 stockyard's property, exit over single track, which is
15 not a -- where your cars are fluid. You would have
16 one track to cross, and it would exit, if there is a
17 map, right into 26th Street, which would take you
18 right to the canal route. And then the City kills two
19 stones. This may be hearsay, but then if the
20 stockyards ever wants to develop, they have ingress
21 and egress.

22 THE COURT: Who owns that property?

23 THE WITNESS: Pardon me?

24 THE COURT: Who owns the property?

25 THE WITNESS: March Oil, Johnny Stephens.

1 THE COURT: So that's not the property
2 that -- none of that property belongs to WTA?

3 THE WITNESS: No.

4 Q. (By Mr. Young) Does -- does that property -- does the
5 FYG property adjoin to the -- to the stockyard
6 property that you -- you've referred to?

7 A. Yes, it does, to the east.

8 Q. Okay. Where would -- where would the -- where would
9 the street coming off of the FYG property intersect
10 with the stockyard property? Would it be way down
11 south?

12 A. No. If you look at the map of the cul-de-sac, you
13 just turn the leg of it to the east.

14 Q. Straight east?

15 A. I'm not a surveyor. There is a dirt road through
16 there, but east, northeast, you know, I'm not sure
17 exactly which way it would tie in.

18 Q. Okay. I'm trying to follow you here for -- if Treatco
19 or FYG build a street heading east from the end of
20 that cul-de-sac that's shown in there, their
21 declaration to the east, would they ultimately
22 intersect with a -- a street that's owned by Johnny
23 Stephens?

24 A. Yes. There is a dirt road.

25 Q. Okay. And if you were traveling -- if you built that

1 street and you got to the dirt road, how would you
2 access your property to get out onto -- to Wichita
3 public streets?

4 A. I have no property there, but you could -- the street,
5 I assume, if the -- if the City wants to build a
6 street, they would also continue that street on
7 stockyard's property, and you would go to the dirt
8 road or -- or build new road, and you would -- I know
9 there is some maps here. It's probably easier to show
10 on a map, but it would come out -- they're all
11 familiar, you may not be, but there is a Pearson's
12 crossing there.

13 Q. Okay.

14 A. It's a private crossing and is -- where it would tie
15 in, and that exits right to the 25th, 26th Street
16 curve.

17 Q. To the north?

18 A. To the north, correct.

19 Q. Okay. So there is an access out of -- out of the
20 Treatco property that you think better operates as a
21 means of ingress and egress from the issue of public
22 safety?

23 A. Yes, I do.

24 Q. Okay. Now, you mentioned this -- you mentioned the
25 property up on the north that's private -- private

- 1 crossing. Who owns that property?
- 2 A. Johnny Stephens, March Oil.
- 3 Q. And -- and is there a name for that corner up there?
- 4 I'm talking about the -- the business that's there.
- 5 A. Pearson.
- 6 Q. Pearson. When --
- 7 A. Pearson Excavating.
- 8 Q. Excuse me?
- 9 A. Pearson Excavating.
- 10 Q. Okay. When was that private crossing put in?
- 11 A. In the 90's, it was put in. There was the bus barn
- 12 there, the school buses, and that was put in in the
- 13 90's, I believe it was.
- 14 Q. Okay. And that was over a single track --
- 15 A. Yes, it was.
- 16 Q. -- single WTA track --
- 17 A. Yes.
- 18 Q. -- that heads east -- east from --
- 19 A. Correct.
- 20 Q. -- from your interchange tracks?
- 21 A. Correct.
- 22 Q. And you think that's the solution to this whole
- 23 problem, one of the solutions to this whole problem --
- 24 A. Correct. Correct.
- 25 Q. -- and the best solution?

1 A. Correct.

2 Q. Okay.

3 A. From -- from a -- a taxpayer's viewpoint, why build a
4 street, and then Johnny Stephens come in, want a
5 street, why not kill -- put one street in that solves
6 both issues?

7 Q. So you believe that there is a possibility that if
8 this area up there is ultimately developed, that
9 Johnny Stephens, who owns the stockyards, will see
10 that that street is built, is that right?

11 A. I can't speak for Johnny, but I assume that he would.

12 Q. Okay.

13 MR. YOUNG: I believe that's all, Your
14 Honor.

15 THE COURT: All right. Mr. Dwire? And
16 forgive me, Mr. Dwire, but let me just ask Mr. Miller
17 a question.

18 Mr. Miller, did you present your alternative
19 proposal to anyone when you were meeting with the City
20 and/or people connected with Treatco?

21 THE WITNESS: My proposal was a question --
22 or they asked me for a recommendation, and that was my
23 recommendation.

24 THE COURT: So --

25 THE WITNESS: So I presented nothing, no

1 plat, nothing official.

2 THE COURT: Okay. You realize that
3 Mr. Johnny Stephens is not a party to this case, and I
4 can't order Johnny Stephens to do anything?

5 THE WITNESS: I fully understand that.

6 THE COURT: Okay. Go ahead, Mr. Dwire.
7 Now, I'm not saying your idea is not a good one. I
8 just don't know. Mr. Stephens is not present in the
9 courtroom.

10 Go ahead, Mr. Dwire.

11 **CROSS-EXAMINATION**

12 **BY MR. DWIRE:**

13 Q. Now, this road that you talked about on Mr. Stephens'
14 property, that's not a public road, is it?

15 A. No, not to my knowledge, I --

16 Q. And, in fact -- and, in fact, there is a blockage that
17 he keeps locked from when you pull into Mr. Pearson's,
18 there is a -- a blockage on that road, where that road
19 is, is that true?

20 A. There is a gate. I don't know that it's always
21 closed. There is a reason for the gate..

22 Q. And that road leads to two towers, I don't know the
23 type, there is two towers that extend high up in the
24 air that that road leads to, is that correct?

25 A. That's not correct. The road leads all the way down

- 1 to the scrap dealer, the car salesman. It did go all
2 the way to 21st. You can traverse that road from 21st
3 to 25th or 6th.
- 4 Q. You can't now?
- 5 A. No. That scrap dealer has it blocked.
- 6 Q. Right. And the -- but that -- there is a couple of
7 towers in that -- along that road, also?
- 8 A. There are a couple of towers.
- 9 Q. Okay. Now, this crossing that you talked about there,
10 Mr. Pearson's, was that not put in by Mr. Stephens on
11 a weekend?
- 12 A. Mr. Stephens installed that crossing with my
13 permission.
- 14 Q. Okay.
- 15 A. I don't know if it was on a weekend or not. You'd
16 have to ask him.
- 17 Q. Okay. Now, does the -- having these two tracks along
18 FYG's property on the south, does that seriously
19 disrupt the development of that land on the south?
- 20 A. The two tracks?
- 21 Q. Yes.
- 22 A. You want my opinion?
- 23 Q. Yeah.
- 24 A. No.
- 25 Q. Okay. Now, but there is no access to that land coming

1 to -- from the south to the north, is there?

2 A. I am not an expert on FYG's property. I know they
3 come into their property on 23rd. They're -- we used
4 to service Cudahy, and there was a bridge across that
5 creek at one time, Chisholm Creek.

6 Q. Okay. Now, let's go there. The -- the bridge was a
7 cattle bridge that's located up on the south end, is
8 that correct?

9 A. I -- I don't know.

10 Q. Okay. Now --

11 A. There were railroad bridges on the south end. That
12 was my concern. Not cattle bridges.

13 Q. Now, that -- this ditch is the North Wichita Drainage
14 Ditch, is that right, also called Chisholm Creek?

15 A. The only name I know is Chisholm Creek.

16 Q. And are you aware that that is a designated drainage
17 ditch under Chapter 24 of our Kansas Code?

18 A. If that's what you say, that's -- I have no problems
19 with that.

20 Q. And --

21 A. Don't disagree.

22 Q. And are you aware that the easement rights in regards
23 to that -- to the State of Kansas is approximately 150
24 feet, 75 feet on each side of the center?

25 A. The ditch is not my concern. It does -- I have no --

1 no reason to know that. I'm not a --

2 Q. Let's go back to the beginning of your testimony, sir.
3 And you told us about a crossing that was put in up at
4 the west end. Now, sir, was that crossing not put in
5 when the City requested the crossing to clean out the
6 North Wichita Drainage Ditch?

7 A. I have no idea. All I know is Ken Thomas, Larry
8 Tobar, Don Mai met, and that was the recommendation of
9 the FRA. Larry Tobar, Ken Thomas agreed. Why they
10 wanted it, I have no idea. That -- that private
11 crossing was put in.

12 Q. Well, you're not aware that the City of Wichita came
13 in and cleaned out the drainage ditch?

14 A. I know they cleaned the drainage ditch out, but like
15 Mr. Thomas, most of the time, there is a bridge -- a
16 railroad bridge that crosses the Chisholm Creek, and
17 that's where they cut off. They did not go to the
18 private crossings. I have pictures. There is no
19 tracks. My crews -- BNSF crews, that's the reason it
20 was taken out to keep -- matter of fact, the scrap
21 yard called me or the car dealer and wanted it out,
22 because the thieves were going through Treatco's
23 property and stealing vehicles and dragging them back
24 across. That's the main reason we took the crossing
25 out.

1 Q. Okay. And that crossing was on the Santa Fe right of
2 way, and it was taken --

3 A. Santa Fe property.

4 Q. Right. And it was taken out shortly after the City
5 completed the drainage ditch clean-out?

6 A. That's incorrect. The crossing was taken out after
7 the two 25th Street tracks were repaired, and that's
8 when the crossing was taken out.

9 Q. Okay.

10 A. If that happened because the City quit, that's not the
11 reason it was taken out.

12 Q. Who paid for the construction of the crossing at the
13 west end of 25th Street?

14 A. As I stated earlier, the BNSF supplied the planks and
15 labor, and the WTA supplied the approach and AB-3 mix,
16 and we leveled it and made the approach.

17 Q. Does the WTA decide where crossings will be
18 constructed?

19 A. To my knowledge, there's been no crossings installed
20 on the WTA probably in the last 50 or 60 years, so I
21 have no idea. If the WTA did, it would be -- it would
22 go through the zoning roads, engineering department,
23 which would be the BNSF and the UP, but I know of no
24 new crossings that have been installed. By looking at
25 the maps, I'd say even longer than that, maybe back to

1 the 30's.

2 Q. Are you acquainted with the Wichita City Ordinance
3 5436?

4 A. I have no idea what it is.

5 Q. Do not?

6 A. Refresh my memory. Is that the 1916 ordinance?

7 Q. Yes.

8 A. Yes, I am.

9 Q. And is the -- has the -- has the -- during your
10 tenure, has the WTA ever been in compliance with that
11 ordinance?

12 MR. YOUNG: That calls for a legal
13 conclusion, Your Honor. I think it's outside the
14 purview of this witness.

15 THE COURT: Well, unless you can lay a
16 foundation, even though he's already made some
17 statements that are of a legal conclusion, but as far
18 as that question is concerned, unless you can lay a
19 foundation, I won't allow it.

20 Q. (By Mr. Dwire) Okay. Has WTA used those tracks for
21 80 years, approximately, since -- well, since they
22 were installed in 1917 or 1918?

23 A. Yes, we have.

24 Q. Okay.

25 A. Let me qualify that. Other than history, I can only

1 speak since 1985, when I came to the terminal, but
2 according to the maps, yes.

3 Q. Okay.

4 MR. DWIRE: That's all, Your Honor.

5 THE COURT: Mr. Young, any further
6 questions?

7 MR. YOUNG: I have just a couple, based upon
8 some things raised by Mr. Dwire. Your Honor, these
9 are in your book under Section 2 of our exhibits.

10 **REDIRECT EXAMINATION**

11 **BY MR. YOUNG:**

12 Q. Mr. Miller, I hand you what has been marked as
13 Plaintiff's Exhibit 2-4. And I'll ask you to identify
14 what that is.

15 A. This is an aerial view of Treatco's northeast
16 property, which includes about the top third of the
17 photograph is the two tracks with cars on 'em, 25th
18 Street, there is a tree line in the middle. The best
19 of my knowledge is property line, and to the east of
20 that, the white line through there is the private road
21 that the stockyards -- since there are no stockyards
22 there, would be the businesses on the south and
23 Pearson uses.

24 Q. And is that the -- the private road that you testified
25 about that came out of that intersection there near

- 1 the Pearson Excavating operation?
- 2 A. Yes, it is.
- 3 Q. Okay. And it was your testimony that -- that a better
4 solution for an access road would be to join up with
5 the -- that private road on the right, is that
6 correct?
- 7 A. That's correct.
- 8 Q. Okay. And that would of necessity require Treatco or
9 FYG to build a road over to that private road, is that
10 correct, in order to get access?
- 11 A. That's correct, or negotiate with the City. I don't
12 know how they --
- 13 Q. Okay. And -- and in your dealing with the City, are
14 you stating that you're aware that the City has
15 considered that particular solution to the problem?
- 16 A. The City was there when the recommendation was made,
17 so I assume --
- 18 Q. Right.
- 19 A. -- they have discussed it.
- 20 Q. All right. Now, I hand you what has been marked as
21 Plaintiff's Exhibit 2-2, which is a higher aerial view
22 of the entire area. Would that be a fair --
- 23 A. That's correct.
- 24 Q. -- explanation? Does that particular exhibit show
25 where that private road that we've been talking about,

1 where it -- it ends up to the south, if you can tell?

2 A. Yes, 21st Street.

3 Q. It goes all the way to 21st Street, is that correct?

4 A. Let me get my bearings here. There is the stockyards,
5 Cudahy. It appears to me to go to 21st Street.

6 Q. All right.

7 A. But I -- I'm not -- it's hard to tell where the
8 streets are with the elevation.

9 Q. So one coming out of Treatco could access to the
10 north, heading into that intersection on the north
11 there at 25th Street and 26th Street, is that correct?

12 A. That's correct.

13 Q. And that heads into Meade and on out to -- to the
14 highway system?

15 A. 29th, yes.

16 MR. YOUNG: We offer Plaintiff's 2-2 and
17 2-4.

18 THE COURT: Any objection?

19 MR. DWIRE: Same objection, Your Honor, as
20 to relevancy and incorporate our previous objection.

21 THE COURT: Well, I'll allow 'em, give 'em
22 whatever weight that the Court deems appropriate. It
23 at least would be helpful to the Court to get an
24 overview of the area, but as the witness held it and
25 was explaining it, I couldn't see what he was talking

1 about, so I still don't have any idea what he was
2 talking about. In any event, I'll go ahead and allow
3 them.

4 MR. YOUNG: Well, does the Court --

5 THE COURT: What we'll do is we'll retire to
6 chambers at some point, and you can explain it to me
7 with Mr. Dwire present.

8 MR. YOUNG: Right.

9 THE COURT: Because frankly, I -- I didn't
10 understand what he was saying.

11 MR. YOUNG: Okay.

12 THE WITNESS: Sorry.

13 THE COURT: Not your fault, sir. Go ahead.
14 Anymore questions?

15 MR. YOUNG: I have nothing further of this
16 witness.

17 THE COURT: All right.

18 MR. DWIRE: Nothing further, Your Honor.

19 THE COURT: All right. Sir, you may step
20 down. Thank you.

21 MR. YOUNG: That concludes our testimony,
22 Your Honor.

23 THE COURT: All right. We'll go ahead and
24 take a break before we'll proceed with Closing
25 Arguments, and I would like counsel back in chambers,

1 so that we can take a look at those two exhibits. All
2 right. We're in recess.

3 (A recess was taken, after which the
4 following:)

5 THE COURT: Let the record reflect we're
6 back in the courtroom. The record should reflect that
7 the attorneys are -- are present.

8 Parties care to argue? Mr. Young?

9 MR. YOUNG: I'm going to be very brief, Your
10 Honor. May I stand just here? Is that all right?

11 THE COURT: Fine. That's fine.

12 MR. YOUNG: Well, I think we've presented
13 evidence this morning that I think will be helpful, I
14 hope, to the Court in making its decision. The Court
15 of Appeals essentially sent the case back to Your
16 Honor, because frankly, the -- the attorneys in the
17 case, I believe, failed to present to the Court a
18 proposed finding of fact and a -- I guess a conclusion
19 of law as well that 25th Street North was a public --
20 public thoroughfare. It has been the position of the
21 WTA from the beginning after I ran across this 1916
22 ordinance in the back offices of a title company,
23 quite frankly, that the WTA built those two parallel
24 tracks in accordance with the 1916 ordinance, which
25 gave the WTA the -- the authority to construct those

1 tracks, but it has been the position of the WTA from
2 the beginning that that 1916 ordinance really has no
3 force and effect, because the street that was
4 contemplated to be built back in 1916, which we
5 probably -- which probably would have been a brick
6 street, was never constructed. So any of the language
7 in -- in the 1916 ordinance that's -- that directed
8 what the WTA was required to do after the street was
9 constructed really has no force and effect in -- in
10 2007.

11 All of that language about laying your tracks down
12 in the street, in presumably a brick street, so that
13 teams of horses and mules could cross over the -- over
14 the street and so on really never happened. And what
15 did happen was the WTA went ahead and created a right
16 of way for their two -- two tracks, and a street
17 evolved pretty much by flopsy, and -- and Mr. Pruitt
18 testified this morning, indicated that -- that they
19 just grade -- they grade the street up, he said, about
20 12 times a year right up to near the -- the railroad,
21 outside the railroad cars and so on that are on the
22 track, so we don't think Section 2 has any force and
23 effect.

24 But the -- the City has laid out and surveyed now
25 after this lawsuit was commenced what they consider to

1 be 25th Street North, and Mr. Pruitt indicated some
2 places it's 60 feet wide, some places it's 30 feet
3 wide. And I think that speaks to the -- the
4 inappropriateness of giving the 1916 ordinance any
5 credence.

6 Well, so we get down to the Court of Appeals
7 discussed the language in the -- I think this *Sebree*
8 case, that a person claiming a right of access to a
9 public road must be an abutting landowner. Well,
10 Treatco is certainly not an abutting landowner to
11 the -- to what the City has designated as 25th Street.
12 It's an abutting landowner to a right of way of two
13 railroad tracks owned by the WTA, which uses those
14 tracks as an interchange track, a very active area of
15 the -- of the railroad in its operations, and I think
16 the Court in listening to Mr. Miller's testimony
17 realizes what would happen if you put a -- cut a
18 street right through the middle of the interchange
19 tracks.

20 What I'm getting to is the City and Mr. Dwire, on
21 behalf of his clients, are considering other means
22 of -- of allowing Treatco and FYG to have access to
23 public streets in Wichita. I think that whatever the
24 Court does today will have -- have some bearing on --
25 on what the City has on its plate to do. That is,

1 whether they're going to build a street in the middle
2 of this interchange track or whether they're going to
3 find a solution for it.

4 Mr. Miller testified that they asked him, how do
5 we solve this problem, how do we get access out of
6 this Treatco property, and he told 'em that there is a
7 manner -- matter of just going east from the
8 cul-de-sac that's laid out in the declaration page to
9 what could become a city street going down into the
10 stockyards area, which would certainly facilitate the
11 development of that whole area. And -- but we do not
12 believe that -- that I think the Court has to weigh
13 considering the development of a street going directly
14 through the middle of the interchange trackage and
15 leaving it to the City of Wichita to -- to develop
16 the -- the area. And with that, I'll conclude.

17 THE COURT: Thank you, Mr. Young.

18 MR. YOUNG: Thank you.

19 THE COURT: Mr. Dwire?

20 MR. DWIRE: Thank you, Your Honor.

21 Mr. Young, please the Court: As we've all stated,
22 this is a remand for certain issues that the Court of
23 Appeals has asked us to present for the Court to make
24 additional findings on. And the first one is the --
25 as to whether or not 25th Street is a public street.

1 Now, we had Mr. Pruitt here today, and his
2 testimony, as I noted, is that the WTA tracks are on
3 the south side of 25th Street, that the City maintains
4 it, that's a public thoroughfare, and it's a public
5 street. The -- so I think that that pretty well took
6 care of that issue, and I don't think it's really
7 disputed.

8 The -- the question, and the Court of Appeals
9 noted in their decision that the parties acknowledged
10 the ordinance of 5436, and it was still in effect, and
11 that the defendant, FYG Investments, Inc., owned the
12 land abutting the railroad on 25th Street.

13 Now, I'm a little concerned on that *Sebree* case
14 that Mr. Young cited. When you read the case all the
15 way through, it points out that you don't have to
16 actually touch the roadway, that you -- that if you
17 come up to the right of way, that -- that is
18 sufficient to be an abutting and entitled to access.
19 And it was two of the cases, I think, that they cited
20 in that that pointed out how that developed in the
21 Kansas common law.

22 Now, in regards to, of course, the -- we also
23 cited in our memorandum the K.S.A. 8-1473, which
24 defines a public thoroughfare. Also, the testimony
25 has shown that there are two businesses located on

1 that street and how they were numbered, and I've cited
2 the Court and included the ordinance that -- for the
3 City defining street and the numbering process that
4 applies in the City of Wichita, which was applicable
5 in this case.

6 And then we look at ordinance 5436, and just by
7 way of -- just to back up just a minute, Your Honor,
8 when this case first started, neither Mr. Young or I
9 had any knowledge of that 5436. And we were -- I was
10 relying on a Roberts case that said, hey, when the
11 railroad puts in tracks, they can use that property,
12 but at the time they go to be replaced, then the
13 landowner has a right to object, and we had evidence
14 showing that we owned that land, and that when they
15 started taking out the tracks, that would terminate
16 their right of use. It's an old Supreme Court case.

17 Then with all due respect to my elder, Mr. Young,
18 he found the ordinance, which was a complete surprise
19 to both of us.

20 MR. YOUNG: Not that elder now.

21 MR. DWIRE: But -- but, Your Honor, then
22 what the -- the position was is they asked for the
23 enforcement of that ordinance that they had that
24 right. And I think that that ordinance did give them
25 the right to put those tracks on, what have been a

1 part of 25th Street, but it was subject to conditions,
2 terms and stipulations, that they were to build it
3 on -- in such condition that teams and vehicles can
4 safely pass over the track at any point. And, of
5 course, during our tenure and Mr. Miller's tenure, at
6 least we know that that has not been in effect.

7 Now, thus, there was a breach of the conditions
8 and stipulations, and what I think is important, we
9 have to look at that ordinance carefully, and when I
10 look at it carefully, I notice that -- that it
11 continuously uses the term "shall." When it sets out
12 what is -- what the obligations of WTA, its
13 predecessors and successors are obligated to do, it
14 says what they shall do. And I think the term "shall"
15 is used seven or eight times in there, and one of
16 those was saying that it was going -- that it had to
17 pay that -- for the costs and that the City was -- of
18 Wichita was not to have any cost.

19 And so the plaintiffs are asking the Court to --
20 for WTA to continue to have a privilege to use the
21 track, while it breaches the conditions, terms and
22 stipulations of the ordinance. And -- and we
23 think -- the defendants think that is wrong.

24 Now, the other thing here is -- is that the
25 defendant, FYG Investments, Incorporated, has a common

1 law right of access. 25th Street, we submit, is a
2 public roadway, that FYG Investments is the abutting
3 landowner, and -- and K.S.A. 68-501 and the cases
4 cited in the memorandum and the City ordinances and
5 the testimony of Pat Pruitt, I think it's clear that
6 we meet that common law requirement.

7 Now, the right of access under -- the common law
8 right of access is not only in case of necessity.
9 It's an incident of ownership, and that is pointed out
10 again in the *Sebree* case, the Board of Shawnee County
11 Commissioners.

12 Now, like to respond a little bit to the
13 plaintiff's memorandum. Let me say that I was
14 unaware, and the engineers may have been aware of
15 Mr. Miller's communication with the City that would
16 call for a street intersecting 25th on east of the
17 defendant's property. Understand, though, and I'm
18 sure the law is clear that the railroad has a right of
19 condemnation, City of Wichita has a right of
20 condemnation. FYG Investments, Incorporated, does not
21 have a right of condemnation. And we have no way of
22 obtaining access to a property east of the FYG
23 property. This issue was not raised also in the
24 Pretrial Order. And when they talk about going down
25 to the single trackage, I think it's clear that that

1 is not FYG property. That is clearly down to Mr.
2 Stephens' property and Pearson Excavating where that
3 access is, and that's probably a hundred or more feet
4 east of the FYG property.

5 Now, Mr. Young comments that 25th Street, as
6 contemplated by the ordinance, was never constructed.
7 I could find nothing about that in the Pretrial Order.
8 I find nothing in the ordinance about it's going to be
9 constructed out of brick. Back at that time, the
10 streets oftentimes were dirt, gravel-type streets.
11 Only the main streets, as I understand, back in those
12 times were what we call paved streets. And for the
13 City in 1916 to pass an ordinance, they had to have
14 title, right, possession, control of 25th Street.
15 This isn't something that was in the future. They
16 would have no right to pass an ordinance giving the
17 railroad the right to put a track on private property
18 that wasn't a -- an existing street.

19 And going back in the early history, back in 1895,
20 we know that there was -- had been a -- previously a
21 plat. This was abandoned, but the -- the history --
22 and I didn't get this till last night, but when I was
23 studying down at the public library, the history of
24 Cudahy, the development of the packing plants and
25 everything, this is the reason that it was abandoned,

1 because they weren't going to have lots down there.
2 This was a commercial property. We were building --
3 trying to build airplanes down there and the refinery
4 and the packing plants and the stockyards. And so the
5 25th Street continued to be used, and it would have
6 been used after 1916. That would have exceeded the
7 statute of limitations, or the -- to the 15-year
8 statute for the City to own that property, even if
9 it's been abandoned, given back to the property owners
10 at that time, but the City in doing that, the Board of
11 County -- of Wichita Commissioners at that time had to
12 have control and ownership of that street at the time
13 they give the City the right to do that. But here
14 again, I submit that that's not a part of the Pretrial
15 Order.

16 The -- also, now, he didn't cover this that much
17 in his statement, but in his memorandum he talks about
18 having access on the 23rd Street. There again, you go
19 across three tracks to get to the Treatco plant, and,
20 of course, it's FYG property. And -- but there again,
21 to get -- there is no way to cross the drainage
22 district, the North Wichita Drainage District, also
23 known as Chisholm Creek. I believe on page 8 of
24 Paragraph 4 of the Pretrial Order, it says that the
25 northeast portion of the southwest quarter of

1 Section 4 is bounded on the east by unplatted ground,
2 which was formerly known as the stockyards, which has
3 no exit to FYG Investment, Inc.'s property; on the
4 south by Chisholm Creek, also known as Wichita West
5 Drainage Ditch, also known as North Wichita Drainage
6 Ditch, pursuant to K.S.A. Chapter 24; on the west by
7 duly purchased and recorded railroad -- railroad
8 easements, and on the north by the 25th Street
9 trackage, with no access to a public street. And that
10 was not refuted in the Pretrial Order.

11 So we -- it's the FYG, Incorporated -- or
12 Investments, Incorporated, has the right of common law
13 access, because it includes two elements, one, the
14 claimant owns the abutting -- the land abutting the
15 street, and the street is a public right of way. And
16 that's designated in the *Sebree vs. Board of County*
17 *Commissioners*, 251 Kansas at 776, I think it's 779.
18 Right of access to and from the existing street is one
19 of the incidents of ownership of the land abutting
20 thereon. And I think that that clearly gives the FYG
21 Investments property a right of access, both under
22 common law and under the ordinance.

23 Now, recognizing that and realizing the "shall"
24 and the City of Wichita provisions in 5436, we have to
25 look at resolution today. And in this process, that

1 crossing is by right of the ordinance and the common
2 law right of access. And we have worked with the City
3 to proceed, in other words, what guidelines, what do
4 we need to do. And that is -- in doing that, we have
5 had the access dedication to the public, which was our
6 Exhibit M-1, our dedication to the public for right of
7 way purposes, which was Exhibit M-2, and M-3 was an
8 access control dedication to the public, which I would
9 agree in reading and trying to understand or almost --
10 I'd call French or something else, those were accepted
11 by the City on September 14th of '06. But we've
12 included an Exhibit M-5, which is the picture that
13 shows what those dedications accomplish.

14 And, Your Honor -- with that, Your Honor, I would
15 like to incorporate as a part of my record in this
16 matter the memorandum notebook that I've submitted to
17 the Court for the remand hearing. I think the Court
18 may have two copies of that, because I submitted
19 that -- at least I submitted that to Mr. Young in
20 November of last year, or maybe it was in 2005, yeah,
21 and then I supplemented a little bit, and so I should
22 probably call this a Second or Amended Memorandum, and
23 I didn't catch that till the time and realized.

24 Then I've also submitted to the Court today
25 proposed findings of fact and conclusions of law for

1 journal entry on remand hearing, which I'd like for
2 the Court to consider in making its decisions in this
3 matter.

4 Thank you, Your Honor. I appreciate the time, the
5 patience that the Court has granted us.

6 THE COURT: Thank you. Well, the Court has
7 to keep its on the ball in these matters. The
8 attorneys have done a good job of presenting their
9 side of the issues before the Court. And frankly,
10 there are only two issues before the Court. And those
11 issues are set out in the Court of Appeals decision
12 for remand.

13 And the Court -- the Court of Appeals was very
14 explicit -- and I'm quoting, on remand if the Court
15 finds that 25th Street is public, then it will have to
16 determine if an injunction to provide ingress and
17 egress is appropriate.

18 So there is an issue of whether 25th Street is a
19 public street, and if so, is an injunction appropriate
20 for ingress and egress.

21 Well, based on the evidence presented and the
22 exhibits that were alluded to in Closing Argument, the
23 Court does find that 25th Street is a public street.
24 I don't think there is much issue about that, at least
25 I didn't hear any evidence to the contrary. And I so

1 find that 25th Street is a public street.

2 So that leaves the question of whether ingress and
3 egress is appropriate.

4 Now, the evidence before the Court is that we do
5 have in existence still today ordinance number 5436,
6 Wichita City Ordinance No. 5436. Now, granted, that
7 ordinance was put in place, passed by the city fathers
8 back on September 12th, 1916. Still in the books.

9 WTA, pursuant to that ordinance, was granted
10 permission to construct, operate, maintain industrial
11 tracks on and across 25th Street. Now, that was done
12 on a condition, and that condition is spelled out in
13 the ordinance.

14 In applying the rules of statutory construction,
15 why, words are to be given their plain meaning, and
16 the ordinance in Section 2 states, the said
17 association -- and I'm quoting: The said association
18 shall construct and maintain in good order the portion
19 of sidewalks crossed and railway crossings and shall
20 keep said track in good repair and in such condition
21 that teams and vehicles on such street can safely pass
22 over such tracks at any point on said street.

23 So the city fathers didn't grant this right out of
24 the kindness of their heart. They granted it on a big
25 condition, frankly. Based on the language of the

1 ordinance, the Court finds that WTA has an obligation
2 to provide FYG ingress and egress over the tracks
3 based on Section 2 of Wichita City Ordinance 5436.

4 Now, frankly, those are the only two issues that
5 are before the Court this morning. Those are the two
6 issues that the Court of Appeals remanded the matter
7 for.

8 Now, having said that, that leaves the issue of
9 how this Court's order is carried out to a future --
10 future debate. There's been much talk here by way of
11 evidence about, oh, the best way to go about
12 implementing such an order, alternatives. Mr. Miller
13 testified to that, and I appreciate that testimony.

14 But as far as the ingress and egress, that's going
15 to have to be worked out between the parties. And the
16 Court trusts that the parties can put forth a good
17 faith effort and come up with the best economic
18 alternative with -- with the least impact upon
19 interstate commerce.

20 Now, it's unfortunate that Mr. Johnny Stephens and
21 March Oil are not a party to this action. The Court
22 cannot make any orders regarding property that belongs
23 to a nonparty. Whether they should be made a party,
24 that's for the attorneys to determine. But at least
25 frank discussions should take place among all parties

1 that this impacts.

2 The attorneys have gone out of their way to talk
3 to the City of Wichita and do what's necessary with
4 the City, which is -- which is a good thing, but I
5 think you're going to have to sit down and talk some
6 more. I don't think I can give you an absolute
7 solution at this point. All I can do is address the
8 issues that I'm under a duty to do so under the Court
9 of Appeals decision. I think I've done that.

10 Now, how you go about implementing this? I think
11 that still is up in the air.

12 Now, do the parties have any questions?

13 MR. DWIRE: May it please the Court: I'd
14 also ask the Court to make a finding that FYG
15 Investments, Incorporated, has the common law right of
16 access. I believe the Court in its ruling relied --
17 looked at the ordinance, but I think that -- that
18 there was two issues in the -- in the remand, both of
19 those, and I would ask, because there is a little bit
20 of difference in the criteria that the Court also make
21 a finding that since the 25th Street is a public right
22 of way and FYG Investments owns the abutting property,
23 that we also have a common law right of access to 25th
24 Street.

25 THE COURT: Well, I think based on the

1 evidence presented -- and I'm glad you brought that
2 up. I'd be remiss in my duty if I didn't address
3 that. I think based on the evidence presented, all
4 the elements are there for the Court to make a finding
5 that based on a common law, that your client does have
6 a right to ingress and egress. I heard no evidence to
7 the contrary. So I'll make that finding.

8 MR. DWIRE: Thank you, Your Honor.

9 THE COURT: Mr. Young, do you have anything
10 further?

11 MR. YOUNG: I have nothing further. I'm
12 just wondering, I've offered -- I've offered the two
13 aerial exhibits, and I -- I don't -- I don't know that
14 anything else in my booklet that I've provided to the
15 Court isn't already in the record, Your Honor. So
16 with that, I have nothing further.

17 THE COURT: All right. Well, as far as the
18 exhibits are concerned, I mean, the hearing is
19 concluded. And the Court is going to return exhibits
20 to respective counsel. That's the way -- that's the
21 way we do it. All right.

22 MR. YOUNG: Thank you, Your Honor.

23 THE COURT: Nothing further, why, we're
24 adjourned.

25 (Off-the-record discussion.)

1 THE COURT: We're back on the record.

2 MR. DWIRE: I want -- I want to be clear,
3 and maybe we need to resubmit it or something to the
4 Court, but I think that the -- if I recall the remand
5 hearing, it was talking about whether an injunction
6 would issue or some type of an order for them to do
7 it. The Court has said we have the right of access,
8 but it says, then the Court will have to determine if
9 an injunction to provide ingress and egress is
10 appropriate. And the -- in my proposed findings of
11 fact and conclusions of law, I had suggested that the
12 Court retain -- you know, give us a year to get that
13 done or a period of time, and that the Court -- so
14 that the Court can enforce what it's saying and get
15 things done.

16 We've been a long period of time in this -- in
17 this process. And I just raise that issue, and I
18 wanted the Court to be clear, because that's what they
19 had said in their opinion.

20 THE COURT: Evidently, I didn't make myself
21 clear. I'm granting the injunction. I guess I didn't
22 say that. But I am granting the injunction. And is
23 there any question about that, I mean --

24 MR. DWIRE: I -- we didn't have it clear in
25 the record, Your Honor. I think the Court's done that

1 now. I appreciate it. Thank you.

2 THE COURT: All right. Well, nothing
3 further, why, we're adjourned.

4 MR. JONES: Thank you, Your Honor.

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F A C S I M I L E C O V E R S H E E T

DATE: September 25, 2009

TO: Name: Jeffrey R. King
Company: LATHROP & GAGE LLP
Fax No.: 913-451-0875
Pages:

FROM: Wyatt A. Hoch

Matter Description: WTA v FYG
Court of Appeals No. 09-103015-A

REMARKS: Please see attached:
Defendants' Opposition to Railroads' Motion to Stay Pending Appeal

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EIGHTEENTH JUDICIAL DISTRICT
CIVIL DEPARTMENT FILED
MOTION MINUTES ORDER

APP DOCKET NO.

PLAINTIFF: Wichita Terminal Association
VS.

SMS

2007 SEP 19 P 2:45

DEFENDANT: F Y G Investments Inc, etal.

CLERK OF THE DISTRICT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KANSAS

DATE: 9/19/2007 TIME: 02:30 pm JUDGE: Karl W Friedel, Div. 1 CASE: 2002-CV-003688-OT

MOTION: Civil Special Set Motion

REASON: Status Conference

ATTORNEYS:

FOR PLAINTIFF: Glenn D Young Jr ✓

FOR DEFENDANT: Edgar Wm Dwire, Edgar Wm Dwire, Edgar Wm Dwire, } BY TELEPHONE.

DISPOSITION IN ALL CASES

COUNSEL DIRECTED TO CONFER FORTHWITH & ATTEMPT TO AGREE UPON THE JOURNAL ENTRY (OF EVIDENTIARY HEARING BEFORE JUDGE BRIBIESCA SINCE REMAND FROM COURT OF APPEALS). IF NOT IN AGREEMENT UPON J.E., COUNSEL SHALL THEN REQUEST HEARING FOR J. BRIBIESCA TO SETTLE J.E. IF J. BRIBIESCA (A JUDGE IN THE CRIMINAL DEPARTMENT) IS NOT AVAILABLE FOR HEARING TO SETTLE J.E., COUNSEL SHALL FILE FORMAL MOTION & THE SAME SHALL BE ASSIGNED BY J. FRIEDEL, IN WHICH EVENT COUNSEL SHALL COMPILE RECORD IN CASE, INCLUDING TRANSCRIPT OF POST-APPEAL ORDER HEARING.

DATE: 9-19-07

IT IS ORDERED:

- THAT _____ PREPARE A JOURNAL ENTRY/ORDER REFLECTING THE COURT'S ACTION
- THAT THIS DOCUMENT SHALL SERVE AS THE COURT'S ORDER WITHOUT FURTHER JOURNAL ENTRY/ORDERS

RECORD TAKEN BY _____

Karl W. Friedel
JUDGE, DIVISION 1

APPROVED: ATTORNEY-PLAINTIFF _____

- pc.: J. BRIBIESCA -
- Mr. Young ✓
- Mr. Dwire ✓

APPROVED: ATTORNEY-DEFENDANT _____

9.19.07

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

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WICHITA TERMINAL ASSOCIATION,)
BURLINGTON NORTHERN & SANTA)
FE RAILWAY COMPANY and UNION)
PACIFIC RAILROAD COMPANY,)
Plaintiffs,)
VS.)
FYG INVESTMENTS, INC., and,)
TREATCO, INC.,)
Defendants.)

Case No. 02 CV 3688

TRANSCRIPT OF DEFENDANTS' MOTION FOR ORDER TO APPEAR
AND SHOW CAUSE

PROCEEDINGS had before the Honorable Terry
Pullman, Judge of Division 16 of the District
Court of Sedgwick County, Kansas, at Wichita,
Kansas, on the 10th day of April, 2009.

APPEARANCES:

The Plaintiffs, appeared by and through
Mr. K. Paul Day, Attorney at Law, 2345 Grand
Boulevard, Kansas City, Missouri 64108.

The Defendants, appeared by and through
Mr. Charles Curran, Attorney at Law, 2001 Bryan
Street, Suite 1800, Dallas, Texas 75201.

1 THE COURT: The Wichita Terminal
2 Association vs. FYG Investments, Inc., case
3 number 2002 CV 3688. Will counsel announce
4 appearances, please.

5 MR. DAY: Paul Day on behalf of the
6 railroads, Judge.

7 MR. CURRAN: Charles Curran of
8 Foulston Siefken on behalf of FYG Investments
9 and Treatco, Inc.

10 THE COURT: This is the defendant's
11 motion for order to appear and show cause in
12 this matter as to why -- I'm assuming all the
13 plaintiffs -- let me double check, Wichita
14 Terminal Association, Burlington Northern, Union
15 Pacific. Not asking this against Santa Fe. Oh
16 yeah, you have.

17 MR. DAY: Same company now, Judge.

18 THE COURT: And the defendants asking
19 why they should not be ordered to appear and
20 show good cause as to why they should not be
21 held in contempt here in court for failing to
22 comply with Judge Bribiesca's August 1st, 2008,
23 journal entry on remand and permanent
24 injunction.

25 Counsel, obviously I'm not Judge Bribiesca.

1 I'm assuming Judge Bribiesca is not hearing this
2 because he's assigned to criminal currently.
3 Educate me, please. I know nothing about it.

4 MR. DAY: Your Honor, do you want me
5 to go first?

6 THE COURT: Gives you warm fuzzies,
7 doesn't it.

8 MR. CURRAN: If you don't mind, I
9 will go first.

10 MR. DAY: Sure.

11 MR. CURRAN: Your Honor, as you said,
12 you have before you the defendants' motion for
13 order to appear and show cause why the
14 plaintiffs Wichita Terminal Association,
15 Burlington Northern and Santa Fe Railroad
16 Company, who they're known as BNSF Railway, and
17 Union Pacific Railway Company, should not be
18 held in contempt of court for failing to comply
19 with Judge Bribiesca's August 1st, 2008, journal
20 entry on remand and permanent injunction.

21 As we've set forth in the affidavit and
22 also the motion, Your Honor, there's a bit of
23 procedural background, a little history of this.
24 If you don't mind, I would like to summarize
25 that for the Court as its set forth in the

1 motion and the affidavit.

2 The beginning of that, FYG Investments,
3 Inc., is the owner of the property. And the
4 plaintiffs made claim to some kind of easement
5 or right of way in that property. And there was
6 a dispute between the parties as to FYG
7 Investments and/or Treatco's right of ingress
8 and egress and also the nature of the easement
9 and the right of way to be possessed by the
10 plaintiff. Plaintiff Wichita Terminal
11 Association filed a lawsuit seeking an
12 injunction. And the other two plaintiffs were
13 joined in that lawsuit by an amended petition.

14 FYG Investment and Treatco certified a
15 counter claim in that lawsuit based on its right
16 of ingress and egress to its property, and the
17 parties moved to summary judgment. As it is
18 further set forth in the affidavit in the
19 motion, that the court granted the motion for
20 summary judgment of the plaintiffs. But the
21 court of appeals reversed, and on remand is when
22 the journal entry of remand and permanent
23 injunction was entered, and that is the order
24 the injunction that we've had.

25 BY THE COURT: That would be

1 Judge Bribiesca's August 1st journal entry?

2 MR. CURRAN: Yes, Your Honor. And
3 among other things there, of course, are
4 findings and conclusions in that order, and that
5 is attached as Exhibit A-2 to the affidavit.
6 Affidavit of...Margie Thomas. And the permanent
7 injunction in the journal entry essentially
8 requires plaintiffs, among other things, to do
9 two things. It requires them to keep a
10 temporary crossing open for the usage benefit of
11 FYG Investments, and that temporary crossing is
12 apparently a 32-foot timber crossing.

13 And the second thing it does, and this is
14 on page four of the journal entry that's exhibit
15 A-2, the court ordered plaintiffs to construct
16 and install within ninety days after defendants'
17 presentation to plaintiffs of sealed engineering
18 drawings for the construction of Emporia Court
19 Street. It required them to construct a
20 permanent railroad crossing at least 32 feet in
21 width, and permanent railroad crossing
22 protection in compliance with Federal Railroad
23 Administration requirements. And it is these
24 two things that we're contending were violated
25 by all three plaintiffs in this case.

1 And again it is set forth in the affidavit,
2 on December 18th, 2008, counsel for defendants
3 forwarded to counsel for plaintiffs a sealed set
4 of engineering drawings for construction of
5 Emporia Court Street which triggered the
6 plaintiffs' obligation under the court's order
7 to finish by March 22nd, 2009, that permanent
8 railroad crossing and permanent railroad
9 protection. Protection found on page four of
10 the permanent injunction. Permanent railroad
11 protection.

12 This was mailed. In correspondence between
13 the parties and letters, the plaintiffs did say
14 that they received the sealed engineering
15 drawings, but as of April 1st, 2009, no
16 construction has ever begun on the permanent
17 crossing. And also as set forth in the
18 affidavit, the plaintiffs are not consistently
19 keeping the temporary crossing open, again, we
20 would contend, in violation of the -- of the
21 permanent injunction that led to the motion for
22 order to appear and a show cause being filed on
23 April 2nd, 2009.

24 Now, before the Court today of course is
25 not whether the plaintiff should have to show

1 cause at this point. The issue today is whether
2 the Court should order an issue for the
3 plaintiffs to appear and show cause at a hearing
4 at a later date. And based on plaintiff
5 counsel's argument, essentially whether all
6 plaintiffs should be required to appear and show
7 cause or just a single plaintiff.

8 As Your Honor is aware, this is a matter
9 controlled by K.S.A. 20-1204a. It is the
10 statute that controls indirect contempt. And I
11 have a copy for Your Honor and plaintiffs'
12 counsel. Of that statute.

13 May I approach the bench, Your Honor?

14 THE COURT: Sure. Thank you.

15 MR. CURRAN: And that statute, Your
16 Honor, requires -- sets forth the procedures for
17 this process. And what it says is that the
18 court may order a person alleged to be guilty of
19 indirect contempt of an order of the court to
20 appear and show cause why such person should not
21 be held in contempt. And then there are two
22 requirements: A motion requesting an order to
23 appear and show cause is filed and that motion
24 is accompanied by an affidavit specifically
25 setting forth the facts constituting the alleged

1 violation.

2 Before you, Your Honor, you have our motion
3 to appear and show cause. It also includes an
4 affidavit which sets forth the facts and
5 circumstances constituting the alleged
6 violation. We think based on the motion and the
7 affidavit that we've met the requirements of the
8 statute and the Court should issue an order for
9 all three plaintiffs to appear and show cause.

10 The -- these matters are usually routine.
11 The courts review the affidavit and generally
12 sign off on the order to appear. We set the
13 matter for hearing based on the fact that we've
14 got plaintiffs represented by counsel and also
15 the entry of appearance of Mr. Day on behalf of
16 plaintiffs on March 10th. So we wanted to make
17 sure we complied with the statute as best we
18 could. The statute itself doesn't actually
19 require this -- this hearing for the court to
20 issue the order.

21 This second issue is whether all plaintiffs
22 in the case should be required to appear and
23 show cause. The text of the -- the August 1st,
24 2008, journal entry is clear, it requires
25 plaintiffs to keep the temporary crossing open.

1 It does not specify which, Wichita Terminal
2 Association, BNSF, Union Pacific. It requires
3 all three to do that.

4 The journal entry also requires that
5 plaintiffs construct the permanent crossing and
6 crossing protection. Again, it doesn't specify
7 a particular plaintiff to do that. And whether
8 or not the plaintiffs between and among
9 themselves have decided who is or who is not
10 going to do that, it is kind of irrelevant for
11 this situation since we have the order requiring
12 all plaintiffs to do that. It is the obligation
13 of all three plaintiffs to do that.

14 And I would also point the Court to Exhibit
15 A-6 to the affidavit, and there are some photos
16 that were attached to an e-mail sent to
17 Mr. Glenn Young who, I believe, is still
18 representing the plaintiffs in this case. And
19 that the photographs show BNSF Railway cars
20 blocking the temporary crossing that we're
21 discussing in this matter. On that alone, BNSF
22 and UP should be required to appear and show
23 cause for at least the violation. But we also
24 believe that order requires the plaintiff to
25 construct, and they have not constructed or

1 begun construction on that temporary -- I mean,
2 that permanent crossing and permanent crossing
3 protection at this point.

4 For all those reasons, Your Honor, we
5 believe that the Court should issue an order
6 requiring all three plaintiffs to appear and
7 show cause at a later date to show why they
8 should not be held in contempt for failing to
9 comply with the journal entry. And I do have a
10 proposed order for the Court's consideration.
11 For the Court and --

12 MR. DAY: Is that the one you sent me
13 yesterday?

14 MR. CURRAN: It is a little bit
15 modified.

16 THE COURT: It is the one you have
17 three million dollars attorney's fees for
18 today's appearance have been added in that
19 really small print footnote. Would that cover
20 you for today?

21 MR. DAY: Three million dollars?

22 MR. CURRAN: Oh, sure. Sure.

23 THE COURT: Okay.

24 MR. CURRAN: Again, I request that the
25 Court issue an order requiring all plaintiffs to

1 appear and show cause.

2 THE COURT: All right.

3 MR. CURRAN: Thank you, Your Honor.

4 THE COURT: Thank you. Mr. Day.

5 MR. DAY: Judge, I'm going to be as
6 brief as possible here. The procedural history
7 that was set forth by Mr. Curran is essentially
8 correct. This case has a long and sordid
9 history. It's been to the court of appeals
10 once. And it was remanded back to
11 Judge Bribiesca. And I think the issue here is
12 the interpretation of Judge Bribiesca's August
13 order.

14 The way that I interpret that order is that
15 the parties here were supposed to consult,
16 determine a location for the crossing at issue
17 which has the least impact on interstate
18 commerce. Then the defendants were supposed to
19 provide engineering diagrams for the street with
20 the crossing located where they were proposing
21 it to be constructed, and then ninety days after
22 the submission of those engineering diagrams,
23 the crossing would be constructed.

24 What this is, Judge, it is an interchanging
25 track that connects the Burlington Northern

1 Santa Fe's main line with all of the customers
2 that take rail shipments. Basically downtown
3 Wichita, all the grain elevators, lumberyards,
4 scrap metal dealers, et cetera. It is a very,
5 very important interchange. In fact it's the
6 only interchange in Wichita for BNSF to access
7 those customers. This means that the defendants
8 have submitted to place an at grade railroad
9 crossing in the very center of that interchange.
10 It is going to result in basically the
11 interchange being unusable for this reason.

12 And Mr. Curran talked about blockage of
13 crossings. But the -- under local ordinance in
14 Wichita, I believe there is a five minute
15 limitation for blocking a crossing, and under
16 Kansas state law, it is ten minutes. So if the
17 crossing is constructed in the center of the
18 interchange, that means any time a train is
19 stored there for longer than five minutes, it
20 will have to be split. The train will have to
21 be separated, and under Kansas law, that there
22 is 250 feet from the end of each end of the
23 train to the crossing.

24 What that means from a practical stand
25 point is that the two ends of the trains, one

1 end will have to be pushed back into the BNSF
2 main line and the other end will have to be
3 pushed to the other construction which will back
4 additional crossings. In suggesting an at grade
5 railroad crossing, the center of one of the
6 busiest interchanges in Wichita renders it
7 almost unusable. So there's been no agreement
8 upon the parties as to the location of the
9 crossing.

10 Furthermore, the engineering diagrams that
11 were submitted for the railroad's review simply
12 show the location of the crossing. There's
13 nothing on those or in those engineering
14 diagrams which show the details of how the
15 crossing is supposed to be constructed. So the
16 location presents a number of safety problems.
17 For instance, the tracks here essentially run
18 down the center of what's called 25th Street.

19 Under the FRA rights that Mr. Curran
20 referenced in which are referenced in
21 Judge Bribiesca's order, I think what they're
22 supposed to be referencing are what's called the
23 MUTCD requirement for railroad signal. To
24 comply with those, under the location that the
25 defendants are proposing, if the crossing

1 signals or the warning devices are active
2 devices, in other words, lights or gates or
3 similarly a post with a crossbuck, those
4 warnings devices, if we comply with the MUTCD,
5 will be stuck in the center of 25th Street.

6 So the defendants have not provided, in my
7 view, the engineering diagrams that were
8 required by the judge's prior order. So two
9 issues really here. There's been no agreement
10 as to the location of their crossings.

11 Secondly, the defendants did not provide the
12 specifics of the details of how the crossing is
13 supposed to be designed at this very unique
14 location. And then third, the third fundamental
15 issue here is what this crossing is going to do
16 to interstate commerce in downtown Wichita.

17 Now, I think we desperately need a hearing
18 on this. I need to put on evidence, et cetera.
19 However, I don't think that the -- that there is
20 a sufficient showing of possible contempt at
21 this point to justify a granting of the order
22 that has been filed by the defendants. It's
23 because of the previous reasons I discussed.
24 That is, lack of detail in the engineering
25 diagram, and no agreement obviously as to the

1 location of the crossing.

2 So we're -- and its at an impasse
3 obviously. Somehow we're going to have to have
4 court intervention to determine where this
5 crossing goes. But I don't believe that
6 Judge Bribiesca's prior order has been complied
7 with by the defendants.

8 Two very brief issues. And then I will
9 conclude with regard to all three defendants --
10 or plaintiffs -- sorry, plaintiffs in the case.
11 All three railroads showing up at a show cause
12 hearing, I realize that the way that the order
13 was crafted originally, it does refer to the
14 plaintiffs in the plural. But this particular
15 piece of railroad track, the interchange at
16 issue, is solely owned by the Wichita Terminal.
17 It is not owned by BNSF. It is not owned by
18 Union Pacific. Union Pacific and the BNSF
19 switch trains over a section of the track, but
20 they do not own it. So with all due respect to
21 the prior judge, I don't think it was proper for
22 him to order two railroads that don't even own
23 the property to install the crossing.

24 So if the Court is inclined to grant the
25 motion and require an additional hearing on that

1 motion, I would ask that only the Wichita
2 Terminal be ordered to appear. They own the
3 tracks. They will be responsible for installing
4 the crossing if the Court eventually determines
5 that that's where it's supposed to go.

6 THE COURT: Would there be any
7 contribution at all from either of these two
8 railroads in the event that the crossing is
9 constructed?

10 MR. DAY: I can't answer that for
11 sure. But the check -- I'm almost certain that
12 the check that is written to the contractor that
13 installs the crossing comes from the Terminal.

14 Now, I want to be totally up front to the
15 court, Judge. The Terminal railroad is a
16 separate entity, separate company which is owned
17 by the various railroads that operate through
18 Wichita, larger class ones. So there is a
19 relationship. I'm not saying that they're
20 totally unrelated. What I'm saying is the
21 ultimate corporate entity responsible for
22 installing the crossing will be the Wichita
23 Terminal, not the BNSF and not the UP.
24 Logistically it would be very difficult for me
25 to get three corporate reps here for a hearing

1 so it is a practical problem for me as well.

2 And then the last issue it has to do with
3 the photos that Mr. Curran referenced. I think
4 what got lost there is that this is a railroad
5 crossing and it's an active track. It is going
6 to be blocked. Mr. Curran made his argument
7 element within the assumption that there's an
8 obligation on the railroads never to block that
9 crossing. Well, every time a train runs through
10 the interchange, it's going to be blocked. So I
11 think the applicable issue is whether either
12 local Wichita ordinance of five minutes or the
13 broader Kansas statute of ten minutes applies.
14 I mean, there's -- it is a railroad track and
15 there's a crossing. It is going to be blocked.

16 THE COURT: All right. Thank you.

17 The journal entry says what the journal
18 entry says. Judge Bribiesca's August 1st, 2008,
19 journal entry. It provided that a permanent
20 crossing would be constructed. I've already
21 lost track of this. There. We got within
22 ninety days after defendants' presentation of
23 plaintiffs have sealed engineering drawings for
24 the construction of Emporia Court Street. By
25 the affidavit that was done on December 18 of

1 2008, sixty -- I'm sorry, ninety days plus or
2 minus would have run on March 18, 2008.

3 Other than Mr. Day's today, I'm not aware
4 that any prior claim of insufficiency of these
5 drawings have been raised. They're certainly
6 not by legal filings. The order says what it
7 says.

8 I'm going to find based on the initial
9 appearance of things, the initial presentation
10 of things, that the -- let me get the parties
11 right -- the defendants' request has merit. I'm
12 going to order a hearing, going to order that
13 representatives of all three companies appear at
14 the hearing because they may have some interest.
15 Even though Wichita Terminal Association appears
16 to have the majority interest in the new
17 construction, the other two may have some
18 interests. I think it is appropriate to have
19 all three represented at the hearing. Court
20 schedules and difficulties aside, I still think
21 that can be done.

22 I'm also going to note on my minute sheet
23 that parties allege some issues revolve around
24 interpretation of the August 1, 2008, order by
25 Judge Bribiesca, and if possible, the hearing

1 should be set with Judge Bribiesca and you're
2 asking for interpretation and application of
3 some aspects of his order. I think it's
4 appropriate for him to be doing the
5 interpretation.

6 He's in criminal, but with enough notice, I
7 think arrangements can be made to where he can
8 give a few days and address this matter, but I
9 would certainly suggest you address that with
10 Judge Lahey at this time and try and schedule
11 that. And he can bring Judge Bribiesca into the
12 loop and possibly get that worked out. That's
13 my ruling.

14 As far as the proposed journal entry,
15 Mr. Day, do you have any objection to this
16 proposed journal entry, the actual form of it?
17 I haven't reviewed it, but I'm assuming it sets
18 forth basically what I just ordered.

19 (Pause.)

20 MR. DAY: No, Your Honor, I don't have
21 any objection to that proposed order.

22 There is one issue I want to bring up to
23 the Court's attention so that --

24 THE COURT: All right.

25 MR. DAY: -- we're all clear on

1 something. The order references the
2 superintendent of the Wichita Terminal
3 Association. That would be the person that I
4 had intended to solely bring to the hearing. He
5 is actually a BNSF employee. There was a prior
6 superintendent which I believe was employed
7 directly by the terminal who has left within
8 the -- the last six or eight months when all of
9 this was kind of brewing.

10 THE COURT: Can one person fill both
11 shoes?

12 MR. DAY: That is my question, Judge.

13 THE COURT: That is fine with me
14 assuming there is no potential conflict between
15 the two interests. I mean, if there is a
16 potential conflict between the BNSF role that he
17 had versus Wichita Terminal Association role,
18 there might be a problem, but absent such an
19 apparent conflict, I don't have any problem with
20 it.

21 Mr. Curran, can you think of any reason why
22 one person can't fill both positions?

23 MR. CURRAN: I don't know of any at
24 this point, Your Honor.

25 MR. DAY: Okay. And just one more

1 shot at this issue. The UP's involvement in
2 this from the beginning had been very
3 tangential. The amount of traffic that they
4 have in the area there, I don't believe they
5 have a direct linkage to the interchange which
6 is at issue. So I'm personally -- I'm
7 struggling with coming up with the appropriate
8 person from the UP to actually appear at this
9 since it's -- they've been hardly involved at
10 all from the very beginning. And I guess that
11 perhaps is my problem, but I just wanted to
12 impress upon the Court that.

13 THE COURT: This order doesn't specify
14 which officer. Can be its most junior, least
15 experienced officer possible. Maybe the summer
16 intern qualifies as a corporate officer because
17 he can play -- he or she can play third base on
18 their softball team really well. Just whatever
19 capacity of a corporate officer they want to
20 provide will be sufficient, but they do need to
21 be a corporate officer.

22 MR. DAY: Okay.

23 THE COURT: Anything further, counsel?

24 MR. DAY: No.

25 MR. CURRAN: No, Your Honor.

1 THE COURT: Okay. I've gone ahead and
2 signed off on this. Mr. Curran, you need to
3 sign off on it as well, and we will be in recess
4 in this matter.

5
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7 * * * * *

1 STATE OF KANSAS)
2 SEDGWICK COUNTY) ss:

3 C E R T I F I C A T E

4 I, JULIE MACERA, a Certified Shorthand Reporter,
5 under and by virtue of the laws of the State of
6 Kansas, and a regularly appointed, qualified, and
7 acting Official Reporter for the Eighteenth Judicial
8 District of the State of Kansas, do hereby certify
9 that as such Official Reporter, I was present at and
10 reported in Stenotype shorthand the above and
11 foregoing proceedings in Case No. 02 CV 3688, heard
12 on April 10, 2009, before the Honorable Terry
13 Pullman, Judge of Division 16 of said court.

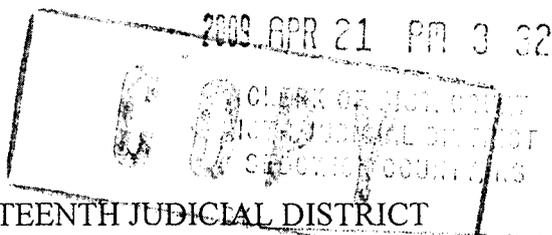
14 I FURTHER CERTIFY that upon the oral request of
15 Mr. Wale Akinmoladun, I personally prepared the
16 foregoing transcript of my shorthand notes via
17 computer-aided transcription, and that said
18 transcript, is true and correct, all to the best of
19 my knowledge and ability.

20 SIGNED, OFFICIALLY SEALED this 29th day of May,
21 2014.

22
23 -----
JULIE MACERA, CSR
24 SUPREME COURT NO. 1439
25

FILED

FOULSTON SIEFKIN LLP
1551 N. Waterfront Parkway, Suite 100
Wichita, KS 67206-4466
316.267.6371



IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

WICHITA TERMINAL ASSOCIATION,)
BURLINGTON NORTHERN & SANTA FE)
RAILWAY COMPANY and UNION PACIFIC)
RAILROAD COMPANY,)
Plaintiffs,)

v.)

Case No. 02 C 3688

F.Y.G. INVESTMENTS, INC., and TREATCO, INC.,)
Defendants.)

**ORDER FOR RAILROADS
TO APPEAR AND SHOW CAUSE**

NOW on this 10th day of April 2009, this matter comes before the Court on Defendants' Motion for Order to Appear and Show Cause. Defendants appear by and through counsel, Charles R. Curran of Foulston Siefkin LLP. Plaintiffs appear by and through counsel, K. Paul Day of Lathrop & Gage LLP. There are no other appearances.

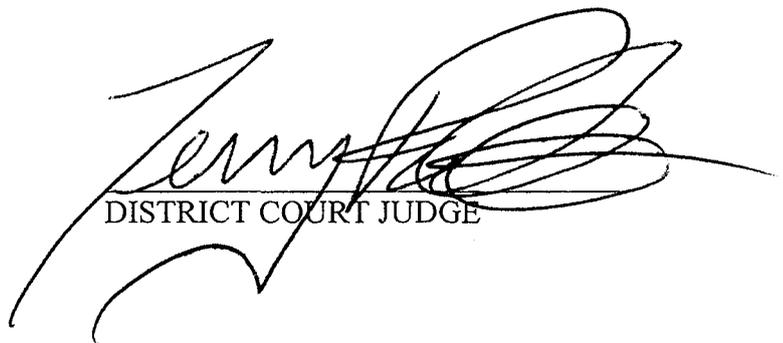
WHEREFORE, after reviewing the court files and being duly advised in the premises, the Court finds that good cause exists to issue an order for the Superintendent of the Wichita Terminal Association and corporate officers of the Burlington Northern & Santa Fe Railway Company, k/n/a BNSF Railway Company, and the Union Pacific Railroad Company to appear and show cause why they should not be held in contempt of court for allegedly failing to comply with Judge Joseph Bribiesca's August 1, 2008 Journal Entry on Remand and Permanent Injunction. The hearing will be held on May 15, 2009, at 9:00 am in the Sedgwick

4.21.09

County Courthouse, Wichita, Kansas. Attached hereto as Exhibit A is the Affidavit of Margie Thomas.

IT IS THEREFORE BY THE COURT ORDERED, ADJUDGED, AND DECREED that the Superintendent of the Wichita Terminal Association and corporate officers of the Burlington Northern & Santa Fe Railway Company, k/n/a BNSF Railway Company, and the Union Pacific Railroad Company shall appear at a hearing on May 15, 2009, at 9:00 am in the Sedgwick County Courthouse, Wichita, Kansas, to show cause why they should not be held in contempt for their alleged violations of Judge Joseph Bribiesca's August 1, 2008 Journal Entry on Remand and Permanent Injunction.

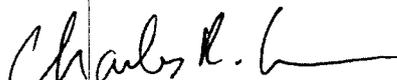
IT IS SO ORDERED.



DISTRICT COURT JUDGE

APPROVED:

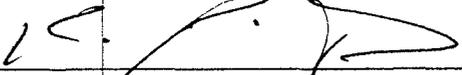
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By: 

K. Paul Day, SC #16964
Patrick N. Fanning, SC #19015

Attorneys for Plaintiffs

I-N-D-E-X

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THE COURT'S RULING: 3

CERTIFIED SHORTHAND REPORTER'S CERTIFICATE: 12

1 THE COURT: We're back on the record
2 in Wichita Terminal Association, et al. vs. FYG
3 Investments, Inc. 02 C 3688.

4 The court would note the appearances
5 are the same.

6 The court has reviewed the evidence,
7 reviewed the briefs, the motions, the
8 documentation filed, as well as the exhibits.

9 The court, over its lunch hour,
10 reviewed the statute at K.S.A. 60-260 as well as
11 the case law reflected by that statute.

12 And counsel of course have been very
13 candid to the court, and the court would concur
14 that it is a justice type of determination as to
15 grant the relief from judgment in this type of
16 case.

17 The court won't dwell much on this,
18 that the plaintiffs presented many arguments
19 that, had I been Judge Bribiesca hearing this
20 case last summer, that this court may have
21 reached a different conclusion. That doesn't
22 mean it's a better conclusion or a worse
23 conclusion, it's just reflective of different
24 judges and different perspectives.

25 That being said, all parties had their

1 day in court, so to speak. That Judge Bribiesca
2 allowed both parties, and all parties involved
3 through counsel, to fully litigate, to fully
4 explore this case. It has already been to the
5 court of appeals once. That it has had
6 obviously numerous opportunities.

7 We're not dealing with pro se
8 litigants that don't understand the legal
9 process. We're not dealing with lawyers fresh
10 out of law school that may have not understood
11 the consequences of the decisions the plaintiffs
12 had a full opportunity to litigate this issue,
13 to point out the impracticality of the crossing
14 that the defendants sought. They had a full
15 opportunity not only to litigate that, but to
16 appeal that to a higher court. They chose not
17 to do so.

18 The court will also find that the
19 plaintiffs aren't a small mom and pop operation
20 without the sophistication to thoroughly review
21 a decision by the court.

22 Mr. Moyer was very articulate in his
23 very appropriate review of the court order, that
24 that was sent to the engineering department.
25 The witness from the Burlington Northern has

1 decades of experience in this area. This was
2 not a naive plaintiff that did not fully
3 appreciate the order that was given. It is a
4 very sophisticated, experienced plaintiff that
5 knew better than most courts, grantedly and
6 admittedly this court, as to the nuances of
7 federal regulations concerning railroad
8 crossings.

9 After getting Judge Bribiesca's order,
10 they chose to do nothing, whether to appeal it
11 or point out to the court the factual
12 impossibility of that order.

13 That being said, when we come to the
14 late spring of 2009, the practical impossibility
15 of placing this crossing at Emporia Street Court
16 without impeding upon 25th Street was and is
17 evident to this court, that this court will not
18 participate nor order something that creates a
19 hazard to the public by impeding into 25th
20 Street regardless of how primitive or
21 underdeveloped it is, no matter how much it
22 still seems to reflect a 1916 Wichita rather
23 than a 2009 Wichita.

24 Balancing those justices and balancing
25 that equity, that the court thinks it would have

1 been clearly within Judge Bribiesca's province
2 to make a decision to use the temporary crossing
3 as the permanent crossing. He chose not to do
4 so. The court respects that decision. That
5 became a final order of the court that was not
6 appealed. I will not overturn the fundamental
7 nature of that order regardless that this court
8 may have reached a different decision.

9 The whole due process of law is built
10 upon a basic foundation that once an order is
11 final we don't get to keep coming back and
12 litigating that. To quote that ancient language
13 from McCullough vs. Maryland, to paraphrase, to
14 attack is to destroy, to relitigate an issue is
15 essentially to never have a decision, which is
16 to never have justice, which is to never have
17 full due process. We cannot and will not
18 continue to relitigate what Judge Bribiesca has
19 already decided.

20 Therefore the court will technically
21 grant the relief from judgment because of Judge
22 Bribiesca's use of the words Federal Railroad
23 Administration Requirements.

24 However, the court will add additional
25 language, as follows:

1 Judge Bribiesca's language, from his
2 original order on the August 1 date, begins:

3 "Whereupon the court orders plaintiff
4 to construct and install, within 90 days after
5 defendants' presentation of to plaintiffs of
6 sealed engineering drawings for the construction
7 of Emporia Court Street, (i) a permanent
8 railroad crossing at least 32 feet in width at
9 the point where the center line of the dedicated
10 Emporia Court Street intersects the railroad
11 tracks, (ii) permanent railroad crossing
12 protection in compliance with by instructing
13 Federal Railroad Administration requirements and
14 inserting all federal, state and local laws
15 regulations and ordinances.

16 This court is adding the following
17 language:

18 Said crossing shall not impede in any
19 manner in the public right-of-way of 25th
20 Street. The plaintiff shall remove the north
21 track of this crossing if that is the only means
22 to construct the crossing without impeding upon
23 25th Street.

24 The plaintiff may replace the north
25 track upon the improvements of 25th Street if

1 such improvements allow said crossing to not
2 impede upon 25th Street.

3 The plaintiffs have 90 days from the
4 entry of the journal entry of this order to have
5 such crossing constructed."

6 The court will order that the
7 defendants prepare the journal entry in regard
8 to the motion for relief from judgment.

9 Concerning the motion in contempt and
10 the show cause and contempt, the court is always
11 hesitant to find an order of contempt unless it
12 is the last and absolute remedy from or for a
13 lack of compliance of the court order.

14 While this court may have wished that
15 the plaintiffs would have been more proactive
16 and more diligent in seeking relief from this
17 order, instead of waiting until the contempt
18 motion was filed, the court also notes that
19 there has been a change of counsel in this case.
20 And due to that change of counsel, as well as
21 the practical impossibility of complying with
22 that, Judge Bribiesca's orders, not only due to
23 the failure to name the controlling regulations
24 or requirements, but because of the impeding
25 upon 25th Street, the court will find the

1 failure to comply with the order for a permanent
2 crossing, that I will deny the motion in
3 contempt due to the difficulties of the language
4 of Judge Bribiesca's order as well as the
5 difficulties in impeding on 25th Street if they
6 were to comply with the manual on Uniform
7 Traffic Control Devices for Streets and
8 Highways, 2003 Edition.

9 Concerning the motion in contempt for
10 blocking the temporary crossing, the court would
11 find Ms. Collins testimony very compelling. And
12 when she indicated there has been no development
13 since August 1 of last year on this property,
14 therefore the court finds that she has not been
15 harmed, even though it is arguable that there
16 may have been blockage of that temporary
17 crossing. The court would find even if there
18 has been blockage of that temporary crossing for
19 more than five minutes, that that has not
20 resulted in any harm that has been proven at
21 this point. Thereby I will deny the motion in
22 contempt in that regard as well.

23 As I indicated to Mr. Day, that since
24 this court has made its orders, and is making
25 its orders, that I fully understand and respect

1 any appeal from this court's order. But if it
2 is not appealed from, and you're back here again
3 on a motion of contempt, I will not hesitate to
4 find the plaintiff in contempt if my orders are
5 not followed, nor will I hesitate to assess
6 attorney fees if we continue to engage in, or
7 begin to engage in probably a better language,
8 of delaying tactics.

9 All right. That is the order of the
10 court regarding the motion in contempt.

11 I would also order the defendant to
12 prepare that journal entry as well.

13 Mr. Hoch, is there --

14 The court will also order all exhibits
15 to be returned to all parties pending any
16 appeals.

17 Is there any other matter I need to
18 address, Mr. Hoch?

19 MR. HOCH: None that I'm aware of
20 Your Honor.

21 THE COURT: Mr. Day.

22 MR. DAY: No, Your Honor.

23 THE COURT: Thank you, Gentlemen.

24 Once again, gentlemen, I just wanted
25 to commend -- and, Mr. Day, you're not from our

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bar, but I will admit you into our family. I am pleased by the professionalism, dedication and courtesy each counsel has shown to each other reflected on the higher tradition of the Wichita Bar with our newest honorary member, Mr. Day.

If nothing further, we'll be in recess.

MR. DAY: I guess, thank you.

MR. HOCH: Appreciate it, Judge.

* * * * *

C-E-R-T-I-F-I-C-A-T-E

1
2 I, BELINDA K. WESTERFIELD, a Certified
3 Shorthand Reporter, under and by virtue of the
4 laws of the State of Kansas, and a regularly
5 appointed, qualified, and acting Official
6 Reporter for the Eighteenth Judicial District of
7 the State of Kansas, County of Sedgwick, do
8 hereby certify that, as such Official Reporter,
9 I was present at and reported in Stenotype
10 shorthand the above and foregoing proceedings in
11 Case No. 02 CV 3688, heard on June 9, 2009,
12 before the Honorable Timothy Henderson, Judge of
13 Division 24 of said court.

14 I FURTHER CERTIFY that upon the
15 written request of the Chief Appellate Defender,
16 I personally prepared the foregoing transcript
17 of my shorthand notes via computer-aided
18 transcription, and that said transcript,
19 consisting of 183 typewritten pages, is true and
20 correct, all to the best of my knowledge and
21 ability.

22 SIGNED, OFFICIALLY SEALED, and FILED
23 WITH THE CLERK OF THE DISTRICT COURT, on the
24 22nd day of June, 2009.

25 _____
BELINDA K. WESTERFIELD, CSR

JDG

FILED MD

2009 JUL 20 AM 11 21

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

CLERK OF DIST. COURT
18TH JUDICIAL DISTRICT
SEDOWICK COUNTY, KS

BY LD

WICHITA TERMINAL ASSOCIATION,)
BURLINGTON NORTHERN & SANTA FE)
RAILWAY COMPANY and UNION PACIFIC)
RAILROAD COMPANY,)

Plaintiffs,)

v.)

F.Y.G. INVESTMENTS, INC., and TREATCO, INC.,)

Defendants.)

Case No. 02 C 3688

Pursuant to K.S.A. Chapter 60

**JOURNAL ENTRY GRANTING THE RAILROADS'
MOTION FOR RELIEF FROM JUDGMENT
and DENYING FYG'S REQUEST
FOR A CONTEMPT CITATION**

This matter came before the Court on June 8, 2009, for hearing on Plaintiffs' Motion for Relief from Judgment or Order Under K.S.A. § 60-260(b) and on the Order for Railroads to Appear and Show Cause why they should not be held in contempt of the Court's August 1, 2008 Journal Entry on Remand and Permanent Injunction. The Wichita Terminal Association, Burlington Northern & Santa Fe Railway Company, and the Union Pacific Railroad Company (together, the "Railroads") appeared by their attorney of record, K. Paul Day of Lathrop & Gage LLP. Defendants F.Y.G. Investments, Inc. and Treatco, Inc. ("F.Y.G.") appeared by their attorney of record, Wyatt A. Hoch of Foulston Siefkin LLP.

After hearing the testimony of witnesses and reviewing the court file, the parties' briefs, and exhibits introduced into evidence on June 8, 2009, the Court made the following findings of

fact and conclusions of law:

1. On August 1, 2008, Judge Joseph Bribiesca issued a Journal Entry on Remand and Permanent Injunction in this case (the "Journal Entry") that ordered the Plaintiffs, in pertinent part, to:

construct and install, within 90 days after Defendants' presentation to Plaintiffs of sealed engineering drawings for the construction of Emporia Court street, (i) a permanent railroad crossing at least 32 feet in width at the point where the centerline of the dedicated Emporia Court street intersects the railroad tracks, and (ii) permanent railroad crossing protection in compliance with Federal Railroad Administration requirements.

2. The Journal Entry further ordered Plaintiffs to keep open a temporary, thirty-two (32) foot timber crossing at the northwest corner of F.Y.G.'s property "for the benefit and use of FYG" to provide ingress and egress from 25th Street to F.Y.G.'s property (the "temporary crossing").

3. F.Y.G. triggered the Railroads' obligation to construct the Emporia Court permanent crossing and the associated crossing protection by presenting to Plaintiffs' counsel, under cover of a letter dated December 18, 2008, a set of sealed engineering drawings approved by the City of Wichita for the construction of Emporia Court street.

4. The Railroads failed to construct a permanent crossing at Emporia Court within 90 days, which expired on March 22, 2009.

5. On April 2, 2009, F.Y.G. filed a Motion for Order to Appear and Show Cause. On April 10, 2009, the Court ordered the Railroads to appear and show good cause why they should not be held in contempt for failing to comply with the Journal Entry's injunction for construction of the permanent crossing and for failing to keep the temporary crossing open for F.Y.G.'s

benefit and use. The hearing on the Order to Appear and Show Cause was initially set for May 15, 2009.

6. On May 8, 2009, the Railroads filed a Motion for Relief from Judgment or Order under K.S.A. § 60-260(b). The Railroads sought relief on the basis, among others, that the Journal Entry requires the Railroads to install permanent railroad crossing protection in accordance with Federal Railroad Administration requirements, when the controlling requirements (as set out in the Manual on Uniform Traffic Control Devices) are in fact promulgated by the Federal *Highway* Administration; and that installation of a crossing at Emporia Court is impractical because of the required locations for crossing protection devices.

7. The Railroads had a full and fair opportunity to litigate the issue of the impracticability of the Emporia Court crossing location before the August 1, 2008 Journal Entry, and to point out to the Court the factual impossibility of complying with “Federal Railroad Administration” crossing protection requirements as mandated by the Journal Entry. The Court nevertheless concludes the Railroads are entitled to relief from the August 1, 2008 Journal Entry because (i) the Journal Entry erroneously refers to “Federal Railroad Administration” crossing requirements instead of the correct reference to the Manual of Uniform Traffic Control Devices promulgated by the Federal Highway Administration; and (ii) the installation of traffic protection for a crossing over two tracks at Emporia Court is practically impossible at this time without impeding upon the unimproved 25th Street. Although the Railroads did not make either argument to Judge Bribiesca before his ruling as memorialized in the Journal Entry, this Court declines to order the installation of crossing protection that would create a hazard to the public by impeding into 25th Street. The Court rejects all of the Railroads’ remaining arguments for relief from the Journal Entry.

8. Based on the testimony of the Railroads' witnesses, the court finds that the installation of traffic protection for a crossing over one track at Emporia Court is possible at this time without impeding upon the unimproved 25th Street. Future improvements to 25th Street (which, based on the testimony, are included in the City of Wichita's Capital Improvement Plan for 2009, 2010, and 2011) might make it possible to install traffic protection for a two-track crossing at Emporia Court without impeding into 25th Street.

9. It was within Judge Bribiesca's province to make the decision to order the location of the temporary crossing as the location for the permanent crossing (as now urged by the Railroads), but he chose not to do so. His decision, as memorialized in the Journal Entry, became a final order of the Court that was not appealed by the Railroads, and this Court will not overturn his decision to order the construction of a crossing at the dedicated Emporia Court street location.

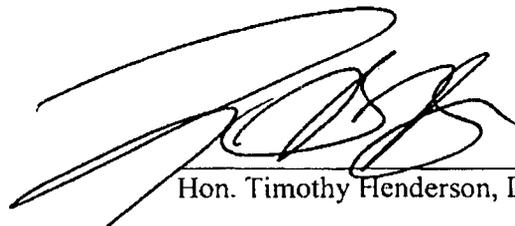
10. The Court finds that the Railroads have shown good cause why they should not be held in contempt of the Journal Entry for failing timely to construct the Emporia Court crossing because (1) the Railroads' have, since August 1, 2008, changed counsel from Mr. Young of Young, Bogle, McCausland, Wells & Blanchard, P.A. to Mr. Day of Lathrop & Gage LLP; (2) the Journal Entry incorrectly referenced the federal agency responsible for promulgating the applicable crossing protection requirements; and (3) construction of crossing protection at Emporia Court in compliance with the Manual on Uniform Traffic Control Devices for Streets and Highways, 2003 Edition (the applicable standards) is currently practically impossible without impeding upon 25th Street. F.Y.G.'s request for this Court to hold the Railroads in civil contempt and to impose sanctions for their failure to construct the Emporia Court crossing is therefore denied.

11. The Court also denies F.Y.G.'s request for a contempt citation and sanctions over the Railroads' failure to keep open the temporary crossing. Ms. Collins, a representative of F.Y.G., testified that there has been no development of F.Y.G.'s property since August 1, 2008. Though the Railroads may have blocked the temporary crossing for more than five minutes on several occasions since August 1, 2008, the Court finds that F.Y.G. failed to demonstrate any harm that resulted from the blockage and therefore declines to hold the Railroads in civil contempt of court.

12. This Court will implement the relief from the Journal Entry ordered above by modifying the last paragraph on page 4 of the Journal Entry to read, in full, as follows:

The court orders Plaintiffs to construct and install (i) a permanent railroad crossing at least 32 feet in width at the point where the centerline of the dedicated Emporia Court Street intersects the railroad tracks, and (ii) permanent railroad crossing protection in compliance with all federal, state, and local laws, regulations, and ordinances. This crossing shall not impede in any manner in the public right-of-way of 25th Street. The Plaintiffs must remove the north track in the area of this crossing if that is the only means to construct the crossing and crossing protection without impeding upon 25th Street. The Plaintiffs may later replace the north track if, after the improvement of 25th Street, those improvements allow the crossing and crossing protection to not impede upon 25th Street. The Plaintiffs must construct the crossing and crossing protection within 90 days after the entry of the Journal Entry Granting Railroads' Motion for Relief from Judgment. All other provisions of the August 1, 2008 Journal Entry on Remand and Permanent Injunction will remain in full force and effect.

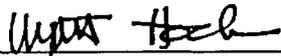
IT IS SO ORDERED.



Hon. Timothy Henderson, Div. 24

Submitted by:

FOULSTON SIEFKIN LLP
1551 N. Waterfront Parkway, Ste. 100
Wichita, Kansas 67206
316.267.6371 phone
316.267.6345 fax

By: 

Wyatt A. Hoch, SC #11747
Charles R. Curran, SC #23303

Attorneys for Defendants

I N T H E C O U R T O F A P P E A L S
O F T H E S T A T E O F K A N S A S

JEFFREY R KING
LATHROP & GAGE LLP
10851 MASTIN BLVD
OVERLAND PARK KS 66210-1669

CASE NO. 09-103015-A

WICHITA TERMINAL ASSOCIATION,
BURLINGTON NORTHERN & SANTA FE
RAILWAY COMPANY AND UNION PACIFIC
RAILROAD COMPANY,
V.
F.Y.G. INVESTMENTS, INC. AND TREATCO, INC.,

APPELLANTS,
APPELLEES.

THE COURT HAS TAKEN THE FOLLOWING ACTION:

DATE: 09/28/2009.

CAROL G. GREEN
CLERK

CASE NO. 103,015

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

WICHITA TERMINAL ASSOCIATION,
BURLINGTON NORTHERN & SANTA FE
RAILWAY COMPANY AND UNION PACIFIC
RAILROAD COMPANY,
Plaintiffs-Appellants,

v.

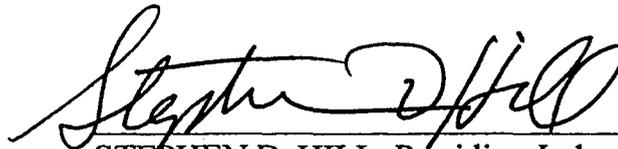
F.Y.G. INVESTMENTS, INC. AND TREATCO, INC.,
Defendants-Appellees.

ORDER

Appellants' motion to stay pending appeal without supersedeas bond is granted in part. Appellees' response is noted. This court grants Appellants' motion for stay pending appeal. However, Appellants' request to proceed without a supersedeas bond is denied. Appellants are ordered to post a \$250,000 supersedeas bond with the Clerk of the District Court on or before October 23, 2009, or the appeal will proceed without a stay.

DATED: September 28, 2009.

FOR THE COURT


STEPHEN D. HILL, Presiding Judge



SUPERSEDEAS BOND

Bond No. 6622957

IN THE Eighteenth Judicial District COURT OF Appeals
COUNTY OF Sedgwick STATE OF Kansas

Wichita Terminal Association,
Burlington Northern & Santa Fe Railway Company and Union Pacific Railroad Company,
Plaintiffs-Appellants,

v.

F.Y.G. Investments, Inc., and Treatco, Inc.,
Defendants - Appellees

CASE NO. 02 C 3688

KNOW ALL MEN BY THESE PRESENTS, That we, Burlington Northern & Santa Fe Railway Company, and
Wichita Terminal Association as Principal, and Safeco Insurance Company of America
a Washington corporation, as Surety are held and firmly bound unto F.Y.G. Investments, Inc., and
Treatco, Inc.
in the amount of Two Hundred Fifty Thousand and No/100-----
Dollars (\$ 250,000.00)

for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally,
firmly by these presents.

WHEREAS, the said Burlington Northern & Santa Fe Railway Company, and Wichita Terminal Association
has petitioned the Court of Appeals for the State of Kansas
for an appeal to said court of an action previously decided in the Eighteenth Judicial District Court, Sedgwick County, Kansas, Civil Department
court, wherein the said F.Y.G. Investments, Inc., and Treatco, Inc.
is Defendant, and being numbered Case No. 02 C 3688 on the docket thereof;

NOW THEREFORE, the condition of this obligation is such that if the said Burlington Northern & Santa Fe Railway
Company, and Wichita Terminal Association shall pay all costs, disbursements
and judgements incurred by reason of the said appeal proceeding, then this obligation shall be null and void and released,
otherwise to remain in full force and effect, provided however, the maximum liability of the surety shall not exceed the penal
sum of Two Hundred Fifty Thousand and No/100-----
Dollars (\$ 250,000.00).

IN WITNESS WHEREOF, Burlington Northern & Santa Fe Railway Company, and Wichita Terminal Association
as Principal and Safeco Insurance Company of America, as Surety, have hereunto set our hands this
19th day of October, 2009.

ATTEST/WITNESS

By: Mary Meis

Burlington Northern & Santa Fe Railway Company
By: [Signature] Principal

Safeco Insurance Company of America

By: Claudia Chavez-Ortiz
Claudia Chavez-Ortiz Attorney-in-Fact





POWER OF ATTORNEY

Safeco Insurance Company of America
General Insurance Company of America
1001 4th Avenue
Suite 1700
Seattle, WA 98154

No. 7386

KNOW ALL BY THESE PRESENTS:

That SAFECO INSURANCE COMPANY OF AMERICA and GENERAL INSURANCE COMPANY OF AMERICA, each a Washington corporation, does each hereby appoint

*****CLAUDIA CHAVEZ-ORTIZ; BRIDGETTE S. JACKSON; PHIL NEIGHORN; PATTY PENNING; Dallas, Texas*****

its true and lawful attorney(s)-in-fact, with full authority to execute on its behalf fidelity and surety bonds or undertakings and other documents of a similar character issued in the course of its business, and to bind the respective company thereby.

IN WITNESS WHEREOF, SAFECO INSURANCE COMPANY OF AMERICA and GENERAL INSURANCE COMPANY OF AMERICA have each executed and attested these presents

this 23rd day of March, 2009

Dexter R. Legg

T. Mikolajewski

Dexter R. Legg, Secretary

Timothy A. Mikolajewski, Vice President

CERTIFICATE

Extract from the By-Laws of SAFECO INSURANCE COMPANY OF AMERICA and of GENERAL INSURANCE COMPANY OF AMERICA:

"Article V, Section 13. - FIDELITY AND SURETY BONDS ... the President, any Vice President, the Secretary, and any Assistant Vice President appointed for that purpose by the officer in charge of surety operations, shall each have authority to appoint individuals as attorneys-in-fact or under other appropriate titles with authority to execute on behalf of the company fidelity and surety bonds and other documents of similar character issued by the company in the course of its business... On any instrument making or evidencing such appointment, the signatures may be affixed by facsimile. On any instrument conferring such authority or on any bond or undertaking of the company, the seal, or a facsimile thereof, may be impressed or affixed or in any other manner reproduced; provided, however, that the seal shall not be necessary to the validity of any such instrument or undertaking."

Extract from a Resolution of the Board of Directors of SAFECO INSURANCE COMPANY OF AMERICA and of GENERAL INSURANCE COMPANY OF AMERICA adopted July 28, 1970.

"On any certificate executed by the Secretary or an assistant secretary of the Company setting out, (i) The provisions of Article V, Section 13 of the By-Laws, and (ii) A copy of the power-of-attorney appointment, executed pursuant thereto, and (iii) Certifying that said power-of-attorney appointment is in full force and effect, the signature of the certifying officer may be by facsimile, and the seal of the Company may be a facsimile thereof."

I, Dexter R. Legg, Secretary of SAFECO INSURANCE COMPANY OF AMERICA and of GENERAL INSURANCE COMPANY OF AMERICA, do hereby certify that the foregoing extracts of the By-Laws and of a Resolution of the Board of Directors of these corporations, and of a Power of Attorney issued pursuant thereto, are true and correct, and that both the By-Laws, the Resolution and the Power of Attorney are still in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the facsimile seal of said corporation

this 19th day of October, 2009



Dexter R. Legg

Dexter R. Legg, Secretary

I N T H E C O U R T O F A P P E A L S
O F T H E S T A T E O F K A N S A S

JEFFREY R KING
LATHROP & GAGE LLP
10851 MASTIN BLVD
OVERLAND PARK KS 66210-1669

CASE NO. 09-103015-A

WICHITA TERMINAL ASSOCIATION,
BURLINGTON NORTHERN & SANTA FE
RAILWAY COMPANY AND UNION PACIFIC
RAILROAD COMPANY,

APPELLANTS,

V.

F.Y.G. INVESTMENTS, INC. AND TREATCO, INC.,

APPELLEES.

THE COURT HAS TAKEN THE FOLLOWING ACTION:

MOTION BY APPELLANT, WICHITA TERMINAL ASSOCIATION, ET AL, FOR
EXTENSION OF TIME TO FILE BRIEF.

MOTION GRANTED. BRIEF TO BE FILED ON OR BEFORE OCTOBER 27, 2009.

BRIEF DUE: 10/27/2009.

DATE: 10/06/2009.

CAROL G. GREEN
CLERK

I N T H E C O U R T O F A P P E A L S
O F T H E S T A T E O F K A N S A S

JEFFREY R KING
LATHROP & GAGE LLP
10851 MASTIN BLVD
OVERLAND PARK KS 66210-1669

CASE NO. 09-103015-A

WICHITA TERMINAL ASSOCIATION,
BURLINGTON NORTHERN & SANTA FE
RAILWAY COMPANY AND UNION PACIFIC
RAILROAD COMPANY,
V.

APPELLANTS,

F.Y.G. INVESTMENTS, INC. AND TREATCO, INC.,

APPELLEES.

THE COURT HAS TAKEN THE FOLLOWING ACTION:

MOTION BY APPELLEE/CROSS-APPELLANT, F.Y.G. INVESTMENTS & TREATCO,
FOR EXTENSION OF TIME TO FILE BRIEF.

MOTION GRANTED. BRIEF TO BE FILED ON OR BEFORE DECEMBER 09, 2009.

BRIEF DUE: 12/09/2009.

DATE: 12/01/2009.

CAROL G. GREEN
CLERK

I N T H E C O U R T O F A P P E A L S
O F T H E S T A T E O F K A N S A S

KENDALL PAUL DAY
LATHROP & GAGE LLP
2345 GRAND BLVD STE 2200
KANSAS CITY MO 64108-2618

CASE NO. 09-103015-A

WICHITA TERMINAL ASSOCIATION,
BURLINGTON NORTHERN & SANTA FE
RAILWAY COMPANY AND UNION PACIFIC
RAILROAD COMPANY,

APPELLANTS,

V.

F.Y.G. INVESTMENTS, INC. AND TREATCO, INC.,

APPELLEES.

THE COURT HAS TAKEN THE FOLLOWING ACTION:

MOTION FOR DESIGNATION OF VENUE BY APPELLANT, WICHITA TERMINAL
ASSOCIATION, ET AL.

GRANTED.

DATE: 12/14/2009.

CAROL G. GREEN
CLERK

I N T H E C O U R T O F A P P E A L S
O F T H E S T A T E O F K A N S A S

KENDALL PAUL DAY
LATHROP & GAGE LLP
2345 GRAND BLVD STE 2200
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CASE NO. 09-103015-A

WICHITA TERMINAL ASSOCIATION,
BURLINGTON NORTHERN & SANTA FE
RAILWAY COMPANY AND UNION PACIFIC
RAILROAD COMPANY,
V.

APPELLANTS,

F.Y.G. INVESTMENTS, INC. AND TREATCO, INC.,

APPELLEES.

THE COURT HAS TAKEN THE FOLLOWING ACTION:

MOTION TO DISMISS CROSS-APPEAL FOR LACK OF JURIDICITION BY WICHITA
TERMINAL ASSOCIATION, ET AL.

DENIED. SEE K.S.A. 60-206(D). RESPONSE NOTED.

DATE: 12/21/2009.

CAROL G. GREEN
CLERK

NOT DESIGNATED FOR PUBLICATION

No. 103,015

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

WICHITA TERMINAL ASSOCIATION, *et al.*,
Appellants,

v.

F.Y.G. INVESTMENTS, INC., *et al.*,
Appellees.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; TIMOTHY H. HENDERSON, judge. Opinion filed February 11, 2011. Affirmed in part, reversed in part, and remanded with directions.

Jeff King, of Lathrop & Gage, LLP, of Overland Park, and *K. Paul Day*, and *Patrick N. Fanning*, of Lathrop & Gage, LLP, of Kansas City, Missouri, for appellants.

Wyatt A. Hoch of Foulston Siefkin, LLP, of Wichita and *James D. Oliver*, of Foulston Siefkin, LLP, of Overland Park, for appellees.

Before MCANANY, P.J., MARQUARDT and CAPLINGER, JJ.

CAPLINGER, J.: This case was previously before this court after Wichita Terminal Association, Burlington Northern & Santa Fe Railway Company, and Union Pacific Railroad (collectively WTA) sought to enjoin FYG Investments, Inc., and Treatco, Inc. (collectively FYG), from interfering with its rights to operate and maintain two sets of parallel tracks abutting FYG's property along 25th Street in Wichita. FYG filed a counterclaim, asserting it had a right of access over the tracks as an abutting landowner.

Both parties moved for summary judgment, and the district court granted WTA summary judgment on both issues, finding WTA had a right to operate and maintain the tracks pursuant to a license granted under a Wichita ordinance and that WTA had no legal duty to provide FYG ingress and egress over the tracks. FYG appealed to this court which concluded summary judgment was not appropriate because the district court failed to determine a material fact issue – *i.e.*, whether 25th Street was a public street. Thus, the panel remanded to the district court to determine whether 25th Street was public, and if so, to determine the propriety of an injunction to provide FYG with ingress and egress over the tracks.

Following a hearing, the district court determined 25th Street was a public street and that the relevant Wichita ordinance required WTA to provide, construct, and maintain ingress and egress over the 25th Street tracks to FYG's property. The court entered an injunction ordering WTA, in pertinent part, to construct and install a permanent railroad crossing at Emporia Court Street and to keep a temporary crossing open to provide FYG ingress and egress from 25th Street to its property. WTA did not appeal this ruling.

FYG subsequently filed a motion for order to appear and show cause, alleging WTA should be held in contempt for failing to begin construction on the Emporia Court crossing and failing to keep open the temporary crossing for FYG's benefit and use. WTA thereafter moved for relief from judgment under K.S.A. 60-260(b), arguing, *inter alia*, that installation of the Emporia Court crossing was impractical because the required location for crossing protection devices would impede the public right-of-way on 25th Street. Following a hearing before a different district court judge, the district court granted the motion for relief, finding installation of traffic protection devices was practically impossible without impeding upon the unimproved 25th Street. The court also modified the previous order, ordering WTA to remove the north track at the crossing if that was the only means to construct the crossing without impeding upon 25th Street. The

district court denied FYG's contempt motion. WTA appeals the district court's ruling and FYG cross-appeals.

FACTUAL AND PROCEDURAL BACKGROUND

In *Wichita Terminal Association v. F.Y.G. Investments, Inc.*, No. 92,132, unpublished opinion filed April 8, 2005, the panel outlined the relevant underlying facts:

"In 1996, FYG purchased approximately 27 acres of land between 23rd and 25th Streets at the southeast corner of 25th Street and Broadway in Wichita, Kansas. A boundary survey disclosed a 30-foot right-of-way easement along the north side of the property where 25th Street was located. The boundary survey also disclosed existing railroad tracks along the south side of 25th Street within the 30-foot right-of-way.

"This dispute involved two railroad tracks running parallel along 25th Street. The tracks extended approximately 643.40 feet beyond an existing railroad easement located on FYG's land. In September 2002, WTA began repairing the tracks. Shortly thereafter, FYG requested that WTA cease its activities, claiming that WTA was trespassing."

WTA filed a petition in the district court seeking to enjoin FYG from interfering with its use of the tracks. In response, FYG sought an easement by necessity crossing the railroad tracks "not less than thirty (30) feet in width along a route suitable for vehicular and truck passage." Both parties moved for summary judgment. WTA argued it had a prescriptive easement because it had used the tracks continually since 1916 and possessed a grant of authority pursuant to Wichita Ordinance No. 5436 (the Ordinance) and amendments thereto. FYG argued WTA lacked a prescriptive easement because its use of the land was permissive. Further, FYG contended WTA's use of the track failed to conform with the Ordinance, which required the tracks be maintained "in such condition that teams and vehicles on such street can safely pass over such tracks at any point on said street."

The district court granted WTA's motion for summary judgment, finding that pursuant to the Ordinance, WTA had a right to construct, operate, and maintain railroad tracks along 25th Street, and had done so for 87 years, giving them a prescriptive easement. The district court also found that WTA had "no legal duty to provide the defendants ingress and egress as abutting property owners over and across [WTA]'s railroad easement." The district court subsequently amended its judgment, finding that the Ordinance granted WTA a license, which did not ripen into a prescriptive easement. The court also found that the issue of ingress and egress was "with the City of Wichita, a non-party, and the Plaintiffs."

FYG appealed the district court's ruling to this court, arguing in part that the district court erred in determining that WTA had no legal duty to provide FYG with ingress and egress as abutting property owners over and across WTA's railroad easement. On appeal, the panel held that although it was undisputed that FYG owned the land abutting 25th Street, the district court failed to determine whether it is a public street, a material issue of fact. The panel further determined the district court erred in finding FYG lacked standing to raise the issue of ingress and egress, because FYG had standing based on the Ordinance or the common-law right of access. Accordingly, the panel reversed the district court's grant of summary judgment and remanded to the district court for a determination of (1) whether 25th Street is a public street, and (2) if so, whether an injunction to provide ingress and egress was appropriate.

Sometime prior to the hearing on remand, FYG filed a request with the City of Wichita for a declaration to construct Emporia Court, a street located on FYG's property which appears to cross over WTA parallel tracks and onto a gravel road.

On February 20, 2007, Judge Joseph Bribiesca conducted the hearing on remand. Testifying for FYG, Patrick Pruitt, the street maintenance supervisor for the City's Public Works Department, testified 25th Street is considered a public street that the City is

charged with maintaining. Danny Miller, WTA's superintendant, testified on behalf of WTA that if FYG had a right-of-way over the tracks, WTA would be required to install a crossing interchange. Miller testified as to the type of crossing surface required as well as other necessary construction, including posts, beams, and crossing gates. Miller also testified that putting a street through the tracks would disrupt WTA's operation and would affect interstate commerce. Miller recommended a safer, alternative means of ingress and egress for FYG, but admitted that means involved a private crossing owned by an individual who was not a party to the action and would require FYG to build a road to get there. Finally, Miller testified that along with the City of Wichita, the State and the Federal Railroad Administration are also involved in making recommendations regarding traffic protection.

At the close of the February 20, 2007, hearing, the district court ruled from the bench that 25th Street was a public street and the language of the Ordinance required WTA to provide, construct, and maintain ingress and egress over the 25th Street tracks to FYG's property. Consequently, the court entered an injunction requiring WTA to construct a crossing to allow ingress and egress to FYG's property and to keep the crossing clear in accordance with the city code. The court did not, however, order any particular means by which WTA was to implement the injunction. Instead, the court ruled:

"Now, frankly, those are the only two issues that are before the Court this morning. Those are the two issues that the Court of Appeals remanded the matter for.

"Now, having said that, that leaves the issue of how this Court's order is carried out to a future—future debate. There's been much talk here by way of evidence about, oh, the best way to go about implementing such an order, alternatives. Mr. Miller testified to that, and I appreciate that testimony.

"But as far as the ingress and egress, that's going to have to be worked out between the parties. And the Court trusts that the parties can put forth a good faith effort and come up with the best economic alternative with—with the least impact upon interstate commerce."

For reasons not explained in the record, Judge Bribiesca did not file the journal entry on remand granting the permanent injunction until August 1, 2008. That journal entry stated, in relevant part:

"On July 25, 2008, this Court finds that the Plaintiffs, in order to meet the requirements of [the prior order to construct a crossing to allow ingress and egress to FYG's property], have temporarily provided F.Y.G. Investments, Inc., with ingress and egress from 25th Street to FYG's property as required by the Court's order by installing a thirty-two (32) foot timber crossing which will remain open for the benefit and use of FYG.

"WHEREUPON, the court orders Plaintiffs to construct and install, within 90 days after Defendants' presentation to Plaintiffs of sealed engineering drawings for the construction of Emporia Court street, (i) a permanent railroad crossing at least 32 feet in width at the point where the centerline of the dedicated Emporia Court street intersects the railroad tracks, and (ii) permanent railroad crossing protection in compliance with Federal Railroad Administration requirements."

On December 18, 2008, FYG presented WTA's counsel with a set of sealed engineering drawings approved by the City for the construction of Emporia Court, triggering WTA's obligation to construct the Emporia Court permanent crossing and the associated crossing protection by March 22, 2009.

As of April 1, 2009, WTA had not begun construction on the crossing and on April 2, 2009, FYG filed a motion for order to appear and show cause, arguing WTA should be held in contempt for failing to comply with the district court's injunction for

construction of the permanent crossing and for failing to keep the temporary crossing open for FYG's benefit and use. The district court ordered WTA to appear and show cause.

On May 11, 2009, WTA moved for relief from the district court's August 1, 2008, judgment pursuant to K.S.A. 60-260(b), arguing in part that it was impossible to comply with the requirement to install a permanent railroad crossing in accordance with Federal Railroad Administration because the controlling requirements are actually promulgated by the Federal Highway Administration, and installation of a crossing at Emporia Court was impractical under the required locations for crossing protection devices required by the Federal Highway Administration's Manual on Uniform Traffic Control Devices (MUTCD). WTA also alleged that because the proposed crossing location would adversely affect interstate commerce, the Surface Transportation Board (STB) had jurisdiction to review the matter under the Interstate Commerce Commission Termination Act (ICCTA).

At the hearing before Judge Timothy Henderson on June 9, 2009, Jason Moyer, WTA's superintendent as of April 2008, testified he first became aware of the Emporia Court crossing litigation in August 2008. Moyer generally testified that train crews and public traffic would be endangered by a crossing at Emporia Court. Moyer suggested that it would be safer and preferable to place the crossing at the location of the temporary crossing.

Bruce Chinn, Assistant Manager for Public Projects of BNSF, testified that pursuant to the MUTCD, warning devices should be posted a minimum distance of 12 feet from the center line of the north track. Chinn testified he measured the area of the proposed Emporia Court crossing, and found that if WTA installed a warning device in accordance with the MUTCD, the crossbuck or signal post would be located in a lane of travel on 25th Street. Chinn explained that a crossbuck could be struck by a vehicle and

that it was otherwise not safe to install a crossing at this location. Chinn professed he did not know why WTA failed to earlier allege that it could not safely build the crossing.

The district court sua sponte questioned Chinn about whether the crossing could be built in compliance with the MUTCD if the north track were removed. Chinn testified that without measurements, he could not answer the court's question. However, he suggested "the chances are much greater that it could be installed in compliance with the MUTCD than what exists today." The court also questioned Chinn as to whether rail lines could be relocated or an underpass or overpass installed at the crossing. Chinn responded that these possibilities were not feasible.

Margie Thomas Collins the vice-president and secretary of FYG, testified that on several occasions, WTA's rail cars blocked the temporary crossing for hours at a time, preventing FYG from accessing its property south of the tracks and interfering with the development of the property.

After hearing testimony and arguments, Judge Henderson noted that WTA had a full and fair opportunity to litigate the issue of impracticability of the Emporia Court crossing and to point out the factual impossibility of complying with the Federal Railroad Administration requirements as mandated by Judge Bribiesca's order. Nevertheless, the district court held WTA was entitled to relief because (1) the order erroneously referred to the Federal Railroad Administration requirements rather than the MUTCD requirements promulgated by the Federal Highway Administration, and (2) the installation of a crossing over the dual tracks at Emporia Court was practically impossible without impeding upon 25th Street.

The district court declined WTA's invitation to place the permanent crossing at the location of the temporary crossing because WTA had not appealed the court's August 1, 2008, final order. Nevertheless, the district court also concluded WTA could install

traffic protection for a crossing over one track at Emporia Court without impeding upon 25th Street, and that future improvements to 25th Street might make it possible to install traffic protection for a two-track crossing. To that end, the court modified Judge Bribiesca's journal entry as follows:

"The court orders Plaintiffs to construct and install (i) a permanent railroad crossing at least 32 feet in width at the point where the centerline of the dedicated Emporia Court Street intersects the railroad tracks, and (ii) permanent railroad crossing protection in compliance with all federal, state, and local laws, regulations, and ordinances. This crossing shall not impede in any manner in the public right-of-way of 25th Street. The Plaintiffs must remove the north track in the area of this crossing if that is the only means to construct the crossing and crossing protection without impeding upon 25th Street. The Plaintiffs may later replace the north track if, after the improvement of 25th Street, those improvements allow the crossing and crossing protection to not impede upon 25th Street. The Plaintiffs must construct the crossing and crossing protection within 90 days after the entry of the Journal Entry Granting Railroads' Motion for Relief from Judgment. All other provisions of the August 1, 2008 Journal Entry on Remand and Permanent Injunction will remain in full force and effect."

Finally, the district court denied FYG's motion for contempt, finding WTA had shown good cause for failing to timely construct the Emporia Court crossing because (1) WTA obtained new counsel following Judge Bribiesca's journal entry, (2) the journal entry incorrectly referenced the requirements of the Federal Railroad Administration, rather than the Federal Highway Administration, and (3) it was impossible for WTA to construct a crossing on Emporia Court that complied with MUTCD requirements without impeding upon 25th Street. The court also denied FYG's request for sanctions resulting from WTA's failure to keep open the temporary crossing because FYG failed to demonstrate any harm resulting from the alleged crossing blockage.

The same day the district court's journal entry was filed, WTA filed an objection opposing the proposed journal entry, alleging it contained inaccurate statements and

failed to remedy the crossing protection problems generated by the original judgment. Additionally, WTA claimed the district court exceeded its jurisdiction and authority by modifying the original order to include the removal of the north track, as removal of that track falls under the jurisdiction of the ICCTA. Further, WTA attached an affidavit from Chinn stating that following the June 2009 hearing, Chinn took measurements at the proposed Emporia Court crossing, anticipating removal of the north track. Chinn opined that even if a portion of the north track were removed, serious clearance and safety issues would still exist, and compliance with the MUTCD was not possible without placing warning devices within the public street right of way.

WTA timely appeals the district court's ruling. FYG cross-appeals the district court's order to the extent it grants relief to WTA or otherwise alters the previous order unfavorably to FYG.

THE DISTRICT COURT ABUSED ITS DISCRETION IN RESOLVING WTA'S K.S.A. 60-260(B) MOTION BY SUA SPONTE ORDERING A NEW MEANS OF IMPLEMENTING THE INJUNCTION.

In this appeal, WTA does not challenge that portion of the district court's order granting relief from its prior order based upon the impossibility of placing a crossing at Emporia Court. Rather, WTA contends the district court abused its discretion in ordering removal of the north track because the district court lacked jurisdiction under K.S.A. 60-260(b) to order that remedy. According to WTA, the court's order is preempted by the ICCTA because it forces abandonment of the track and results in an unreasonable burden on interstate commerce.

Preliminarily, we note that FYG contends WTA failed to preserve these arguments because it did not appeal Judge Bribiesca's final order. Additionally, FYG argues in its cross-appeal that the district court erred in granting WTA relief from judgment because

WTA invited any error requiring compliance with Federal Railroad Administration requirements rather than the MUTCD.

K.S.A. 60-260(b) provides:

"On motion and upon such terms as are just, the court may relieve a party or said party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under K.S.A. 60-259(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."

WTA did not specify below the particular subsection of K.S.A. 60-260(b) under which it sought relief, and the district court did not specify under which subsection it ruled. However, in its reply brief, WTA argues K.S.A. 60-260(b)(6) authorized relief.

We apply an abuse of discretion standard to that portion of the district court's order setting aside the prior judgment pursuant to K.S.A. 60-260(b). *In re Marriage of Leedy*, 279 Kan. 311, 314, 109 P.3d 1130 (2005). "Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable. If reasonable persons could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. [Citation omitted.]" *Unruh v. Purina Mills*, 289 Kan. 1185, 1202, 221 P.3d 1130 (2009). However, an error of law by the trial court is, by definition, an abuse of discretion. *State v. Moore*, 287 Kan. 121, 135, 194 P.3d 18 (2008).

The district court held that construction of the crossing at Emporia Court in compliance with the MUTCD was practically impossible without impeding upon 25th Street. This finding is supported by the evidence and the court did not abuse its discretion in ordering relief from an impossible remedy. The court further held, however, "[b]ased on the testimony of the Railroads' witnesses, the court finds that the installation of traffic protection for a crossing over one track at Emporia Court is possible at this time without impeding upon the unimproved 25th Street." The court thus ordered WTA to remove the north track "if that is the only means to construct the crossing and crossing protection without impeding upon 25th Street."

The district court entirely mischaracterized the nature of "the Railroads' witnesses'" testimony when it suggested that "witnesses testified" that installation of a crossing over one track at Emporia Court was possible without impeding upon 25th Street. In fact, Moyer provided no testimony on this issue. And the only reference to the possibility of removing one track came from Chinn in response to the sua sponte questioning by the district court.

The error in the district court's analysis is obvious when we examine the district court's abrupt and unsolicited questioning of Chinn regarding possible remedies:

"[THE COURT:] Let me ask you a terminology question. What do you call it when a track dead ends?

"What would be the railroad terminology for that?

"A: Where a track dead ends?

"THE COURT: Yes, w[h]ere the track runs out, no more track?

"A: Stub. Stub track.

"THE COURT: Okay. If the north track, there was a stub, it ended before it got to the Emporia Street intersection or crossing, and there was a stub for the width, you know, we essentially break up the north track there and stub each end of it, where would that 12 feet . . . be from the south track?

"A: So if there was no track here?

"THE COURT: Right.

"A: From here, this way?

"THE COURT: Well, there would be track on the outside, for the width of the crossing, there is no north track. Would that crossbuck be out in the road?

"A: Okay. If a train could not travel through here?

"THE COURT: Right.

"A: That crossbuck would then be measured 12 foot from the south track. Since no rail track could transverse through that area.

"THE COURT: How wide is that center section between those two tracks?

"A: Your Honor, I don't know.

"THE COURT: Less than 12 feet?

"A: Typical track centers are around 12, 14 feet, something like that.

"THE COURT: Is it fair to say it would not be out in the road if that north track did not exist?

"A: Your Honor, I could not answer that question unless I went and measured it.

"THE COURT: Fair enough.

"It's a if it's a normal separation between the tracks, as the normal practices, not exactly, I understand the limitation there, but if it's that normal approximate 12-foot wide area between those two tracks, then essentially 12 feet from the south track would be about where the north track is now?

"A: Approximately.

"THE COURT: Approximately. Fair enough, sir."

Following Chinn's testimony on direct and cross-examination, the district court again questioned Chinn about the north track:

"THE COURT: Mr. Chinn, I have a couple of questions.

"And I'm not an expert such as you, sir, so help me understand.

"And I've alluded to it somewhat, as I asked earlier.

"If the north track did not exist, could you build a crossing there that would comply with the manual on uniform traffic control devices?

"A: The only way I could answer that, Your Honor, is to say the chances are much greater that it could be installed in compliance with the MUTCD than what exists today.

"But, on the other side, if that north track [were] removed, then we can't service customers.

"THE COURT: Well, that was an issue for Judge Briescia, not for me."

The court then proceeded to question Chinn about the possibility of installing an overpass or underpass at the crossing, as well as the possibility of rail line relocation or shifting both tracks to the south. Chinn responded that none of these possibilities were feasible. Then, the court again brought up the option of having a single track at the crossing:

"[THE COURT]: One track. I understand, you're connecting the Burlington Northern Santa Fe to the UP. And this connects—and I forget which diagram it is—it connects it and allows that interplay between those two lines.

"One track allows that connection.

"Two tracks allow for more storage of cars while you're making that transition accessing local customers.

"Is that a fair lay persons summary of what's going on there?"

"A: Your Honor, I'm not that knowledgeable of the train operations.

"THE COURT: That's a question I should have asked Mr. Moyer.

"A: Yes, sir.

"THE COURT: Okay. Fair enough."

During closing argument, WTA counsel Paul Day pointed out that neither party had presented any evidence whatsoever to indicate that removal of the north track would bring the crossing into compliance with the MUTCD. Further, Day strongly argued that removal of the track would render the tracks unusable. The district court then interrupted Day to further discuss the possibility of a single track:

"THE COURT: It would render one track unusable.

"MR. DAY: It would render one track unusable.

"THE COURT: And that track would primarily be used for storage; correct?

"MR. DAY: Both tracks are used for storage.

"THE COURT: You would still be able to get cars from Union Pacific to the Burlington Northern side and vice-versa even though it would be more restrictive because you would only have one track to do it instead of two. But on both ends of 25th Street, it narrows down to one track anyway; does it not?

"MR. DAY: On the other side of the switch, yes.

....

"[THE COURT:] I know it's not a remedy your client wants, and I fully recognize the impact it has on the cars, the interstate commerce, but Mr. Chinn also did testify that the average width between the two tracks is around 12 feet. And I agree with your statement that there [has] been no exact drawings or specified details that said this crossing can be done with just one track. But if that one track was removed, just for that crossing area, that is a potential solution to the safety issue, and yet remain true to Judge Bribiesca's underlying order, that a crossing be built at that location, correct?

"MR. DAY: I don't agree, Judge.

"THE COURT: Tell me why.

"MR. DAY: You're still faced—

"First of all, I don't think that the measurements have been taken, and I don't think there is evidence here today as to whether that can be done either in compliance with the MUTCD or safely.

"THE COURT: But you're the one asking for the relief from judgment. Would it not be your burden to provide me a viable alternative relief from judgment?

....

"MR. DAY: I disagree with that as an appropriate remedy. Obviously ordering the removal of those tracks is very—a very extreme remedy that takes them out of service completely.

"And I can't think of a more draconian remedy that would disrupt of the operations of the terminal. I mean, you've eliminated an essential part of their operations completely. Before, at least, maybe we had some room at the end of that track to store things. And to remove it is just—quite frankly, I don't—this is said in all due respect to the court, I'm going to have research whether the court has jurisdiction to order that remedy. I don't know at this point, Judge, and that was new, and it was something that

"How could you have complied with that order without doing one of those two things?"

"MR. DAY: Well, my point was, I don't believe it's been—I don't think there is any evidence that removal of the track gets us in compliance with that.

"THE COURT: Okay. My question is, what is the remedy?"

"MR. DAY: I'm sorry, I misunderstood.

"THE COURT: But those are the only two potential options.

"Once again, if you've got a third, I'm open to it."

Significantly, the record reveals that neither party proposed or contemplated the solution ordered by Judge Henderson, and it is clear the parties were not prepared to present evidence on this issue. The only testimony on the issue came from Chinn in response to sua sponte questioning from the court. But even Chinn did not testify that removal of the north track would bring the crossing into compliance with the MUTCD; instead, he indicated he could not be sure without taking the relevant measurements. Judge Henderson even acknowledged the lack of evidence presented on this issue, agreeing "that there [has] been no exact drawings or specified details that said this crossing can be done with just one track."

The court found that compliance with Judge Bribiesca's order was impossible without impeding upon 25th Street. This finding is undisputed and the district court did not abuse its discretion in granting relief from judgment despite WTA's failure to appeal or otherwise timely challenge Judge Bribiesca's order. See *State ex rel. Morrison v. Price*, 285 Kan. 389, 402, 172 P.3d 561 (2007) ("An injunction is an equitable remedy 'governed by the principles of equity.'"); *Vogeler v. Owen*, 243 Kan. 682, 687, 763 P.2d 600 (1988) ("'[G]iving due regard to the sound interest underlying the finality of judgments, the district court, nevertheless, has power [under K.S.A. 60-260(b)(6)] to grant relief from a judgment whenever, under all the surrounding circumstances, such action is appropriate in the furtherance of justice.'"); *Koch Engineering Co. v. Faulconer*, 227 Kan. 813, 830, 610 P.2d 1094 (1980) ("A trial court has the jurisdiction,

the authority, and the power not only to enforce its orders but also to entertain a motion for supplemental relief and to issue appropriate additional orders to make effective the relief previously granted.").

However, the district court did not simply find compliance with the previous order was impossible. Instead the court modified the order without providing the parties with an opportunity to address the feasibility of the modification and without determining whether this modification would solve the underlying issue of impossibility. In short, there was no evidence presented that removal of the north track would bring the crossing into compliance with the MUTCD without impeding the public right-of-way. As such, the district court abused its discretion in ordering removal of the track, and we reverse that portion of the ruling on WTA's K.S.A. 60-260(b) motion.

On remand, the district court should give both parties a limited time period in which to propose and address the options for viably implementing the injunction in compliance with the MUTCD, including but not limited to removal of the north track at Emporia Court and/or any other legally compliant crossing location.

In light of our decision remanding to the district court with respect to the implementation of the injunction, WTA's remaining arguments on appeal and FYG's arguments on cross-appeal are moot.

In conclusion, we affirm the district court's order granting relief from judgment based on the impossibility of the remedy ordered. However, we reverse that portion of the order in which the district court sua sponte ordered a remedy that was neither proposed by the parties nor supported by the evidence and remand with directions as set forth above. FYG's cross-appeal is dismissed as moot.

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IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

WICHITA TERMINAL ASSOCIATION,)
BURLINGTON NORTHERN & SANTA FE)
RAILWAY COMPANY and UNION)
PACIFIC RAILROAD COMPANY,)
Plaintiffs,)
vs.)
FYG INVESTMENTS, INC. and)
TREATCO, INC.,)
Defendants.)

Case No. 02 CV 3688

**TRANSCRIPT OF CLOSING ARGUMENTS and
COURT'S RULING REGARDING BENCH TRIAL**

Proceedings had and entered of record before the
Honorable Joseph Bribiesca, Judge of Division 22 of the
18th Judicial District, Sedgwick County, Kansas, at
Wichita, Kansas on December 12, 2011.

APPEARANCES:

The Plaintiffs, Wichita Terminal Association,
Burlington Northern & Santa Fe Railway Company and Union
Pacific Railroad Company, appeared by and through its
attorney, Mr. K. Paul Day, of Lathrop & Gage, LLP, 2345
Grand Boulevard, Suite 2200, Kansas City, Missouri
64108-2618.

The Defendant, FYG Investments, Inc. and
TreatCo, Inc., appeared by and through its attorney, Mr.
Wyatt Hoch, of Foulston Siefkin, LLP, 1551 N. Waterfront
Parkway, Suite 100, Wichita, Kansas 67206-4466.

1 THE COURT: Good morning.

2 THE PARTIES (IN UNISON): Good morning.

3 THE COURT: Parties ready?

4 MR. DAY: Ready, Your Honor.

5 MR. HOCH: Yes, sir.

6 THE COURT: All right. For the record, this
7 is the matter of Wichita Terminal Association, et al
8 vs. FYG Investments, Inc. and TreatCo, Inc., 02 CV
9 3688. Appearances, please.

10 MR. DAY: Paul Day appearing on behalf of
11 the plaintiff railroads, Your Honor.

12 MR. HOCH: And Wyatt Hoch appearing on
13 behalf of FYG and TreatCo, and Margie Collins is with
14 me this morning.

15 THE COURT: Okay. Thank you.

16 For the record, we had a previous hearing, an
17 evidentiary hearing, and the evidentiary portion is
18 closed. We were at that point where the Court was
19 going to hear Closing Arguments. The parties
20 announced that they wished to set the matter over in
21 an attempt to settle their differences, come to a
22 mutually-agreeable settlement. It's the Court's
23 understanding that you have been unable to do that, is
24 that correct?

25 MR. DAY: That's correct, Your Honor.

1 THE COURT: All right. And that's
2 unfortunate, because regardless of how I rule this
3 morning, I foresee this matter going up for a third
4 time.

5 In any event, Mr. Day, let's hear your Closing
6 Arguments.

7 MR. DAY: If it may please the Court, Your
8 Honor, I'm going to try to be brief this morning and
9 get to what I think are the -- the salient points
10 here.

11 I think the evidence has shown that the crossing
12 cannot be installed at the proposed Emporia Court
13 location in compliance with the minimum standards set
14 forth in the Manual on Uniform Traffic Control
15 Devices. I think that the defendants' own expert
16 conceded that.

17 The problem, of course, there is that under those
18 clearance standards, under the MUTCD, under the 2003
19 edition, the warning devices would have to be 12 feet
20 from the center line of the north rail of the
21 interchange, which would place that crossbuck device
22 in the lane of travel of 25th Street. Under the 2009
23 edition, which should be adopted in Kansas in January,
24 that standard, because of the requirements of the
25 yield sign, put that warning device an additional

1 three feet -- well, actually more than three feet, 15
2 feet from the near rail of the -- of the north track
3 into 25th Street, impeding the lanes of travel even
4 more.

5 So under the present configuration of the
6 interchange tracks and 25th Street, it's not possible
7 under MUTCD standards to place those warning devices
8 and install a crossing at the proposed location. I
9 think everybody, even Mr. Austin, the defendants'
10 expert, concedes that there are serious safety issues
11 if that were to be done. In fact, I think this
12 Court's July 2009 order recognized the practical
13 impossibility of placing a crossing at the Emporia
14 Court location without impeding 25th Street and
15 recognized that that would be a hazard.

16 The other -- well, Mr. Austin had a theoretical
17 proposal to essentially move the lanes of travel of
18 25th Street to the north to where the right-of-way
19 line is on the north edge. His -- his proposal is to
20 basically realign the street. I suppose that would be
21 theoretically possible if the -- if the city were to
22 undertake that project, but that's not the way that
23 the street is laid out currently, and that's not
24 really a practical solution to the problem.

25 The other point that was discussed by Mr. Austin,

1 and I assume that will be advocated by the defendants
2 is the removal of the portion of the north track to
3 allow for the installation of the crossing in
4 compliance with the MUTCD. First of all, just from a
5 factual or practical standpoint, I don't believe
6 that's a practical solution at this point. Mr. Austin
7 testified that that would require lane delineation,
8 curbs, narrowing of the lanes of travel, and at least
9 some involvement by the city in that type of
10 reconfiguration.

11 But even if that were to occur, it's our position
12 that the Court of Appeals' decision was very clear
13 that this Court should consider all legal remedies to
14 provide access across the IT tracks.

15 And it is our position that the removal of tracks
16 is not a legal remedy. The reason for that is under
17 what I'm going to call the ICCTA federal statute, the
18 Interstate Commerce Commission Transportation Act, it
19 is clear that federal law preempts or deprives Kansas
20 courts of subject matter jurisdiction to order a track
21 abandonment. That issue has been ruled on by the
22 United States Supreme Court, granting exclusive
23 jurisdiction to the Surface Transportation Board with
24 regard to track removal, with regard to track
25 abandonment.

1 The Kansas courts have also recognized -- or I
2 should say that the 10th Circuit has also recognized
3 complete preemption in this field. The case law is
4 clear. The subject matter of track abandonment or
5 track removal is within the exclusive jurisdiction of
6 the federal Surface Transportation Board, and this
7 Court lacks subject matter jurisdiction to order
8 tracks removed.

9 Judge, in conclusion, the -- I think the best
10 solution for this case is to -- is to enter an order
11 that the current temporary crossing at the west end of
12 the interchange be made the permanent crossing to
13 provide access for the defendants.

14 The evidence at the hearing by Mr. Austin was not
15 that that was a practical impossibility or a safety
16 hazard or anything of the sort. His argument -- his
17 testimony was, basically, it was an inconvenience to
18 the defendants, because it would require some type of
19 repositioning or an adjustment to their development
20 plan.

21 So it's our position that to put an end to this --
22 this long litigation, that the temporary crossing at
23 the west end be made the permanent location for the
24 crossing to provide access for the defendants.

25 Thank you, Judge.

1 THE COURT: Mr. Day, is that the pinch point
2 location or what was referred to as the pinch point
3 location that you're advocating for?

4 MR. DAY: It is a pinch point in the sense
5 that there is only one track at that location. The
6 switch for the north track on the interchange would be
7 to the east of that crossing. So although it
8 certainly impacts the terminal's operations, it is of
9 a less impact because of the car storage problem and
10 the car movement problems, and in an effort to put an
11 end to this, that's where we propose that the crossing
12 be located.

13 THE COURT: And my second question, Mr. Day,
14 this is the first time this Court has heard the
15 argument -- unless my memory is -- no longer serves
16 me -- first time the Court has heard the argument that
17 this Court does not have subject matter jurisdiction
18 over the tracks, or more specifically, ordering the
19 removal of the tracks. I do not recall you asking any
20 of your witnesses or any witness at the evidentiary
21 hearing about that. Of course, that would be a legal
22 question, I realize that, but I don't recall the
23 question being posed to the -- a witness, asking the
24 witness whether that would be a viable option to the
25 Court.

1 So I take it you have some case law you want the
2 Court to look at or --

3 MR. DAY: Judge, I have -- if the Court
4 would like me to provide copies of all of the cases
5 dealing with this, I would be happy to do it. I could
6 give you the citations now. I can send those down
7 later. I don't have copies at this point.

8 Basically, the federal statute involved is section
9 10906, I believe that's the federal statute. The main
10 Supreme Court case on point is *Chicago Northwest*
11 *Transportation Company vs. Kalo Brick and Tile*. It's
12 a 1981 Supreme Court case. I could give you the 10th
13 Circuit case as well. May be a good idea if I just
14 sent them all to you, if you'd like to review them.

15 THE COURT: Well, just give me the -- the
16 one that you see as the bay horse case on this point,
17 and tell me what -- what it stands for, what
18 proposition does it stand for, even -- although I
19 believe you've already done that, but what's the bay
20 horse case on the question?

21 MR. DAY: Well, I think I'd cite the *Kalo*
22 *Brick & Tile* case, which is 450 U.S. 311, Supreme
23 Court case. There is the 10th Circuit case of *Port*
24 *City vs. Union Pacific*, 518 F. 3d 1186. There is the
25 *State vs. Skinner* case in Kansas, which is 987 Pacific

1 2d 1096.

2 THE COURT: Do you have the Kansas cite on
3 that?

4 MR. DAY: 267 Kansas 808. That's -- and
5 that -- that case -- I'm sorry.

6 THE COURT: Well, I was going to say, this
7 Kansas case, you're taking the position that it stands
8 for the proposition that the state court doesn't have
9 subject matter jurisdiction to order removal of track?

10 MR. DAY: No, Judge, I was going to clarify
11 that. That -- that case says that the parties cannot
12 confer subject matter jurisdiction by consent, waiver
13 or estoppel.

14 There is a 5th Circuit case that deals with
15 interchange tracks specifically, which is directly on
16 point, and just on all fours with the current
17 situation. That case is *New Orleans Terminal Company*
18 *vs. Spencer*, 366 F. 2d 160. I'm sorry, Judge. I
19 meant the *Port City* case -- well, wait a minute. Let
20 me make sure I'm telling the Court the correct case.
21 That's the *New Orleans Terminal* case, Judge. That's
22 correct.

23 THE COURT: That's at 366 Fed. 2d 160?

24 MR. DAY: Yes, sir. And that specifically
25 deals with interchange terminal tracks being main line

1 tracks, exclusive STB jurisdiction over abandonment of
2 those types of tracks.

3 Under the -- under the statute there is -- under
4 49 U.S. Code 10906, the STB does lack jurisdiction
5 over construction, acquisition, operation, abandonment
6 or discontinuance of spur, industrial, team, switching
7 or side tracks.

8 In the *Port City* case from the 10th Circuit that I
9 cited to you earlier, that case has held that not only
10 does the STB not have authority over that, but neither
11 do state courts. That's solely a railroad management
12 decision. There's still preemption, but is not STB
13 jurisdiction. But again, it's our position that that
14 portion of the statute doesn't apply, because these
15 are interchange tracks through -- through line
16 movement tracks, that are preempted by STB
17 jurisdiction.

18 THE COURT: Well, I have another question
19 for you, then. So you're taking the position -- for
20 purposes of the record, you're taking the position
21 that the Kansas Court of Appeals is in error?

22 MR. DAY: I didn't say that.

23 THE COURT: Well, but -- and please don't
24 take this personal, but I'm going to quote from the
25 decision. It says, quote: On remand, the district

1 court should give both parties a limited time period
2 in which to propose and address the options for viably
3 implementing the injunction in compliance with the
4 MUTCD, including but not limited to removal of the
5 north track at Emporia Court and/or any other legally
6 compliant crossing location, end of quote.

7 Based on your argument, I'm led to conclude that
8 what you're saying is the Court of Appeals is in error
9 when they tell the district court to consider the
10 removal of the north track.

11 MR. DAY: Well, Judge, the way that I
12 interpret that is the word legally. And if the Court
13 of Appeals was saying that it was legal for a state
14 court judge to order track removal, then I disagree
15 with the Court of Appeals. The way I interpret that
16 part of the decision is that this Court was to
17 consider legal remedies, and it is our position that
18 that is not a legal remedy. The case law, the federal
19 statutes are clear that abandonments, that track
20 removal are within the exclusive jurisdiction of the
21 STB, and this Court does not have subject matter
22 jurisdiction to enter that order.

23 THE COURT: Thank you, Mr. Day.

24 MR. DAY: Thank you, Judge.

25 THE COURT: Mr. Hoch?

1 MR. DAY: And could I make -- could I make
2 one more point --

3 THE COURT: Yes.

4 MR. DAY: -- before I sit down?

5 THE COURT: Yes.

6 MR. DAY: On -- on the subject of track
7 removal, the -- the problem is even Mr. Austin
8 concedes that that requires city involvement, the
9 exercise of rights by the city, over the city, it
10 requires lane delineation, all of the things he listed
11 in his testimony that were appropriate, and we -- we
12 have no details about that.

13 So putting aside the legal argument, from a
14 factual standpoint on what's in the record, there
15 isn't enough there to enter an order, because we have
16 no details as to what that entails. There's been no
17 plan. There's been no specifics. It requires an
18 exercise of jurisdiction, in my view, over -- over the
19 city. It's an attempt -- it would be an attempt to
20 change the lane configurations in the area, and I just
21 don't think that's a practical solution under the
22 facts that have been presented. I just wanted to make
23 that point, Judge.

24 THE COURT: All right.

25 MR. DAY: Thank you.

1 THE COURT: Thank you.

2 Mr. Hoch? And I would like for you to give me
3 your view on Mr. Day's argument relative to the
4 question of whether this Court has subject matter
5 jurisdiction for an order of removal of the track.

6 MR. HOCH: That's where I'll start.

7 THE COURT: All right.

8 MR. HOCH: Because I believe the Court of
9 Appeals opinion that you just read from is very clear.
10 The issue of the preemption was briefed by the
11 railroads to the Court of Appeals the last time
12 around, in the context of their motion for relief from
13 your order from August of 2008 enjoining them in
14 saying, build the crossing at Emporia Court location.
15 That's the context. You issued the order and said,
16 build a crossing at Emporia Court. After I filed the
17 motion for contempt or the -- got the show cause order
18 why they shouldn't be held in contempt, because they
19 failed to build the crossing within the time period
20 after we produced the drawings for them, they filed
21 the motion for relief from the injunction, and that's
22 what went up on appeal. And as you read a little bit
23 ago, the Court of Appeals was very specific on what
24 they charged the district court with doing on remand.
25 And that is to -- to -- for the parties to propose and

1 address the options for viably implementing the
2 injunction. In the next paragraph: In light of our
3 decision remanding to the district court with respect
4 to the implementation of the injunction, WTA's
5 remaining arguments on appeal are moot.

6 So the Court of Appeals didn't say that it's fair
7 game to have the preemption argument addressed in this
8 hearing. That's not what this is about. They've --
9 they've specifically said that argument is moot.
10 The -- I -- and I don't believe that issue is properly
11 before the Court here today.

12 What the railroads' evidence shows -- and I think
13 it's important to put this in context. The railroad
14 has the burden of getting relief from the injunction,
15 which says build a crossing at Emporia Court. There's
16 been no plan presented by the railroad that says,
17 here's where we can build a crossing, and here's how
18 it is MUTCD compliant. That's missing from the record
19 in this case.

20 We've come in with Mr. Austin and his engineering
21 drawings to show how Emporia Court can be built in a
22 couple different contexts, and I want to address those
23 specifically in a moment. I think Mr. Dame's
24 testimony was very, very telling. He's the
25 superintendent for the Wichita Terminal Association.

1 First of all, he testified at page 66 of the record,
2 and we've had the record transcribed, and if you have
3 it there?

4 THE COURT: I have it here.

5 MR. HOCH: I asked Mr. Dame on
6 Cross-Examination at line 18 on page 66: "Now, these
7 IT tracks, they're used for storage, correct?" And he
8 answered: "Can be, yeah." Question: "Both tracks?"
9 Answer: "Yep. Yes, sir." Question: "And they're
10 also used for through train movements, correct?" His
11 answer: "Very little, but it could be."

12 He went on to talk about the capacity issue on
13 the -- on the storage of rail cars on these tracks.

14 First point simply is, the evidence is that these
15 tracks are used for car storage.

16 Secondly, at page 74, I asked Mr. Dame about why
17 the Union Pacific and Burlington Northern couldn't
18 work out alternative arrangements, rather than parking
19 cars on these two tracks for making the hand-offs.
20 And he admitted at page 74 that the location for
21 storing cars is a union problem between the railroads.
22 There's a business issue underlying this that we've
23 heard no evidence that anybody has attempted to
24 address on the railroad side of the thing. Union
25 contract issue.

1 Third point in Mr. Dame's testimony, he testified
2 that if the storage capacity is reduced by a crossing
3 here anywhere at this location, the WTA would have to
4 build tracks elsewhere. Have we heard any evidence of
5 their efforts to identify where they might build
6 storage tracks elsewhere? No.

7 And the fourth point, Mr. Dame testified at page
8 79 that the land on the south side of the temporary
9 location, which was unilaterally selected by the
10 railroad three years ago, is a swamp, his words,
11 swamp, in which my clients are supposed to somehow be
12 able to build a road to serve the area that is
13 land-locked by the railroad on the north and by the
14 creek on the south.

15 Mr. Mooney, who's not an engineer, didn't present
16 any alternative how to make any location for a
17 crossing work. He came in as -- as has been the
18 railroad's perspective on this for the three and a
19 half, almost four years now that I've been involved in
20 the case, the railroad's perspective has been to say,
21 no, that won't work, for this reason or that reason or
22 preemption, whatever. Mr. Mooney didn't present an
23 alternative. Mr. Mooney didn't do a diagnostic study
24 that's talked about in the MUTCD and the provisions
25 that we looked at for any crossing location, Emporia

1 Court or the temporary crossing down at the pinch
2 point at the northwest corner.

3 FYG's evidence was the presentation of a solution
4 from a Kansas licensed civil engineer, Mr. Austin.
5 That's Exhibit A in the record this time around. If
6 25th Street is improved, both tracks can remain in
7 service and MUTCD-compliant signage can be erected,
8 and there can be a 41-foot wide street in the
9 right-of-way.

10 The issue, Judge, is how to handle the situation
11 before 25th Street is improved. Mr. Austin testified
12 that the dynamic envelope for the north rail of the
13 tracks currently, as it sits out there today, impedes
14 into the 25th Street right-of-way by 4.71 feet.
15 That's shown on his Exhibit A. It's measured out
16 there to where that edge of the 12-foot dynamic
17 envelope is on the north side. And -- and one of the
18 photographs that the railroad introduced is a
19 photograph of a signalman, I hope that's the correct
20 title for him, hanging off the side of the car, and it
21 looks like he's hanging out over the street. Well,
22 that's the dynamic envelope that they've talked about,
23 and that is impeding on a street.

24 Mr. Austin's opinion, and he expressed it at page
25 119 of the record, is a public crossing in full

1 compliance with the MUTCD can be built at Emporia
2 Court if the north track is abandoned, even if on a
3 temporary basis until 25th Street is improved, curbs
4 are installed, the street's paved, further north and
5 away from those two tracks that are in place.

6 The railroad has the burden on this remand of
7 showing why they're entitled to relief and an
8 alternative location crossing that's MUTCD compliant.
9 And we don't believe they've met that burden. We've
10 given you the alternatives. We've addressed
11 specifically the questions that the Court of Appeals
12 raised when it said including but not limited to
13 removal of the north track and Emporia Court. And we
14 believe there's plenty of bases here for you to make a
15 ruling.

16 What we, I think, need, Judge, from you is a
17 ruling on the location of the permanent crossing to be
18 installed. We believe that is at Emporia Court. And
19 a time, once again, for you to -- or for the railroad
20 to honor your order and to build the crossing. Last
21 time around in August of 2008, we didn't have the
22 drawings yet, and we had the 90-day trigger in the
23 injunction order after we presented the drawings.
24 We've presented the drawings. There is no evidence
25 anywhere in the record that those drawings are not

1 sufficient for the railroad to be able to build the
2 crossing. So we think that just an order saying --
3 and I believe that it's appropriate to say April the
4 1st, that's about 105 days at this point, instead of
5 just 90, in which to build the crossing, so that my
6 clients can begin to do the work to develop the piece
7 of land that they've been working for nearly 10 years
8 to do. Thank you.

9 THE COURT: Thank you. Mr. Day, I'll give
10 you the final word if you'd like.

11 MR. DAY: Just briefly, Judge. With regard
12 to Mr. Dame's testimony on page 66, just for the
13 record, Mr. Hoch didn't read the follow-up question on
14 page 67 at the top, where he says: "That's probably
15 the wrong term. What I meant to say is they're -- not
16 only are they used for storage, they're also used for
17 interchanging cars to the various industries to the
18 east." And the answer to that was: "Correct."

19 So Mr. Hoch took a section of the testimony out of
20 context on page 66 and didn't follow up with the
21 question on 67.

22 With regard to Mr. Dame's testimony about the
23 swamp, I believe the record would reflect that that is
24 property to the south of the temporary crossing as you
25 travel down that road. What was discussed in the

1 hearing was the construction of a road parallel to the
2 tracks coming up to the temporary crossing from the
3 current Emporia Court Street dedication. That is not
4 swamp land. It's the same land as the rest of the
5 property.

6 With -- and finally, Judge, just one small point
7 here, with regard to the previous set of drawings
8 submitted by the defendants, those engineering
9 drawings did not contemplate track removal. There's
10 nothing in those drawings about the testimony from
11 Mr. Austin about train -- or about lane delineation,
12 about curbing, about those types of things, so I just
13 wanted to make that point. Thank you, Judge.

14 THE COURT: Well, first of all, let me say
15 that I've had plenty of time to think about this. And
16 frankly, I haven't -- I did not hear any argument
17 that's any different than what I heard at the -- at
18 the evidentiary hearing in terms of what was presented
19 to me. Obviously, you just put it together in
20 argument form, with the exception of the argument
21 about not having subject matter jurisdiction.

22 And let me just say for the record, I'm duty-bound
23 to follow the dictates of the Court of Appeals. The
24 Court of Appeals has told me that I need to consider
25 the removal of the north track. And so I'm going to

1 do that.

2 Well, as I stated at the beginning, I'm a hundred
3 percent sure my decision is going to be appealed, so
4 this matter is not going to come to any conclusion by
5 my decision. And it's unfortunate the parties can't
6 agree on a mutually-advantageous way to settle this
7 matter.

8 Well, for the record, pursuant to the Court of
9 Appeals' remand directives of February 11th of this
10 year, the district court is ordered to decide the best
11 option for implementing the injunction in compliance
12 with the Manual on Uniform Traffic Control Devices.
13 In other words, FYG is legally entitled to ingress and
14 egress. This Court is simply ordered to decide the
15 most viable option for implementing the injunction.

16 The WTA is of the opinion that the most viable
17 option is to build a crossing at the location that was
18 referred to in the course of the evidentiary hearing
19 as the pinch point location. On the other hand, FYG
20 is of the opinion that the most viable option for the
21 crossing is at -- is at their proposed Emporia Court
22 location. The evidence shows that the pinch point
23 location -- and I'm going to make this finding, I
24 disagree with plaintiffs' counsel. I'm of the opinion
25 that the evidence showed that the pinch point location

1 is located in an area that is a low point and a
2 virtual swamp with a creek running through it. In the
3 Court's opinion, the pinch point location is not the
4 most viable access point, because of the grade and
5 swampy nature of the land at that location.

6 The evidence further shows there are two sets of
7 tracks running alongside 25th Street on the south side
8 of the road. The evidence shows that south of the
9 existing tracks, there are no businesses that would be
10 impacted if a rail line were laid south of the
11 existing tracks. The evidence shows that on the north
12 side of 25th Street, there are businesses and utility
13 poles. The Court of Appeals, in its remand order,
14 specifically stated that the trial court was to
15 consider removal of the north track at the Emporia
16 Court location.

17 Based on the evidence presented, the Court is of
18 the opinion that the removal of the north track,
19 coupled with the lane of a track south of the existing
20 tracks, is the most viable option. The removal of the
21 north track line would allow the Emporia Court
22 location to be built in compliance with the Manual on
23 Uniform Traffic Control Device, which is what this
24 Court was called upon to decide.

25 The pinch point location is not a feasible option

1 for reasons I already stated. Widening of the street
2 is not the best viable option, because of its impact
3 on the existing business owners.

4 In this Court's opinion, the new southern track
5 line could be laid prior to the removal of the north
6 track line. If done in that sequential manner, WTA's
7 concern of losing parking lot spaces, I believe that
8 was the language that was utilized at the -- in the
9 course of the evidentiary hearing, should be
10 alleviated to a great degree.

11 To summarize, the Court is ordering the crossing
12 to be located at the proposed Emporia Court location.
13 The Court is also ordering the removal of the north
14 track and the laying of a new line south of the
15 existing line.

16 Mr. Hoch is ordered to prepare an order reflecting
17 the Court's decision and circulate it for signature.

18 Now, although I believe my decision is going to be
19 appealed, Mr. Day, I want to be fair with you. How
20 quickly can this be done?

21 MR. DAY: Judge, I -- I don't know. I have
22 to confer with my clients. The construction of a new
23 set of tracks is a new wrinkle in all of this. I have
24 no idea at this point.

25 THE COURT: Well, all right. Since you

1 didn't give me a date, I'm going to order that it be
2 done by April 1st of 2012, and -- unless -- obviously,
3 unless you appeal my decision. If you don't appeal
4 it, then I assume the matter will be brought back to
5 the Court if it hasn't been done by April 1 of 2012.

6 Now, I will tell you this, I'm going to criminal
7 come January 1. I frankly don't know if I'm keeping
8 the case after January 1. It may land in another
9 judge's lap. I don't know. And that was -- that
10 happened previously. I mean, I had it initially.
11 Then it went to Judge Henderson, and then -- I don't
12 know. We'll see. I'll talk to the chief judge or the
13 administrative civil judge, or we'll see what happens,
14 but -- and you can put your two cents in. If you want
15 to go talk to them, that's up to you. I'm not asking
16 you to, but I'm sure you might want to. Of course, as
17 I sit here, I'm just using good old common horse
18 sense, I imagine Mr. Day would want a different judge,
19 and Mr. Hoch would want me to preside over it, but
20 that's for another day.

21 In any event, that's my order. Go ahead and draw
22 up the order, circulate it for signature. And if
23 there was any way the two of you could put your heads
24 together and come up with a mutually-advantageous way
25 to settle it without a third appeal, in my humble

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opinion, that would be very wise.

We're adjourned.

MR. DAY: Thank you, Judge.

MR. HOCH: Thank you, Judge.

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IN THE EIGHTEENTH JUDICIAL DISTRICT COURT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

WICHITA TERMINAL ASSOCIATION,)
BURLINGTON NORTHERN & SANTA FE)
RAILWAY COMPANY and UNION)
PACIFIC RAILROAD COMPANY,)
Plaintiffs,)
vs.) Case No. 02 CV 3688
FYG INVESTMENTS, INC. and)
TREATCO, INC.,)
Defendants.)

TRANSCRIPT OF BENCH TRIAL

Proceedings had and entered of record before the
Honorable Joseph Bribiesca, Judge of Division 22 of the
18th Judicial District, Sedgwick County, Kansas, at
Wichita, Kansas on November 21, 2011.

APPEARANCES:

The Plaintiffs, Wichita Terminal Association,
Burlington Northern & Santa Fe Railway Company and Union
Pacific Railroad Company, appeared by and through its
attorneys, Mr. K. Paul Day and Mr. Jeffrey R. King, of
Lathrop & Gage, LLP, 2345 Grand Boulevard, Suite 2200,
Kansas City, Missouri 64108-2618.

The Defendant, FYG Investments, Inc. and
TreatCo, Inc., appeared by and through its attorney, Mr.
Wyatt Hoch, of Foulston Siefkin, LLP, 1551 N. Waterfront
Parkway, Suite 100, Wichita, Kansas 678206-4466.

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1 THE COURT: Good morning.

2 MR. HOCH: Good morning.

3 MR. DAY: Good morning, Judge.

4 THE COURT: Parties ready?

5 MR. HOCH: Yes, sir.

6 MR. DAY: Yes, Your Honor.

7 THE COURT: All right. This is WTA, et al
8 vs. FYG Investments, et al, 02 C 3688. Appearances,
9 please.

10 MR. DAY: Paul Day and Jeff King on behalf
11 of the plaintiff railroads, Your Honor.

12 MR. HOCH: Wyatt Hoch here on behalf of FYG
13 Investments and Treatco, Inc. With me is Margie
14 Collins and Ken Thomas.

15 THE COURT: For the record, we're here to
16 have a trial following a remand from the Court of
17 Appeals. Would either party care to make an Opening
18 Statement?

19 MR. DAY: Judge, based upon our discussions
20 in chambers, I don't think that's necessary at this
21 point, and I'm willing just to proceed with my
22 evidence today.

23 THE COURT: All right. So you're waiving.
24 Mr. Hoch, are you waiving?

25 MR. HOCH: I will. Thank you.

1 THE COURT: All right. Call your witness.

2 MR. DAY: Thank you, Your Honor. Your
3 Honor, the railroads call Mr. Richard Mooney.

4 THE COURT: Mr. Mooney, please come forward,
5 be sworn.

6 **RICHARD T. MOONEY,**
7 called as a witness on behalf of the Plaintiffs, having
8 first been duly sworn, testified as follows:

9 MR. DAY: Judge, what I've done on exhibits,
10 I've marked all my photographs, I have copies for my
11 witness, I have copies for Mr. Hoch and copies for the
12 Court. I have a few blow-ups, but what I intended to
13 do as I go through the examination, just get everybody
14 copies of the exhibits that I'll be utilizing.

15 THE COURT: All right.

16 MR. DAY: Would you like me to lay the
17 foundation and get them into evidence before you look
18 at them or --

19 THE COURT: Well, it depends. Did you --
20 did the -- the two of you get together and --

21 MR. DAY: No.

22 THE COURT: Are you -- you're not in a
23 position to stipulate to exhibits?

24 MR. DAY: We haven't done that yet.

25 THE COURT: All right. You'll just have to

1 do it via examination.

2 MR. DAY: I'll do it, Your Honor.

3 DIRECT EXAMINATION

4 BY MR. DAY:

5 Q. Would you tell the Court your name, please.

6 A. Richard T. Mooney.

7 Q. And, Mr. Mooney, where do you live?

8 A. I live 2300 Yorktown Drive, Jefferson City, Missouri.

9 Q. And what is your occupation?

10 A. I'm a railroad safety consultant.

11 Q. Let me hand you what I've marked as Plaintiffs'

12 Exhibit No. 1 for this hearing. You recognize the
13 exhibit?

14 A. Yes.

15 Q. What is it?

16 A. It's my resume.

17 MR. DAY: And, Judge, I'd offer Mr. Mooney's
18 resume, Plaintiffs' Exhibit 1.

19 MR. HOCH: No objection.

20 THE COURT: Any objection?

21 All right. Plaintiffs' 1 shall be admitted.

22 Q. (By Mr. Day) Thank you. And would you go through
23 your educational background for us.

24 A. I received my B.S. in education from Central Missouri
25 State in 1971 and stayed -- realized I didn't want to

1 be a teacher, so I stayed on, got my master's in
2 safety in 1972. And upon completion of that, was --
3 received my first job with the Missouri Public Service
4 Commission.

5 Q. All right. Let's go through your work history.
6 What -- what was the Missouri Public Service
7 Commission?

8 A. It was involved in a utility and transportation
9 regulation in the state of Missouri.

10 Q. And when did you first go to work for the Missouri
11 PSC?

12 A. In October of 1972.

13 Q. What was the position that you held when you first
14 went to work for 'em?

15 A. It was a railroad safety specialist position.

16 Q. What were your duties in that position?

17 A. To go out and inspect crossings for complaints of
18 accident investigation, look at crossings in need of
19 improvement, warning devices, vegetation complaints,
20 the general safety of the public at railroad crossings
21 in Missouri.

22 Q. And how long did you hold that position for -- at the
23 Missouri PSC?

24 A. Right at 10 years.

25 Q. And did you move on at that point, change positions;

1 what happened?

2 A. Yes. I was promoted to the manager of the Rail Safety
3 Department.

4 Q. At the Missouri PSC?

5 A. Yes.

6 Q. And explain for the Court, if you would, your duties
7 as the manager of rail safety at the Missouri PSC.

8 A. Administered the rail program in the state, which we
9 had crossing safety, hazardous material, track safety
10 program, employees' safety, had eventually, then,
11 light rail safety in St. Louis, and education programs
12 that we designed for the public called Operation
13 Lifesaver.

14 Q. And how long did you hold that position?

15 A. For 18 years.

16 Q. Until 2000?

17 A. Yes.

18 Q. And did you retire at that point from the Missouri
19 PSC?

20 A. Yes. There was an early retirement program, and I
21 retired in 2000.

22 Q. And what have you been doing since your retirement?

23 A. Been doing various consulting, rail safety consulting
24 for the railroads and the cities and the Operation
25 Lifesaver program.

1 Q. Would you tell the Court some more detail about that
2 consulting work for -- for railroads.

3 A. Well, I've been doing a lot right now with the Kansas
4 City Southern Railway, working with a signal design
5 company out of Kansas City that we -- we design
6 crossing signals and get them installed for the -- the
7 Kansas City Southern Railway. Also worked in various
8 capacities with the Union Pacific and Burlington
9 Northern on crossing closure programs, and then
10 with -- doing quiet zones, developing the application
11 for cities to -- to install quiet zones within their
12 community, and then coordinate -- as a state
13 coordinator for Missouri Operation Lifesaver, as well
14 as the executive director for that program.

15 Q. All right. In your work as a railroad safety
16 specialist at the Missouri PSC, did that involve going
17 out and inspecting locations for proposed railroad
18 crossings?

19 A. Yes, it did.

20 Q. Did it involve designing signal systems for railroad
21 crossings?

22 A. In -- yes, determining what type of signals should go
23 in, not actually the design of the electric -- you
24 know, the electronics involved.

25 Q. Sure. Your role was to determine where the signal

1 systems should go with respect to the public roadway
2 and -- and the railroad tracks?

3 A. Right, what the public is going to see and how those
4 warning devices should -- should operate.

5 Q. All right. You've heard the term diagnostic review of
6 a public grade crossing. What is that?

7 A. That's where all parties involved, would be the state,
8 D.O.T., the city, whoever wants the crossing in the
9 railroad, would come together to make a determination
10 to look at all the facts and location at the crossing,
11 make a determination what exactly should -- should
12 happen at that crossing, what type of warning, how the
13 roadway would be designed, and everything involved
14 about the aspects of the crossing would -- would be
15 discussed and make a determination at that time for
16 the benefit of all parties.

17 Q. Have you been to the proposed Emporia Court crossing
18 on the WTA interchange here in Wichita?

19 A. Yes, I have.

20 Q. Let me show you what I've marked for purposes of this
21 hearing as Exhibit No. 19.

22 MR. DAY: Judge, I think this was admitted
23 into evidence in a previous case, but I'd go ahead and
24 offer Plaintiffs' 19.

25 Wyatt, do you have any objection?

1 MR. HOCH: No.

2 THE COURT: All right. Plaintiffs' 19 shall
3 be admitted.

4 Q. (By Mr. Day) And what is Plaintiffs' 19, Mr. Mooney?

5 A. It's the aerial view of the vicinity of 25th Street
6 and TreatCo Industrial Complex.

7 MR. DAY: Can the Court see that, or would
8 you like him to step up?

9 THE COURT: Well, I can see it, but I can't
10 see it in exact detail. If you want --

11 MR. DAY: Would you like us to move closer
12 to you?

13 THE COURT: No. You're fine.

14 Q. (By Mr. Day) All right. Would you -- would you just
15 point out the general geographic locations that are
16 involved here at the 25th Street area and the proposed
17 Emporia Street crossing?

18 A. Well, to the bottom is Broadway Street, Avenue,
19 whatever. Up at the very left corner is 25th Street
20 that runs east and west, and then the railroad track,
21 the IT, interchange track curves and parallels 120 --
22 or 25th Street.

23 Q. Whose tracks are these that run parallel to Broadway?

24 A. Those are the BNSF Railway.

25 Q. And is the BNSF interchange over the WTA tracks that

1 run along 25th Street?

2 A. Yes.

3 Q. All right. And the Emporia Court crossing, where is
4 the proposed location at this point?

5 A. Would be several hundred feet from the Burlington
6 Northern tracks, probably five, six -- 600 feet to the
7 best of -- of my knowledge, where it would be, 'cause
8 we didn't see an exact location.

9 Q. All right.

10 THE COURT: Sir, there is a pointer there in
11 front of you. You can't see it, but would you please
12 use that?

13 MR. DAY: You want me to use it, Judge, or
14 you want the witness to use it?

15 THE COURT: Whichever is more convenient.

16 Q. (By Mr. Day) All right. Where is -- okay. The
17 Burlington -- Burlington Northern Santa Fe tracks run
18 parallel to Broadway, and where is the switch located
19 to switch tracks from BNSF onto the WTA interchange?

20 A. Well, the first is right here on the west side of the
21 property (indicating), and then they come around, and
22 there's a switch -- there's a little temporary private
23 crossing right there, just on the east side of that,
24 there's a switch for -- there's two tracks in this
25 area (indicating).

- 1 Q. All right. That I'm -- that's where I'm going. I
2 want to locate -- I want you to locate for the Court
3 where the current temporary private crossing is
4 located, relative to this two switches that you just
5 mentioned.
- 6 A. Okay. It is just on the west side of the -- of this
7 switch right here (indicating).
- 8 Q. All right. So the Emporia Court crossing crosses how
9 many sets of tracks?
- 10 A. Two.
- 11 Q. And --
- 12 A. Would be two -- two tracks.
- 13 Q. Would be two. And the temporary crossing to the west
14 crosses how many sets of tracks?
- 15 A. One.
- 16 Q. Why is that?
- 17 A. Because the switch, this is the interchange track,
18 it's kind of the lead track that comes over, and then
19 there's, you know, second track where they can store
20 cars and will hand off to each other.
- 21 Q. Okay. So temporary crossing would be west of the east
22 switch to the interchange?
- 23 A. Correct.
- 24 Q. All right. Thank you. Told us earlier you have been
25 to -- been to the location, correct?

1 A. Yes.

2 Q. When was that?

3 A. On November the 1st and November 20th.

4 Q. Yesterday?

5 A. Yes.

6 Q. Did you take some measurements?

7 A. Yes, I did.

8 Q. Did you take some photographs?

9 A. Yes, I did.

10 Q. All right. Before we get into those measurements and
11 those photographs, I want to talk to you about the
12 MUTCD, the Manual on Uniform Traffic Control Devices.
13 Let me hand you what I've marked as Plaintiffs'
14 Exhibit 2. Would you identify that document?

15 A. That's the 2009 Edition of the Manual on Uniform
16 Traffic Control Devices.

17 MR. DAY: Judge, I'd offer Plaintiffs'
18 Exhibit 2.

19 THE COURT: Any objection to the manual?

20 MR. HOCH: No, sir.

21 THE COURT: All right. Plaintiffs' 2 shall
22 be admitted.

23 Q. (By Mr. Day) What -- what is the MUTCD, Mr. Mooney?

24 A. It's basically kind of the engineering bible for
25 traffic signals and signs in the United States.

1 Q. Now, is Exhibit 2 the entire manual?

2 A. No.

3 Q. All right. Is it a portion of the manual?

4 A. Yes.

5 Q. Which portion?

6 A. It's part 8, or Chapter 8, which deals with railroad
7 crossings and light rail crossings.

8 Q. All right.

9 THE COURT: Let's put on the record --
10 excuse me. Let's put on the record -- that's
11 obviously an acronym. Let's put on the record what it
12 means.

13 THE WITNESS: It's the Manual on Uniform
14 Traffic Control Devices.

15 THE COURT: Thank you, sir.

16 THE WITNESS: It's abbreviation, just MUTCD.

17 Q. (By Mr. Day) To your knowledge, Mr. Mooney, has that
18 been adopted as law in the state of Kansas?

19 A. I -- it's -- yes. It has in the past. Whether or not
20 they've updated to this current edition, I -- I don't
21 know if the state has, but I know Wichita has.

22 Q. Okay. Well, that's my next question. Has the city of
23 Wichita, by city ordinance, adopted whatever the most
24 recent edition is of the MUTCD?

25 A. It's my understanding they have.

1 Q. And just generally, at railroad crossings, what are
2 the different types of warning devices that are called
3 for under the Manual on Uniform Traffic Control
4 Devices?

5 A. Well, the very basic is the crossbuck, which is the
6 railroad crossing sign, black on white. And now with
7 that, it's either a yield sign or stop sign. That's
8 the minimum. Then the flashing light, the next would
9 be if it's -- that's a passive crossing. If it's an
10 active crossing, that is advise the motoring public if
11 a train is approaching, would be flashing light
12 signal, or a cantilevered flashing light signal, which
13 is out over traffic lanes, flashing light signal and
14 gate, or even flashing light signal and gate that have
15 four quadrant gates.

16 Q. So passive would be basically a sign; active would be
17 the lights and gates that come down?

18 A. Correct.

19 Q. And I didn't ask you this earlier, but when you
20 inspected the proposed Emporia Court location for the
21 crossing there, did you essentially do a diagnostic?

22 A. No.

23 Q. All right. What was the purpose of your visit there?

24 A. To look at the location, examine it and see if this
25 would be a good location for a proposed crossing.

- 1 Q.- All right. The Manual on Uniform Traffic Control
2 Devices, does it -- does it have standards that govern
3 how close or how far the warning signs, the crossbuck
4 and the yield sign you mentioned earlier, are to be
5 from the railroad tracks involved?
- 6 A. Yes.
- 7 Q. All right. Hand you what I've marked as Plaintiffs'
8 Exhibit 5. Is that a photo you took?
- 9 A. Yes.
- 10 Q. When did you take it?
- 11 A. On November 1st.
- 12 Q. Who's the gentleman in the photograph?
- 13 A. He's the -- a survey crew with BNSF Railway.
- 14 Q. All right. He's a BNSF employee, to your knowledge?
- 15 A. Yes.
- 16 Q. And what was the purpose in taking this photo?
- 17 A. To show where the location of -- the minimum location
18 for the crossbuck would be located.
- 19 MR. DAY: Judge, I'd offer Plaintiffs'
20 Exhibit 5.
- 21 THE COURT: Any objection?
- 22 MR. HOCH: No, sir.
- 23 THE COURT: All right. Plaintiffs' 5 shall
24 be admitted.
- 25 Q. (By Mr. Day) And Plaintiffs' Exhibit 5, Mr. Mooney,

1 again, the gentleman is holding a survey stake. What
2 is that location supposed to represent in Plaintiffs'
3 Exhibit 5?

4 A. That is located 12 feet from the center line of the
5 north track and would be the closest that a crossbuck
6 could be placed.

7 Q. All right. And that is per the 12-foot requirement
8 under the Manual on Uniform Traffic Control Devices?

9 A. Yes.

10 Q. And that crossbuck would then be in the eastbound lane
11 of travel of 25th Street, correct?

12 A. Yes.

13 Q. All right. Let me hand you what I've marked as
14 Plaintiffs' Exhibit No. 6. Would you identify that
15 photo?

16 A. That's taken from the other direction, looking east as
17 a truck was approaching, westbound lane.

18 Q. And did you take the photo?

19 A. Yes.

20 Q. And again, is this BNSF employee 12 feet from center
21 line of rail?

22 A. Well, the stake is 12 feet. He's a little bit
23 further.

24 Q. Exactly.

25 MR. DAY: Judge, I'd offer Plaintiffs'

1 Exhibit 6.

2 THE COURT: Any objection?

3 MR. HOCH: No, sir.

4 THE COURT: All right. Plaintiffs' 6 shall
5 be admitted.

6 Q. (By Mr. Day) Once again, that's similar to 5, just on
7 the other side of the gentleman and looking eastbound,
8 correct?

9 A. Yes, sir.

10 Q. Let me hand you what I've marked as Plaintiffs'
11 Exhibit No. 8. You recognize that photograph?

12 A. Yes.

13 Q. Did you take it?

14 A. Yes.

15 Q. When did you take it?

16 A. This was on November 1st of this year.

17 Q. And was I with you on that day?

18 A. Yes.

19 Q. And is that my briefcase in the middle of the road?

20 A. Yes, sir.

21 Q. How far is the center of that briefcase from the
22 center line of the tracks?

23 A. Twelve feet.

24 MR. DAY: Judge, I'd offer Plaintiffs'

25 Exhibit 8.

1 THE COURT: Any objection?

2 MR. HOCH: No, sir.

3 THE COURT: All right. Plaintiffs' 8 shall
4 be admitted.

5 Q. (By Mr. Day) Once again, does that show that the
6 location of the crossbuck under the minimum 12-foot
7 requirement would block the lane of travel?

8 A. Yes. Would obstruct -- be an obstruction inside that
9 lane.

10 Q. And Plaintiffs' Exhibit No. 11, can you identify that
11 photo?

12 A. Yes. That's taking from -- taken from the opposite
13 direction, looking to the west.

14 Q. And once again, the -- the photos we've been looking
15 at are the -- the -- as you understand it, the
16 approximate location of the Emporia Court crossing,
17 correct?

18 A. Yes.

19 Q. And on exhibit -- Plaintiffs' Exhibit 11, once again,
20 how far is my briefcase from the center line of the
21 north track of the interchange?

22 A. Twelve feet.

23 MR. DAY: Judge, I'd offer Plaintiffs' 11.

24 THE COURT: Any objection?

25 MR. HOCH: I've just now seen it.

1 THE COURT: All right.

2 MR. HOCH: No objection.

3 THE COURT: All right. Plaintiffs' 11 shall
4 be admitted.

5 Q. (By Mr. Day) Now, Mr. Mooney, in Plaintiffs' Exhibit
6 11, does that show a situation that causes you
7 concern?

8 A. Yes.

9 Q. And what -- what is it about the photo that causes you
10 concern?

11 A. Well, if the crossbuck is -- was there, crossing was
12 in, it's going to be in the lane of -- the eastbound
13 lane of travel.

14 Q. All right. And it shows a truck that's pulled off --
15 pulled over into the westbound lane to pass the -- the
16 other vehicle that's there?

17 A. Correct.

18 Q. Is that a concern of yours?

19 A. Yes.

20 Q. Is it a safety -- go ahead.

21 A. Well, there's not enough room on that roadway if the
22 crossbuck is out there.

23 Q. Is that a hazardous -- hazardous situation in your
24 mind?

25 A. It would be, yes.

- 1 Q. In your opinion, is this a -- a safe location for a
2 railroad grade crossing?
- 3 A. No.
- 4 Q. Is it an appropriate location?
- 5 A. No.
- 6 Q. Why not?
- 7 A. Because of the two tracks, getting into that -- into
8 the crossing when you have to the west of it over a
9 single track to be able to get into that area of need.
- 10 Q. Are there also industry standards for the placement of
11 these warning devices?
- 12 A. Yes.
- 13 Q. Incidentally, before we -- I'm sorry. Before we talk
14 about the industry standards, what is an advance
15 warning sign?
- 16 A. It's a -- well, either diamond shape or circular
17 black-on-yellow sign that says railroad crossing, or
18 implies a railroad crossing is in advance.
- 19 Q. All right. Is there an example of advance warning
20 sign contained in Plaintiffs' Exhibit 2?
- 21 A. Yes.
- 22 Q. And would you tell the Court which page that is on.
- 23 A. As soon as I can find it here. On page 759, about 12
24 pages back.
- 25 Q. And based on the proposed Emporia Court location under

- 1 the MUTCD, would there be a requirement for an advance
2 warning sign along 25th Street both east and west of
3 the crossing --
- 4 A. Yes.
- 5 Q. -- under the MUTCD?
- 6 A. Excuse me. Yes.
- 7 Q. And which sign is that on page 759?
- 8 A. It would be the -- the 10-3.
- 9 Q. And is there --
- 10 A. W -- excuse me, W10-3.
- 11 Q. W10-3 on 759. And is -- under the MUTCD, is there a
12 requirement, how far back from the crossing, either
13 east or west, that sign would have to be to give the
14 motorist advanced warning?
- 15 A. There's a guideline, kind of, that would be based on
16 the speed of that roadway, it would -- you know, from
17 roughly 100 to 200 feet away.
- 18 Q. All right. So at that location, it would still have
19 to be -- would it have to be adjacent to the
20 interchange track?
- 21 A. Yes, it would.
- 22 Q. And do the same clearance requirements with regard to
23 the 12 feet under the MUTCD apply to those advance
24 warning signs as well?
- 25 A. It would, yes.

1 Q. And we didn't have a picture of that, but would that
2 sign post also be out in the eastbound lane of travel,
3 the eastbound lane of travel on both sides of the
4 crossing?

5 A. As the roadway exists now, yes, it would.

6 Q. Is that a hazardous situation?

7 A. Yes, it would be.

8 Q. Why?

9 A. Because it's going to be just a pole out there in
10 your -- your traveled roadway, and it's probably going
11 to get knocked down very quickly.

12 Q. Okay. Why not just put these signs closer to the
13 tracks?

14 A. Because there's -- you know, you're in violation of
15 the MUTCD putting it any closer than 12 feet from the
16 center line of the train.

17 Q. What are the safety hazards involved with placing it
18 closer to the tracks in violation of the MUTCD?

19 A. Well, one, the vehicle is getting close to the car,
20 and the -- there's a thing called a dynamic envelope
21 of the train, which basically extends out about six
22 feet beyond rail, which would be, like, eight feet six
23 inches from the center line of the track. And
24 anything within that is prohibited by, you know,
25 railroad standards, because it could get, you know,

- 1 struck by the -- the car, or if a car man is on --
2 riding on the side of the car, which in this area they
3 would be.
- 4 Q. So WTA or BNSF employees actually hang on the side of
5 these cars as they move across the interchange?
- 6 A. Yes.
- 7 Q. And one of the reasons for that clearance issue is to
8 protect the trainmen from hitting the sign --
- 9 A. Yes.
- 10 Q. -- on a moving train, correct?
- 11 A. Yes, sir.
- 12 Q. All right. Sorry I got side-tracked there, but I want
13 to talk to you about industry standards for placement
14 of these signs. We talked about the requirements
15 under the MUTCD. Are there also separate industry
16 standards with regard to how close these signs can be
17 to the tracks?
- 18 A. Yes.
- 19 Q. Have you done any consulting work for BNSF and UP?
- 20 A. Yes, I have.
- 21 Q. What kind of consulting work have you done for them?
- 22 A. On different crossing concerns, on crossing closings,
23 on difficult crossings, on what type signals to
24 install, and involved in quiet zones.
- 25 Q. Okay. Would that include determining how far under

1 these industry standards these signs should be from
2 the tracks?

3 A. Yes, what's the best location for the signage.

4 Q. All right. MUTCD is 12 feet. What is the industry
5 standard with regard to the distance a crossbuck needs
6 to be from a set of railroad tracks?

7 A. It's -- normally, it's 15 feet from the near rail --

8 Q. All right.

9 A. -- the post would be set in the ground, 15 feet from
10 the near rail, where the post would be set in the
11 ground.

12 Q. All right. Now, earlier you talked about these yield
13 signs being installed next to or underneath the
14 crossbucks; you remember that testimony?

15 A. Yes.

16 Q. Is there a new requirement under the MUTCD that a
17 yield sign, in conjunction with a crossbuck sign, has
18 to comply with the 15-foot industry standard rather
19 than the 12-foot MUTCD standard?

20 A. Yes. First of all, there's the new requirement in the
21 2009 Edition was to shall -- a crossbuck shall have
22 either a yield sign or a stop sign placed either on it
23 or beside it, depending on the circumstances. And
24 then if it -- if it is either one of those signs, and
25 the default is the yield sign if no decision is made,

1 then they -- those need to be 15 feet from a near
2 rail.

3 Q. Let me hand you what I've marked as Plaintiffs'
4 Exhibit 13. You recognize that photograph?

5 A. Yes.

6 Q. What is it?

7 A. Those -- that's a photograph taken yesterday showing
8 the 15-foot cone where the -- the crossbuck would be
9 located and the yield sign.

10 Q. Did you take the photograph?

11 A. Yes, I did.

12 Q. And was I with you yesterday?

13 A. Yes, you were.

14 Q. Is that my car in the photograph?

15 A. Yes. That's your brand new car.

16 MR. DAY: Judge, I'd offer Plaintiffs'
17 Exhibit 13.

18 THE COURT: Any objection?

19 MR. HOCH: No, sir.

20 THE COURT: All right. Plaintiffs' 13 shall
21 be admitted.

22 Q. (By Mr. Day) The -- as you face the photograph, the
23 cone nearest the tracks, what measurement is that from
24 the rail?

25 A. The cone on the left is 15 feet from the near rail.

1 Q. And the cone on the right?

2 A. Seventeen feet.

3 Q. And why did you put a cone 17 feet from the rail?

4 A. Well, that second cone would depict if -- you can't
5 just put a crossbuck out there in that roadway, 'cause
6 it's not going to last very long. So my
7 recommendation if a crossing went there, that that
8 second cone would depict where the edge of the curb
9 would be, 'cause the curb would need to be constructed
10 alongside that -- that track.

11 Q. Why do you need a curb?

12 A. Well, the requirement for -- on the crossing for the
13 crossbuck would have -- it needs to be two -- roughly
14 two feet three inches from the edge of the crossbuck
15 sign to the face of the curb. So that when a motorist
16 would be going across the crossing, there -- you know,
17 if they're up against a curb, their side mirror is not
18 going to hit the -- the crossbuck. And in this case,
19 even though the crossbuck would be flat, you know,
20 that you'd see as -- coming on 25th Street, say, if
21 you were approaching on the eastbound lane, you'd need
22 also two feet away from the crossbuck so that your
23 rear view -- or your outside mirror would not hit the
24 crossbuck, so it needs to be out there, you know, two
25 feet away from the curb.

- 1 Q. Okay. Exhibit -- Plaintiffs' Exhibit 13, under the
2 MUTCD requirements with regard to yield signs and with
3 regard to industry standards, you're at the location
4 of the Emporia Court crossing, the crossbuck and yield
5 sign is basically in the middle of 25th Street, isn't
6 it?
- 7 A. Yes.
- 8 Q. Is that hazardous?
- 9 A. Yes.
- 10 Q. Why is it hazardous?
- 11 A. Well, it's going to be sitting out right in the middle
12 of a roadway, and people are not going to know where
13 to -- to drive around it, how is it protected. You're
14 going to put barriers around it, it would be in an
15 island out there and all by itself for -- between it
16 and the yield sign.
- 17 Q. Generally not appropriate to put warning signs out in
18 the middle of a public road?
- 19 A. No.
- 20 Q. Let me hand you what I've marked as Plaintiffs'
21 Exhibit 3-A. Take that back. 3-A is the blow-up.
22 Let me hand you what I've marked as Plaintiffs'
23 Exhibit 3. What is -- or I should say, what are
24 Plaintiffs' Exhibit 3 and Plaintiffs' Exhibit 3-A?
- 25 A. It -- this -- this is the drawing that was provided by

1 the defendant, and then we put -- or the BNSF Railway
2 surveying crew put additional data in there, based on
3 what information I found when I visited the first
4 time.

5 Q. Okay. A diagram provided by the defendant was used to
6 create this?

7 A. Yes.

8 Q. Was Plaintiffs' Exhibit 3 done at your direction?

9 A. Yes.

10 Q. At your request?

11 A. Yes.

12 Q. Were you present when the BNSF survey crew was
13 surveying the area for purposes of creating this
14 exhibit?

15 A. Yes.

16 Q. And have you relied on it?

17 A. Yes.

18 Q. Would it assist you in illustrating the existing
19 conditions of 25th Street and the proposed Emporia
20 Court crossing?

21 A. Yes.

22 MR. DAY: Judge, I'd offer Plaintiffs'
23 Exhibit 3.

24 THE COURT: Any objection?

25 MR. HOCH: Yes, sir. Foundation and

1 hearsay. This drawing was not developed by this
2 witness.

3 THE COURT: What do you have to say?

4 MR. DAY: Judge, it was done at his
5 direction. He was present when the survey work was
6 done. He's relied on it in formulating his opinions,
7 and he's testified that it would assist him in
8 explaining to the Court his opinions and the current
9 condition of the -- of the location. He is an expert.
10 He can rely on hearsay evidence. I think I've laid
11 enough foundation to get it in.

12 THE COURT: Well, I think your objection
13 goes more to weight than it does admissibility. I'll
14 go ahead and allow it.

15 MR. HOCH: May I ask a couple voir dire
16 questions before you do that?

17 THE COURT: Absolutely.

18 **VOIR DIRE EXAMINATION**

19 **BY MR. HOCH:**

20 Q. Mr. Mooney, are you a licensed civil engineer?

21 A. No.

22 Q. Licensed any kind of engineer?

23 A. No.

24 Q. Licensed surveyor in the state of Kansas?

25 A. No.

1 Q. What kind of software was this drawing prepared on?

2 A. I -- I don't know.

3 Q. Who -- the name of the individual who prepared this?

4 A. Bitley (phonetic). I'm sorry. I can't remember his
5 last name with the BNSF out of Kansas City.

6 Q. Do you know whether he's an engineer?

7 A. He is. Yes.

8 Q. In the state of Kansas?

9 A. I believe so. Yes.

10 MR. HOCH: Well, Judge, I am -- still have
11 same objections. It's hearsay.

12 THE COURT: All right. Your objection is
13 noted. I'll give it what weight I deem appropriate.
14 It's overruled.

15 MR. DAY: And that -- I don't know what I
16 said, Judge, but I meant to offer 3 and 3-A. 3-A is
17 identical, just a blow-up, just for the record.

18 THE COURT: All right. Then Mr. Hoch's
19 objection will be noted. I'll go ahead and allow 3-A.

20 **FURTHER DIRECT EXAMINATION**

21 **BY MR. DAY:**

22 Q. All right. Let's go through the different locations
23 here on Plaintiffs' 3-A. You show the Court the
24 proposed Emporia Court crossing?

25 A. Yes.

- 1 Q. Where is that?
- 2 A. It's right here (indicating).
- 3 Q. All right. And where are the two WTA interchange
4 tracks?
- 5 A. Here's -- the track starts here (indicating), and
6 here's the south one (indicating), and the north one
7 comes right there (indicating). It's on this red
8 line.
- 9 Q. Okay. And the current edge of the gravel pavement,
10 where is that on Exhibit 3-A?
- 11 A. It's somewhere just short -- just to the south of this
12 yellow and black line.
- 13 Q. All right. That's -- that would be the south edge of
14 25th Street along the tracks?
- 15 A. Yes.
- 16 Q. And where -- what line represents the north edge of
17 25th Street of the gravel pavement?
- 18 A. This green dashed line (indicating).
- 19 Q. All right. And the blue line, where does that -- what
20 is that?
- 21 A. That would be the curb line that -- that I would
22 recommend putting in if you're going to put this
23 crossing in.
- 24 Q. This -- this blue line here (indicating)?
- 25 A. Yes.

1 Q. Okay. And the blue line to the north, what's that
2 line?

3 A. That would be kind of where the edge if taken -- the
4 roadway, if it's a 40-foot roadway, that would be the
5 north edge of the pavement, or the gravel on the north
6 side.

7 Q. Okay. Is that -- is that the practical location of
8 the north side of the road today?

9 A. No.

10 Q. What are these objects sitting here (indicating)?

11 A. Those are vehicles parked that are going to work at
12 this -- these industries.

13 Q. Is there a fence here (indicating)?

14 A. Yes.

15 Q. Where is the fence located?

16 A. That's the red, just on the north side a couple feet
17 of the road -- of the blue, where the proposed north
18 edge of the roadway would be.

19 Q. Are there also utility poles on the north side of 25th
20 Street?

21 A. Yes.

22 Q. Where are they located?

23 A. They're located just on the -- just a couple feet on
24 the north edge of the current roadway now, where these
25 red dots --

1 Q. The red dots on the diagram?

2 A. Yes.

3 Q. Okay. All right. Thank you.

4 Let me hand you what I've marked as Plaintiffs'

5 Exhibit 4. What is Plaintiffs' Exhibit 4?

6 A. That's a little drawing I made and sent to your office
7 of the -- depicting my recommendations at the
8 crossing.

9 Q. All right.

10 MR. DAY: Judge, I'd offer Plaintiffs'
11 Exhibit 4.

12 THE COURT: Any objection to 4?

13 MR. HOCH: No objection.

14 THE COURT: All right. Plaintiffs' 4 shall
15 be admitted.

16 MR. DAY: Judge, I've also -- also blown
17 this up. I won't offer this into evidence, but I'm
18 going to use it for demonstrative purposes. I've got
19 the same exhibit sticker on it.

20 You have any objection to that, Wyatt?

21 MR. HOCH: No, sir.

22 THE COURT: Have you reviewed it?

23 MR. HOCH: It's just an enlargement of
24 Exhibit 4 that's been introduced and admitted. I'm
25 fine with the blow-up.

1 THE COURT: All right.

2 MR. DAY: It is.

3 THE COURT: All right. Go ahead.

4 Q. (By Mr. Day) Okay. Now, Mr. Mooney, utilizing
5 Exhibit 4, can you show to the Court the clearance
6 issues that we've been discussing?

7 A. Yes. Here's the two tracks, and in this dash line
8 that I put in would be the -- what's known as the
9 dynamic envelope. It's -- be six feet from the edge
10 of the rail, or eight feet six inches from the center
11 of that north track, where nothing should be in there
12 at all for the protection of the employees on the rail
13 and to keep vehicles from getting hit by the train.
14 And then this location of the crossbuck signs, and
15 also there would be a yield sign beside it, would be,
16 you know, 15 feet from the near edge, and then the
17 curb would be out there at -- at 17 feet from the near
18 edge of the rail.

19 Q. Okay. And once again, those are in the lanes of
20 travel of 25th Street at this -- at this point today?

21 A. Yes.

22 Q. Now, this line at the top of the diagram that's
23 measured 41 feet from the curb line that you've drawn
24 in, what line is that?

25 A. That would be where the -- if this crossing were put

1 in, where the north edge of the roadway should be
2 located.

3 Q. Okay. Is it where the north edge of the roadway is
4 located today?

5 A. No.

6 Q. All right. Can you -- I want you to draw on this, if
7 you can. See if I have a marker. Approximately,
8 where is the north edge of 25th Street today --

9 A. Can I --

10 Q. -- the effective lanes of travel of 25th Street?

11 A. Can I get on this other side?

12 Q. Sure.

13 THE COURT: Keep the court reporter in mind
14 wherever you stand. Be sure and speak loud enough so
15 she can hear you.

16 A. It approximately would be right in through here
17 (indicating).

18 Q. (By Mr. Day) Okay. Is that a clearly-defined edge of
19 roadway at this location?

20 A. No.

21 Q. What's the crossing -- or the road surface 25th
22 Street?

23 A. It's gravel, clay.

24 Q. All right. So if I understand your testimony, and
25 we're -- for this crossing to work under the MUTCD and

1 under-industry standards, 25th Street has to be moved
2 some distance to the north?

3 A. Yes.

4 Q. How far?

5 A. It's approximately 20 feet.

6 Q. Okay. Do you know what the 250-foot rule is under in
7 the railroad industry?

8 A. Yes. It's a site distance obstruction rule that
9 requires railroads to keep vegetation and any debris,
10 material back 250 feet from the crossing as well as
11 any stored railroad cars from the edge of the crossing
12 back 250 feet in each direction.

13 Q. All right. Did you measure the length of the IT
14 tracks --

15 A. Yes.

16 Q. -- along 25th Street?

17 A. Yes.

18 Q. How did you measure 'em?

19 A. I had a roller wheel.

20 Q. A what?

21 A. Roller wheel. Measuring wheel.

22 Q. How does that work?

23 A. It's -- you -- just has a little wheel, and you roll
24 it, and it measures the feet by actually inches and
25 records it in footage.

1 Q. All right. And how long is the interchange?

2 A. Well, from switch to switch, it's probably close to a
3 thousand feet, from the west switch to the east
4 switch. What I was looking at were the -- kind of
5 the -- the clearance areas where the -- the -- the
6 track -- where the two tracks come together, they
7 would be fouling each other, so that you couldn't set
8 a car closer on one track to that close enough to the
9 switch, because it would interfere with -- get too
10 close to the second track as it angles in towards it.

11 Q. Utilizing Plaintiffs' 3-A, can you illustrate that for
12 the Court?

13 A. Well, at this -- let's just say at the west end where
14 the switch comes off, you can't put these cars up real
15 close to the switch, because they'll hit each other.
16 And it was about -- probably a distance of, I'm just
17 guessing from there, maybe 125 feet from the switch
18 before the first clearance would be obtained where you
19 could set that car. So to answer your first question,
20 from the clearance point there on the west end to the
21 east end was right at 850 feet.

22 Q. All right. And if there is a crossing, Emporia Court
23 crossing as shown on Exhibit 3-A, if that's
24 constructed, how does the 250-foot rule work?

25 A. Well, anything from this edge of the crossing in each

1 direction, 250 feet back here and 250 feet to the
2 east, will have to be kept clear when they come in and
3 store cars.

4 Q. And that's so motorists who could be making a right or
5 left onto Emporia Court can see down the tracks and
6 make sure a train is not coming?

7 A. That's correct.

8 Q. The law in Kansas is that the distance must be
9 reasonable --

10 A. Yes.

11 Q. -- by Kansas statute. Do you have an opinion, based
12 on your training and experience, work history, what is
13 a reasonable distance that cars should be moved back
14 from the crossing?

15 A. Well, it's going to vary on your speed of your trains,
16 but 250 is a good minimum distance for the crossing
17 such as this and speeds that would be a good distance
18 to have it cleared. If you're at a higher speed, then
19 you're going to need more of a visibility.

20 Q. Okay. If the train speeds at this location, 250 feet,
21 you think, is reasonable?

22 A. Is adequate, yes.

23 Q. All right. Is that the law in other states?

24 A. Yeah -- mostly it's 250. There's some exceptions
25 where it's -- some states have a little bit longer.

- 1 Q. All right. When you measured the length of the
2 interchange track at clearance points at 850 feet,
3 were you able to make a calculation as to the storage
4 capacity of those two tracks with regard to rail cars?
- 5 A. Yes.
- 6 Q. And how did you do that?
- 7 A. Well, really went from the center of the roadway,
8 which the roadway is going to be 41 feet wide, so it
9 went to the middle, and the crossing service would
10 have to be two feet outside of that roadway, so it's
11 roughly -- I took 25 feet from the center of the
12 roadway, added that to 250 feet, so you got 275 feet,
13 both east and west down the tracks.
- 14 Q. And what -- what did you come up with -- well, what
15 did you assume to be the car length?
- 16 A. The rail cars that are generally used on their grain
17 and hoppers would be tank cars, would be roughly 60
18 feet long.
- 19 Q. Are you familiar with the various industries that are
20 served by the interchange track?
- 21 A. Well, there were mostly grain and -- and then there's
22 scrap metal and different types of -- mostly grain
23 elevators.
- 24 Q. What kind of rail car service, those types of things?
- 25 A. Those would be hopper cars and tank and --

1 Q. Sixty-footers?

2 A. Yes, generally.

3 Q. What was the car capacity of the entire interchange,
4 based on your calculation --

5 A. About --

6 Q. -- both tracks?

7 A. About 30 cars.

8 Q. Thirty cars in total, so 15 cars on each track?

9 A. Well, 13 on the north, 15 on the south.

10 Q. And that's because of the clearance --

11 A. Yes.

12 Q. -- point issue we talked about earlier where the
13 tracks come together?

14 A. Yes.

15 Q. And assuming the Emporia Court crossing is installed
16 at the location proposed by the defendants, how does
17 that impact the rail car storage capacity of those
18 tracks?

19 A. That basically wipes out 18 storage cars, cars that
20 would be stored there, can only have room for 12.

21 Q. About a 60 percent reduction?

22 A. Yes.

23 Q. And how would such a loss of storage capacity impact
24 switching operations on the BNSF and WTA?

25 MR. HOCH: Excuse me. Objection,

1 foundation.

2 THE COURT: Sustained.

3 Q. (By Mr. Day) You're familiar with the location of the
4 temporary crossing?

5 A. Yes.

6 Q. Spoke about that earlier. Assuming that is made the
7 permanent rail crossing for access to the land where
8 Emporia Court is proposed, how does the 250-foot rule
9 work there? Do you understand my question?

10 A. Yeah. It applies the same. You need 250 feet
11 clearance from the edge of the crossing, and the car
12 storage, then, the switch is just to the west there,
13 and on the north track, I think you'd lose maybe
14 one -- one car, and on the south one probably three,
15 maybe, maybe four. So if the crossing were there,
16 instead of having 30, they would have either 25 or 26
17 spots for storage.

18 Q. Okay. We lose some space, but not near as bad if it's
19 in the middle?

20 A. My opinion, they could live with that.

21 Q. Okay. Now, last thing I want to talk to you about,
22 Mr. Mooney, is track removal. Based on your analysis,
23 would removal of a section of the north track solve
24 the clearance issues we've talked about under the
25 MUTCD and industry standards?

1 A. No.

2 Q. Why?

3 A. You'd still have the same for the south track.

4 Q. Okay. And would you still have, based on the 15 foot
5 and the 17-foot rule, warning devices in the public
6 thoroughfare of 25th Street, if it's not realigned?

7 A. Yes.

8 Q. Is that a safe situation?

9 A. No. It would not be.

10 Q. Is it hazardous?

11 A. Yes.

12 (Mr. Day confers with Mr. King.)

13 MR. DAY: Judge, I think that concludes my
14 examination. I'll pass the witness to Mr. Hoch.

15 THE COURT: All right. Cross?

16 MR. HOCH: Thank you, Judge.

17 **CROSS-EXAMINATION**

18 **BY MR. HOCH:**

19 Q. Good morning, Mr. Mooney.

20 A. Good morning.

21 Q. Want to make sure that I understand what your
22 understanding is of how these two tracks along the
23 south side of 25th Street are used by the railroads.
24 Are these two tracks used as an interchange between
25 the Burlington Northern main line, which runs up and

- 1 down along Broadway, and the Union Pacific on the
2 east, or is it used for storage of cars?
- 3 A. To my understanding, it's used as a hand-off between
4 the WTA, who's the terminal, and Burlington, BNSF,
5 where they will bring loads and empties and give 'em
6 to each other.
- 7 Q. And -- and so it becomes a parking lot?
- 8 A. Well, it also becomes a clearance, I mean, if they can
9 take 'em and give the cars, take 'em -- take 'em on
10 through, then no, it's a through track, but it can be
11 used as a storage until the other one's ready to pick
12 'em up.
- 13 Q. And, in fact, on the aerial, Exhibit 3-A, that you
14 talked with Mr. Day about a little bit ago, there's
15 cars parked two wide on -- on this section of track,
16 right?
- 17 A. Yes.
- 18 Q. And the photos that you took on November 1, when you
19 were down, show cars parked on both tracks?
- 20 A. Yes.
- 21 Q. Right. It's -- I mean, and indeed, part of the
22 earlier proceeding in this case was a complaint by the
23 landowner, FYG, that the railroad wasn't keeping even
24 the temporary crossing open; you understand that?
- 25 A. I'm not familiar with that.

1 Q. Did you understand that the -- it was the
2 reconstruction of one track and the construction of a
3 second track at this location that triggered this
4 lawsuit back in 2002?

5 A. No.

6 Q. You were not aware that prior to that time there was
7 only one track paralleling 25th Street?

8 A. No.

9 Q. And were you aware, Mr. Mooney, that the ordinance
10 granting the railroads the right to build a track in
11 this right-of-way on FYG's property was required
12 access at any point along that right-of-way?

13 A. No. I wasn't aware.

14 Q. Isn't this case from your understanding and from
15 Mr. Day's questions being presented by the railroads
16 as -- as whether the railroads' ability to use this as
17 a parking lot for cars being interchanged between the
18 two railroads as opposed to clearance distances for
19 the crossing at Emporia Court?

20 A. I don't follow your line of questioning, I mean --

21 Q. Well, I heard your testimony that if the crossing's
22 built, the railroads' ability to store cars there goes
23 from 30 cars on the two tracks down to a dozen?

24 A. Yes.

25 Q. You lose eight -- the railroads will lose 18 cars --

- 1 A. Yes.
- 2 Q. -- right? That crossing being built there wouldn't
3 affect at all the railroads' ability to interchange
4 cars between the two rail lines, between the UP and
5 the BNSF?
- 6 A. Yes, it would.
- 7 Q. Well, if just moving 'em along, if you weren't parking
8 'em?
- 9 A. Well, like, the WTA will set 'em out there, then the
10 Union Pacific will pick 'em up.
- 11 Q. So --
- 12 A. Now, or Burlington, BNSF, will pick 'em up so --
- 13 Q. So it becomes a parking lot?
- 14 A. Well, for a period of time.
- 15 Q. And if it weren't used as a parking lot for the cars,
16 building a crossing here wouldn't really be an issue,
17 would it?
- 18 A. Well, it -- yeah, it would. If you just have one
19 track there, and you're still going to be -- not going
20 to have any room with that crossing with the 250-foot
21 requirement on each side to have an adequate track to
22 be able to hand off full loads and empties to each
23 other.
- 24 Q. Whether it be a dozen cars, according to your
25 testimony, it could be -- could be parked there

- 1 waiting to be picked up?
- 2 A. Correct.
- 3 Q. Now, are you a street designer?
- 4 A. No, not a designer.
- 5 Q. Or a design engineer --
- 6 A. No.
- 7 Q. -- of any sort?
- 8 A. No.
- 9 Q. I want to ask you about -- I want to talk with you
10 about the orientation of this Exhibit No. 19, Mr. Day
11 looked with you at early on, and I'm going to turn it
12 90 degrees so that north is up, consistent with
13 Exhibit 3-A, right?
- 14 A. Yes.
- 15 Q. Now, and Judge can look at this after a while if he
16 needs to. The location of -- of the dedicated Emporia
17 Court Street, a location is shown on this Exhibit 19,
18 right?
- 19 A. Yes.
- 20 Q. And the question I want to ask you about is whether in
21 your two visits to the site you observed the big
22 drainage ditch, the old creek bed that cuts off from
23 northwest to southeast across this property?
- 24 A. Yes. I observed it.
- 25 Q. And -- and you would agree with my characterization

1 that for the land that is north of the ditch, it's --
2 there's a pinch point here at this northwest corner,
3 and it's much wider to the east?

4 A. Well, you have -- I mean, there's more room,
5 obviously.

6 Q. Yeah. Okay. Now, did you, Mr. Mooney, or the BNSF
7 surveyors determine how much street right-of-way is
8 available for 25th Street?

9 A. No. I did not.

10 Q. So you don't know how wide the dedicated street is at
11 that point?

12 A. No.

13 THE COURT: Now, let me understand your
14 question when you said, at this point, at that point.
15 Are you talking about that pinch point you referenced?

16 MR. HOCH: No, sir. I better clarify that.

17 THE COURT: Yeah.

18 Q. (By Mr. Hoch) My question, Mr. Mooney, is whether you
19 made any attempt to understand the width of the 25th
20 Street right-of-way running east to west along the
21 north side of the railroad tracks?

22 A. No.

23 Q. And from the standpoint of anybody's ability to
24 construct a new street or a paved improved street
25 instead of a dirt road along this segment of 25th

1 -Street, that width of the right-of-way north to south
2 would be very important, wouldn't it?

3 A. Yes.

4 Q. Did you ask anybody at the railroads to figure that
5 out?

6 A. No.

7 Q. Did you ask the survey crew to figure that out when
8 they were out there doing a survey?

9 A. No. I -- no.

10 Q. Have you had any discussions with anybody at the City
11 of Wichita engineering department about whether a
12 temporary curb or other south side of the road
13 definition could be built along 25th Street as it
14 exists today?

15 A. No.

16 Q. Are you aware of whether improvements to 25th Street
17 east of Broadway is on the city of Wichita's capital
18 improvement project budget?

19 A. I'm not aware of it.

20 Q. And would you agree with me that that would -- that
21 would be important in figuring out whether, in fact, a
22 street could be built at this location consistent with
23 the MUTCD requirements for the Emporia Court crossing?

24 A. That's the purpose of having diagnostic teams to look
25 at all the crossings, look at the matters of concern

- 1 and -- and take those into consideration when you
2 design it.
- 3 Q. Did you do a diagnostic review of this crossing with
4 the city?
- 5 A. No.
- 6 Q. Do you know where the 41-foot roadway width that
7 you've testified about in conjunction with Plaintiffs'
8 Exhibit No. 3-A comes from?
- 9 A. From the drawing that was provided by your client.
- 10 Q. And beside that, you're not aware?
- 11 A. No.
- 12 Q. Okay. Now, I went back and double-checked, but I'm
13 going to ask you to make sure: You've not prepared
14 any drawing or analysis at this point of the crossing
15 sign locations relative to the current dirt road if
16 the north track was taken out and you were measuring
17 from the north rail of the south track to set the post
18 for the crossbuck, right?
- 19 A. No.
- 20 Q. You haven't made any attempt to figure that out,
21 correct?
- 22 A. Correct.
- 23 Q. You've just assumed that the two tracks are going to
24 stay in there?
- 25 A. Yes.

1 Q. Have -- have you done any study as to whether the
2 railroads could build another track to the south of
3 the current track location, take out the north track?

4 THE COURT: Would you have the witness hold
5 that exhibit up so I can conceptualize what you're
6 talking about?

7 MR. HOCH: Absolutely.

8 THE COURT: Thank you.

9 Q. (By Mr. Hoch) My question, Mr. Mooney, is whether
10 you've made any study to figure out whether another
11 track could be built to the south of the current south
12 track to put cars on when the north track is taken out
13 and abandoned?

14 A. No. I have not.

15 Q. Did you ever visit with anybody at the railroads about
16 that possibility?

17 A. No.

18 Q. Do you know whether anybody at the railroads has ever
19 asked from the landlord whether they could get a
20 right-of-way to build another segment of track along
21 there?

22 A. No.

23 Q. Are you aware, Mr. Mooney, of the City of Wichita
24 ordinance dealing with how long rail cars can block a
25 particular crossing?

1 A. Not that particular ordinance, I mean, I'm aware of
2 city ordinances or state laws.

3 Q. And you understand that if there's a crossing, then a
4 crossing can't be blocked for more than, in the case
5 of Wichita's ordinance, five minutes?

6 A. Five or ten minutes, most of them, yes.

7 Q. You would agree with me that under the Federal Highway
8 Administration's Railroad Highway Handbook, there are
9 exceptions made to the signage location distances,
10 there's opportunity for exceptions to the signage
11 locations set out in the MUTCD.

12 A. Which signs, I mean, there are some exceptions that --
13 that you can have on certain types of signs.

14 Q. Now, do you have any opinion about the crossing
15 location's impact on property use or values?

16 A. No.

17 MR. HOCH: Those are all the questions I
18 have, Judge. Thank you.

19 THE COURT: Redirect?

20 MR. DAY: Just a few, Judge.

21 **REDIRECT EXAMINATION**

22 **BY MR. DAY:**

23 Q. Mr. Mooney, Mr. Hoch asked you about possible
24 exceptions under federal D.O.T. regulations with
25 regard to the location of these signs. Are you aware

1 of any exceptions that would exist or be applicable at
2 this location?

3 A. Well, only that the -- you know, the crossbuck could
4 be placed 12 feet from the center line instead of the
5 15, yet the yield sign has to be back at 15 feet from
6 the near rail. So if you put the crossbuck up at, you
7 know, closer to the rail, yield sign needs to be 15
8 feet.

9 Q. And, of course, both of those would be in the lane of
10 travel of 25th Street if they were installed here?

11 A. Yes.

12 Q. Now, utilizing Exhibit 13, mister -- well, Mr. Hoch
13 asked you some questions about curbing. If we put a
14 curb around the two signs that -- the yield sign and
15 the crossbuck sign that would be at the location of
16 the cones shown on Exhibit 13, would that alleviate
17 the safety concerns that you have about putting a
18 crossing at this location?

19 A. As far as -- yeah, I mean, if you put a curb, make the
20 south edge of that roadway there where the cone is --

21 Q. I'm just talking about sticking curbing in the middle
22 of the road.

23 A. Oh, no. That's not going to -- that wouldn't do
24 anything if you put a circle around it, because people
25 would circumvent that, wouldn't even see it, would go

1 to the right and make the -- go across the crossing.

2 Q. And the curbing that you think is appropriate would be
3 shown on Exhibit 4, and that involves a
4 reconfiguration of the entire 25th Street move to the
5 north?

6 A. Yes.

7 Q. Mr. Hoch asked you a bunch of questions about what
8 these tracks are used for. And what is your
9 understanding of how this interchange is used, both in
10 terms of storage and switching operations on the
11 terminal?

12 A. The BNSF will have -- will get cars' loads and
13 empties, and they will bring 'em in, set 'em there on
14 the track, the -- on the two tracks. The WTA then
15 will pick 'em up, take 'em to their industries, and
16 they may have some other cars, then, from other
17 industries that they'll come back in and give back to
18 the BNSF, and they'll -- they'll pick 'em up. That
19 could be a few hours, or it could be a day or so.

20 Q. Is the interchange track, both of those tracks, is it
21 a parking lot?

22 A. No.

23 Q. How would -- well, strike that.

24 MR. DAY: That's all I have, Judge.

25 THE COURT: All right. Recross?

1 MR. HOCH: No, sir. Thank you.

2 THE COURT: All right. Now, I know that
3 Judge Henderson got into a little trouble with the
4 Court of Appeals, 'cause he *sua sponte* started asking
5 questions. I've read the decision. But this area of
6 inquiry was gone into by both attorneys. I just want
7 to clarify something, so with your permission.

8 **EXAMINATION**

9 **BY THE COURT:**

10 Q. Sir, look at Plaintiffs' Exhibit 11.

11 A. Okay.

12 Q. Do you have it in your hand, sir?

13 A. Yes, sir.

14 Q. Okay. And this is just clarification for purposes of
15 the Court. I know that you know the answer, and I
16 know the attorneys know the answer as well, but I just
17 want to clarify. In Plaintiffs' Exhibit 11, we're
18 looking at 25th Street, correct?

19 A. Yes, sir.

20 Q. Now, we also see utility poles there in the
21 photograph?

22 A. Yes.

23 Q. And we also see what appears to be business?

24 A. Yes. That's a -- to the right there is a recycling or
25 steel, some type of refabrication.

- 1 Q. Now, do you recall whether there are businesses,
2 plural, all up and down 25th Street there?
- 3 A. Yes. There's more on the west side than there is on
4 the east side of this -- of the proposed crossing, but
5 looking at this picture, there are several businesses
6 there.
- 7 Q. Now, those utility poles and the businesses, are they
8 to the north or south of 25th Street?
- 9 A. They are just on the north edge of the current edge of
10 roadway of 25th.
- 11 Q. So there are no businesses to the south?
- 12 A. Correct.
- 13 Q. Okay.
- 14 A. And then that -- just point of clar -- utility pole,
15 then there is the yellow protection device, that's a
16 water meter, there's some water lines there.
- 17 Q. That's about in the center of the photograph, correct?
- 18 A. Yes, sir, Your Honor.
- 19 Q. Thank you for pointing that out.
- 20 THE COURT: Mr. Day, do you have any
21 questions based on my questions?
- 22 MR. DAY: No, Your Honor.
- 23 THE COURT: Okay. Mr. Hoch, do you have any
24 questions based on my questions?
- 25 MR. HOCH: No, sir.

1 THE COURT: Okay. Mr. Mooney, you may step
2 down. Thank you.

3 Can someone please tell me what time it is?

4 MR. HOCH: 10:30.

5 THE COURT: Okay. As you can see, the clock
6 is not working. This is a logical point for a short
7 break. Let's go ahead and take a short recess. We'll
8 be in recess for 15 minutes.

9 MR. DAY: Judge, before we do that, I'm
10 sorry, I was not keeping a record of the exhibits that
11 have been admitted.

12 Did you do that?

13 MR. HOCH: Yeah, I did.

14 MR. DAY: Can you tell me what they are?

15 THE COURT: I can tell you. I can tell you.
16 We don't have to be on the record for this.

17 (An off-the-record discussion was had,
18 after which a recess was taken from
19 10:32 a.m. to 10:50 a.m., after which
20 the following:)

21 THE COURT: Call your next witness.

22 MR. DAY: Judge, I'd call Ron Dame.

23 THE COURT: Sir, please come forward, be
24 sworn.

25

1 **RONALD WILLIAM DAME,**
2 called as a witness on behalf of the Plaintiffs, having
3 first been duly sworn, testified as follows:

4 THE COURT: Sir, would you please tap on the
5 mike?

6 (Off-the-record discussion.)

7 THE COURT: All right. Go ahead, sir.

8 MR. DAY: Thank you, Your Honor.

9 **DIRECT EXAMINATION**

10 **BY MR. DAY:**

11 Q. Would you state your name, please.

12 A. Ronald William Dame.

13 Q. And, Mr. Dame, is it D-A-M-E?

14 A. Yeah, as in Mary.

15 Q. Okay. Where do you currently live, residential
16 address?

17 A. 823 Surrey Lane, Maize, Kansas, zip code 67101.

18 Q. And are you currently employed?

19 A. Yes, I am.

20 Q. Where do you work?

21 A. Wichita Terminal Association.

22 Q. And where is the business address of the Wichita
23 Terminal Association?

24 A. 1537 Barwise Street, Wichita, Kansas, 67214.

25 Q. Do you have a title there at the terminal?

- 1 A. I am the superintendent.
- 2 Q. And how long have you held that position?
- 3 A. Approximately 14 months.
- 4 Q. Could you tell the Court what it is the superintendent
5 of a railroad does.
- 6 A. I'm responsible for the safe operations, customer
7 commitments of the company, in charge of the budget,
8 funding, track projects, train crews, have 16
9 employees I manage, I have train crews, I have track
10 people, and I have clerks.
- 11 Q. All right. Would you be -- in the hierarchy of things
12 at the WTA, are you at the top?
- 13 A. Yes.
- 14 Q. All right. And just if you could run through your --
15 where you worked before coming to work for the WTA.
- 16 A. Well, I worked for Union Pacific Railroad for
17 approximately 38 years.
- 18 Q. And just a brief run-down of the various positions you
19 held and responsibilities.
- 20 A. I worked in the track department for 15 years and
21 train management the rest of it.
- 22 Q. All right. And by train management, what does that
23 mean?
- 24 A. I've held several positions in the field as assistant
25 superintendent with Union Pacific in Wichita, and

1 senior director and director's positions in the
2 Harriman Train Dispatching Facility in Omaha, Nebraska
3 and Spring, Texas.

4 Q. All right. So you'd be generally familiar with
5 dispatching and -- and train movements?

6 A. That's correct.

7 Q. All right. Told us earlier the WTA has how many
8 employees?

9 A. I have 16.

10 Q. And there's TYE (ph) folks?

11 A. I have nine TEMY (ph) folks, which are trainmen and
12 handle the car -- car movements, and I have four track
13 people and four clerks.

14 Q. And track people, those are the folks that go out and
15 fix the tracks?

16 A. Yeah. They maintain the structure.

17 Q. Okay.

18 THE COURT: Let me stop you there. Just for
19 the benefit of the Court, please keep in mind I've
20 never worked for the railroad. And so whenever you
21 use terms of art that are exclusive to the railroad or
22 abbreviations, that you obviously know what you're
23 talking about, I have no clue what you're talking
24 about. So, counsel, just follow up with questions
25 to -- for the benefit of the Court so the Court

-1 understands the colloquy.

2 MR. DAY: I'll do that, Your Honor. Is
3 there anything I need to go back and cover at this
4 point?

5 THE COURT: No.

6 Q. (By Mr. Day) All right. The WTA -- well, what --
7 what's the Wichita Terminal Association?

8 A. Wichita Terminal Association is a nonprofit company
9 owned by Union Pacific and Burlington Northern Santa
10 Fe railroads.

11 Q. And are you a WTA employee, or are you a UP or BN
12 employee?

13 A. I am a UP employee loaned out, currently not
14 affiliated with Union Pacific, other than the --
15 working for this company.

16 Q. All right. And as far as the railroading activities
17 that the WTA does in Wichita, could you explain that
18 to the Court? What -- what does the WTA do as far as
19 railroad operations in the city limits?

20 A. We -- Union Pacific and the Burlington Northern, as
21 owners of the company, we provide service to them
22 to -- service to the local customers here, the grain
23 customers, scrap dealers, anybody that's within our
24 confine, our little yard operation. We take cars from
25 the UP, which are road haul cars that come from all

- 1 over the United States and even Mexico, same with the
2 Burlington Northern, and we -- we -- we interchange
3 and deliver back cars and service to local customers
4 here, which they don't have trackage rights on.
- 5 Q. Okay. Maybe the best way to ask it is, what is --
6 what does it mean to interchange cars?
- 7 A. We -- we will take cars from the -- depending on which
8 railroad it is, we interchange to both railroads just
9 at different spots. Say the Burlington Northern, we
10 have interchange tracks set up to where we deliver
11 cars to those interchange tracks, because we -- we do
12 not have track rightage -- rights to go in directly
13 into their yard, so we designate interchange tracks to
14 where we can hand off cars to one another.
- 15 Q. All right. Using Plaintiffs' Exhibit 3-A, can you
16 tell us what that -- what you've been talking about,
17 for instance, where is the BNSF line and where is the
18 IT line, the interchange track on the terminal?
- 19 A. Interchange tracks are right here (indicating) --
20 Q. Right.
- 21 A. -- along 25th Street. That's a Burlington Northern
22 lead, and then that's the Burlington Northern main
23 lines.
- 24 Q. All right. And these -- the interchange tracks, do
25 they continue on to the east?

- 1 A. They tie into our -- what we call our lead, which you
2 could probably see that's it right there (indicating).
3 If the two pages come together, it would look like
4 that.
- 5 Q. Right. Okay. And so are you interchanging tracks
6 between BNSF's main line and BNSF's customers on the
7 other side of the interchange?
- 8 A. Can you say that again, please?
- 9 Q. That was a terrible question. The cars that are
10 moving over the interchange from BNS -- BNSF's main
11 line, where are they going?
- 12 A. Several places.
- 13 Q. Give me an example.
- 14 A. Coming to -- coming to my operation?
- 15 Q. Okay.
- 16 A. They go to -- they could go to Bartlett elevator,
17 which is north of town, or the scrap dealers, any of
18 the scrap dealers or any of the other elevators that I
19 have. We mostly do grain. Our biggest share of the
20 business is the elevators we have here, Cargill,
21 Horizon Milling, Bartlett, Ralston-Purina, and few
22 scrap dealers.
- 23 Q. Okay. By grain, do you mean wheat?
- 24 A. Wheat, corn, soy -- soybeans --
- 25 Q. All right.

- 1 A. -- different commodities.
- 2 Q. And those --
- 3 A. Flour.
- 4 Q. I'm sorry?
- 5 A. Flour, oil.
- 6 Q. Okay. And those cars that are being interchanged over
7 the IT track from BNSF's track, are those moving in
8 interstate commerce?
- 9 A. Yes. They would be.
- 10 Q. Okay. Are the products that are being shipped from
11 the customers you just mentioned, either from or to
12 those customers, going outside the state of Kansas?
- 13 A. Probably most of it, yes.
- 14 Q. Give me a percentage.
- 15 A. I'd say 90 percent of it.
- 16 Q. How many cars per day does the Wichita Terminal
17 Association interchange over the IT tracks?
- 18 A. Ninety -- up to 90 cars a day on those particular
19 tracks.
- 20 Q. All right. And you listened to the testimony earlier
21 from Mr. Mooney about the storage capacity of those
22 tracks. Do you agree with those numbers?
- 23 A. It's pretty accurate, I believe.
- 24 Q. Okay. How would the -- well, the -- and you heard the
25 testimony about the 250-foot rule with regard to the

1 crossings?

2 A. Yes, sir.

3 Q. What is -- again, what does that mean?

4 A. Well, for safety standards and city local government
5 and state regulations, there's got to be a certain --

6 THE COURT: Sir, I realize you don't come to
7 court to testify every day, but try not to turn your
8 back to the court reporter.

9 THE WITNESS: Oh, okay.

10 THE COURT: Okay.

11 A. The crossings have to be cut or the train has to be
12 severed and -- and put in a distance to where it's not
13 to where there would be obstructions from traffic.

14 Q. (By Mr. Day) Okay. In other words, the train cars
15 have to be 250 feet back from the edge of the crossing
16 in both directions?

17 A. Correct.

18 Q. All right. And Plaintiffs' Exhibit 3-A, if the
19 Emporia Court crossing is installed at the proposed
20 location, and those cars have to be moved back 250
21 feet, how does that impact WTA's switching operations?

22 A. Well, it's -- it's drying up our capacity. We don't
23 have -- like I say, we don't have the trackage rights
24 just to take cars into the Burlington Northern yard,
25 so we have to store 'em there for them to come to get

- 1 'em.
- 2 Q. Okay.
- 3 A. And likewise, them to us. So they -- they deliver to
4 the interchange, we pull, and then we fill it back up,
5 and then they clear it off again, so this goes on
6 constantly during the day and the week.
- 7 Q. Would it have a -- a negative impact on your
8 operations?
- 9 A. Yeah. It's going to take us from almost, like, 30
10 cars down to over 50, 60 percent reduction and what we
11 can take over there at a time.
- 12 Q. And what does that do to your switching operations?
- 13 A. It kind of handcuffs our switching operations, because
14 we don't have storage capacity, per se, on the WTA.
- 15 Q. All right.
- 16 A. We -- we -- you know, we're a switching operation, a
17 third-party switching operation.
- 18 Q. Now, these IT tracks, they're used for storage,
19 correct?
- 20 A. Can be, yeah.
- 21 Q. Both tracks?
- 22 A. Yep. Yes, sir.
- 23 Q. And they're also used for through train movements,
24 correct?
- 25 A. Very little, but it could be. Yes.

- 1 Q. All right. May -- that's probably the wrong term.
2 What I meant to say is they're -- not only are they
3 used for storage, they're also used for interchanging
4 cars to the various industries to the east?
- 5 A. Correct.
- 6 Q. Okay. And that would be both -- both sets of tracks?
- 7 A. That's -- that's correct.
- 8 Q. What if a portion of the north track is taken out, how
9 would that affect your operations?
- 10 A. It's capacity.
- 11 Q. All right.
- 12 A. You know, it's -- it's capacity that we don't have to
13 spare, without going and building tracks somewhere
14 else.
- 15 Q. Would the installation of a crossing at the Emporia
16 Court location result in more frequent switching
17 operations on the terminal?
- 18 A. Yeah. It would take us from two to three a day to
19 possibly seven or eight a day.
- 20 Q. And can you explain that for the Court.
- 21 A. Well, we have to -- only being able to bring 12 cars
22 over at a time is we're going to have to make that
23 many more moves to get the 90 cars a day over, where
24 we'd do it in two or three now, then we're going to
25 have -- it's going to take us seven or eight. It's

- 1 going to cause us our budget impact on overtime, fuel
2 cost, car delays, customer dissatisfaction, car delay.
3 The Union Pacific is going to be holding cars for the
4 BN that we can't get over there to 'em, because a lot
5 of those cars come from the -- we take from the Union
6 Pacific and take right over to the BN, so we -- we got
7 a lot of customers that's going to suffer from it, and
8 car delay.
- 9 Q. And would that be also true with respect to the
10 removal of any -- any portion of the north track?
- 11 A. Yes, sir.
- 12 Q. Basically, the result's the same, isn't it?
- 13 A. Yeah. Yes, sir.
- 14 Q. You know where the temporary crossing is located just
15 east of the west switch to the BNSF?
- 16 A. Yes, sir.
- 17 Q. Shown on Plaintiffs' Exhibit 3-A, it's basically in
18 this -- this location here (indicating), is that
19 correct?
- 20 A. Yes.
- 21 Q. Have you been out there recently?
- 22 A. I've been out there -- I go up there about every day.
- 23 Q. All right. This aerial shows the crossing here; do
24 you see it?
- 25 A. Yes, sir.

- 1 Q. It doesn't show a road here, but is there a -- is
2 there a road currently at that location?
- 3 A. Not what I would say is a road, no, sir.
- 4 Q. Well, is there a path?
- 5 A. There is -- there is a -- a path, knocked-down weeds.
6 I think the city has been using to go in there and
7 clean some ditch -- ditches along that -- I think
8 they're along Broadway over there --
- 9 Q. Okay.
- 10 A. -- that they cleared off.
- 11 Q. But somebody's been driving vehicles through here
12 (indicating)?
- 13 A. Yeah. It's just basically just, like, down in there
14 and over that way (indicating).
- 15 Q. Okay. You think that's the city that's been doing
16 that?
- 17 A. I know it's the city.
- 18 Q. Did you talk to 'em? How do you know that?
- 19 A. Well, because I seen 'em going in and out of there.
- 20 Q. With their city work trucks?
- 21 A. Yes.
- 22 Q. Okay. How long has that -- I'm calling it a road or
23 path, whatever, how long has that been -- been there?
- 24 A. I just noticed it this week, but generally, when
25 I'm -- I go up there, there's cars could be blocking

- 1 that view of that or -- or the BN could be switching
2 over there or whatever, and I don't -- I didn't pay
3 any attention to it.
- 4 Q. Okay. It was there on November 1st when I was there
5 with Mr. Mooney. Does that comport with your
6 recollection?
- 7 A. The road?
- 8 Q. The road.
- 9 A. I don't remember if it was that day or not when I
10 noticed that was in there.
- 11 Q. Fair enough. You know who built the path or the road?
- 12 A. I heard the city did.
- 13 Q. Okay.
- 14 A. My track supervisor, in fact, told me it was the city
15 did, when I asked him about it.
- 16 Q. If the Court orders the permanent crossing to be
17 located where the temporary crossing is located now,
18 would that have less of an impact on the WTA's
19 operation?
- 20 A. Yes, sir.
- 21 Q. And I mean that as compared to a permanent crossing at
22 the proposed Emporia Court location.
- 23 A. I still have my 30 cars the way it is.
- 24 Q. All right. Be less of an impact on your operations,
25 correct?

1 A. Oh, dramatically.

2 Q. All right.

3 MR. DAY: That's all the questions I have.

4 THE COURT: Just give me a second.

5 Okay. Cross?

6 **CROSS-EXAMINATION**

7 **BY MR. HOCH:**

8 Q. Good morning, Mr. Dame.

9 A. Good morning.

10 Q. I think I have only a very few questions for you. I
11 want to understand, first of all, about this
12 relationship between the WTA and the BNSF and Union
13 Pacific, okay?

14 A. Uh-huh.

15 Q. We had some testimony in a hearing two and a half
16 years ago about that, and I just want to make sure
17 that I remember it correctly. As I understand your
18 testimony, the Wichita Terminal Association is a
19 nonprofit corporation owned exclusively by the BNSF
20 and the UP?

21 A. 50/50.

22 Q. Now, I also heard you testify that -- that the WTA, I
23 think you used the word we don't have trackage rights
24 to be able to store cars in the BNSF yard?

25 A. We can't -- we can't physically take 'em in there.

- 1 Q. And they're a 50 percent owner. Has the WTA asked if
2 you could get permission from your 50 percent owner to
3 be able to take cars into BNSF yard?
- 4 A. Oh, we work -- we work -- we work together on deals
5 all the time. It -- you know, it's a matter -- it's a
6 matter of what their operation can handle, or same as
7 with the -- the Union Pacific, you know. The
8 Burlington Northern has a pretty good switching yard
9 over there. And for the WTA, plus those two main
10 lines that go up Broadway Street with 30, 40 -- 35, 40
11 trains a day coming in there, the WTA would -- or even
12 a -- the KNO that's in town, another short line
13 railroad, got access into their yard, could shut their
14 main lines down.
- 15 Q. I think my question, Mr. Dame, was whether the WTA has
16 asked its 50 percent owner, the BNSF, if you could
17 store cars in their yard.
- 18 A. We -- I'm misunderstanding your question, because we
19 do store cars in their yard. We don't have the -- we
20 don't have the ability to take 'em to their yard,
21 because we -- we do not have track rightages in that
22 BN yard going in from that side.
- 23 Q. Okay. Let me ask the question a little differently.
24 Have you asked your 50 percent owner whether you could
25 get track rights to be able to take cars into the BN

1 yard?

2 A. Well, personally I haven't, no.

3 Q. Do you know whether anybody from the WTA has?

4 A. No, I don't.

5 Q. How about on the Union Pacific side to the east?

6 A. We have -- we have an interchange track in the Union
7 Pacific side, on north of the -- north of the elevator
8 in the Klein (sp) yard, we can go into that yard,
9 well, in designated tracks only. But I don't have an
10 interchange set up with 'em like we -- like we do
11 here.

12 Q. The interchange -- I'm sorry. The -- the trackage
13 rights with BNSF would solve the problem of your
14 practice of storing 30 cars at a time on these two
15 tracks on 25th Street?

16 A. Not necessarily. Not necessarily, no.

17 Q. Have you ever had any discussions with the BNSF
18 management about them giving the WTA trackage rights
19 to be able to take cars into the BNSF yard?

20 A. It's been discussed at several locations, but there's
21 labor issues involved with -- any time you do that,
22 because my -- my folks are in the union, their folks
23 are in the union, they all have their piece of
24 territory. There's got -- it's intensive human -- or
25 labor relations to go through my men going to work

1 over on the BN or the BN, vice versa. I don't -- I
2 hope you -- I don't know, maybe I'm not saying it
3 right, but the organizations for the Burlington
4 Northern and the organization for the Wichita Terminal
5 employees take care of their own people.

6 Now, the Burlington Northern employees do not have
7 seniority on the Wichita Terminal, nor do the Wichita
8 Terminal employees have seniority on either of the
9 BNSF or the Union Pacific Railroads. So when you get
10 into -- enter -- when you get into going into the
11 other yards, and it can get down, sometimes be
12 classified as a switching moves or whatever, then --
13 then the -- the union and labor organizations have a
14 big problems and issues with it.

15 Q. So is this a union problem?

16 A. It could be. I mean, it will be. I mean, that will
17 be involved in all of it.

18 Q. The WTA could acquire more capacity for storage at
19 other locations, right? You've got a -- you've got an
20 interconnect north of the grain elevator, you said,
21 right?

22 A. North -- well, that's Union Pacific property.

23 Q. Okay. You could acquire some other property that
24 would alleviate this interconnect problem along 25th
25 Street?

- 1 A. I don't know that.
- 2 Q. Have you ever gone and looked?
- 3 A. I've looked all over up and down the whole railroad.
- 4 I would love to be able to put in more tracks for us
- 5 to use to switch and to store cars based on the growth
- 6 of the grain and the growth of the city of Wichita and
- 7 some of these customers around here, but as most
- 8 cities along where there's railroad yards built, they
- 9 pretty much filled 'em up when -- before the town
- 10 started building around 'em and the customers started
- 11 building around 'em and started squeezing off that
- 12 right-of-way, so I -- I search for opportunities every
- 13 day to find places to put cars or maybe build another
- 14 five car length of track somewhere, extend a track, I
- 15 mean, that's part of the duties that I assume when --
- 16 assumed when I took this job was to, you know, grow
- 17 this company any way I can, and I look for
- 18 opportunities daily to do that.
- 19 Q. And in the 18 months or so that you've held the
- 20 position of superintendent of the WTA, have you had
- 21 any discussions with either BN or UP officials about
- 22 acquiring more property --
- 23 A. I've had --
- 24 Q. -- adjacent to the -- to the 25th Street trackage?
- 25 A. I've had -- not the 25th Street, but I've had

- 1 discussions with the Burlington Northern and the board
2 members of the -- the company that I work -- the board
3 members that I work for that work for both companies
4 about acquiring a yard north of 29th Street that the
5 BNSF has abandoned up there, that I wanted to take
6 over, that I want to take over.
- 7 Q. You haven't had any discussions about buying property
8 here along 25th Street?
- 9 A. No, sir.
- 10 Q. Did --
- 11 A. I wasn't aware there was any land there to sell, so --
- 12 Q. Well, at this point it's land-locked, so I'm not sure
13 it's there to sell, but --
- 14 A. But --
- 15 Q. -- but --
- 16 A. But it's economically cheaper for me to assume a yard
17 that's got 10 tracks already in it, that's already had
18 the grade work done for it, already got most of the
19 components in there, it needs rehabbed, it's FRA --
20 FRA, federal railroad adm -- association --
21 administration has taken the yard out of service. But
22 I want to take it over and rehab it, and that would --
23 that would be a big, big deal for the company.
- 24 Q. Would that take -- eliminate the need for this
25 interchange?

1 A. No. We'd still have to go there.

2 Q. Mr. Dame, does the WTA have a legal right to encroach
3 on 25th Street -- the 25th Street right-of-way with
4 either rail of the dynamic envelope?

5 MR. DAY: Objection, Your Honor. Lack of
6 foundation. Improper opinion. Also calls for a legal
7 conclusion.

8 THE COURT: Well, are you saying your
9 witness is not qualified to answer the question?

10 MR. DAY: Well, he asked -- he asked him to
11 form a legal conclusion in that question.

12 THE COURT: Well, I'll sustain it on that
13 basis.

14 Q. (By Mr. Hoch) What's your understanding, Mr. Dame, of
15 whether the WTA has a right to encroach with the
16 dynamic envelope on to the city of Wichita's 25th
17 Street right-of-way?

18 THE COURT: Do you understand his question,
19 sir?

20 THE WITNESS: No, I don't. No. I mean, I
21 don't understand it.

22 THE COURT: Do you want to break it down?

23 MR. HOCH: Sure.

24 Q. (By Mr. Hoch) Mr. Mooney and I talked a little bit
25 about the dynamic envelope, and he testified more in

- 1 his Direct Examination about the dynamic envelope.
- 2 A. Uh-huh.
- 3 Q. That's the safety thing, right?
- 4 A. Yes.
- 5 Q. And what's your understanding of the dynamic envelope?
- 6 A. Well, from his perspective, it's about where the
7 location of the -- where the signs and the crossings,
8 or the road can be from the -- away from the railroad
9 property.
- 10 Q. And my question was, what's your understanding?
- 11 A. My understanding is basically the same, based on his
12 expertise, I -- you know, I don't know anymore than he
13 does about it.
- 14 Q. The dynamic envelope for the north rail, as it's
15 currently constructed and operated, is out into the
16 middle of the 25th Street right-of-way, right?
- 17 A. Possibly. I don't know that for a fact, but possibly.
- 18 Q. Now, have -- have you ever investigated, I mean, we've
19 seen photos here of vehicles pretty close to the
20 parked cars?
- 21 A. Uh-huh.
- 22 Q. Have you ever investigated whether the WTA has a right
23 to use up part of that street right-of-way for the
24 dynamic envelope?
- 25 A. No, I haven't. No.

1 Q. You ever asked anybody about that?

2 A. No.

3 MR. HOCH: Those are all the questions I
4 have, Judge. Thank you.

5 THE COURT: Redirect?

6 MR. DAY: Very briefly, Your Honor.

7 **REDIRECT EXAMINATION**

8 **BY MR. DAY:**

9 Q. Mr. Hoch made a statement that this property is
10 land-locked. Did you hear him make that statement?

11 A. Yes, sir.

12 Q. Is there an access point here on the interchange
13 tracks for this property?

14 A. An access where?

15 Q. Where the temporary crossing is. In other words, can
16 you access this piece of property over the temporary
17 crossing that is there?

18 A. I don't see -- see where you can, but --

19 Q. Well, there's a path there. There's a road there.

20 A. I mean, without -- that -- that -- that's a swamp.

21 Q. Well, I understand there's no roads built at this
22 point.

23 A. No. I'm -- there could -- I guess there could be if
24 there was considerable amount of the grade -- the
25 grade separation between the level of 25th Street and

1 . those railroad tracks and that land is -- is
2 significant.

3 Q. Okay. He made a comment that it was land-locked.
4 Okay. What I'm trying to establish is are there other
5 access points to this piece of property as shown on
6 Plaintiffs' Exhibit 19 where the proposed Emporia
7 Court Street would be?

8 A. I'm -- I think there -- where they come in --

9 Q. I'm going to talk to you about that in a minute, but I
10 want to first talk to you about the --

11 THE COURT: Wait a minute.

12 A. Not that I'm aware of, no.

13 THE COURT: Wait. Wait. Both of you can't
14 speak at the same time, because we're making a record.
15 And, counsel, you asked him a question, and he started
16 to answer it. Then you interrupted him.

17 MR. DAY: I'm sorry, Your Honor.

18 THE COURT: So you should let him answer the
19 question.

20 Q. (By Mr. Day) All right. Go ahead.

21 A. You go ahead.

22 Q. All right.

23 THE COURT: Let's have read-back on the
24 question.

25 And, Mr. Dame, listen closely to the question, and

1 then go ahead and answer it.

2 THE WITNESS: Okay.

3 (The question was read back.)

4 THE COURT: You understand that question,
5 Mr. Dame?

6 THE WITNESS: Yes, sir.

7 THE COURT: All right. Can you answer it?

8 A. To my knowledge, there is the one other access point
9 to that property, and that would be coming off of
10 Broadway going towards the TreatCo building and then
11 back from the building out that way.

12 Q. (By Mr. Day) All right. Can you show us on
13 Plaintiffs' Exhibit 19 where that access point is.

14 A. Well, we can't really tell from this map, but I'm
15 assuming that's the road there would be about 23rd
16 Street or 22nd Street, would take 'em back into that
17 property.

18 Q. All right. And that is a crossing off of Broadway
19 across BNSF's main line at 23rd Street?

20 A. That's correct.

21 Q. And how would you get to the Emporia Court piece of
22 property from that location?

23 A. Well, you'd have to come into their -- where their
24 facility is, where that building just caught on fire
25 and then go back north.

1 Q. All right.

2 A. Then you could get into that -- I believe you could
3 get into that area.

4 MR. DAY: That's -- that's all the questions
5 I have, Judge.

6 THE COURT: Recross?

7 MR. HOCH: Yes, sir. Thank you.

8 **RECROSS-EXAMINATION**

9 **BY MR. HOCH:**

10 Q. Mr. Dame, you know that it would take a bridge and a
11 rather long bridge to get across the creek that the
12 city's been working on cleaning out the last month?

13 A. Oh, I don't -- I don't know.

14 Q. If you came in from the south --

15 A. I didn't walk in there, so I don't know what the --
16 like I say, I know there's a big grade separation
17 there from the track to the land, so I -- it would be
18 considerable work either way in my dirt working
19 build-up, you know, and packing and everything else,
20 but --

21 Q. You're aware there's a creek that runs through there?

22 A. I know there's a creek in there somewhere. I don't
23 know the exact location, though, sir.

24 Q. All right. Thank you.

25 MR. HOCH: That's all, Judge. Thank you.

1 THE COURT: All right. Any further
2 questions?

3 MR. DAY: Nothing further, Your Honor.

4 THE COURT: All right. Mr. Dame, you may
5 step down. Thank you.

6 THE WITNESS: Thank you.

7 THE COURT: May he be released from his
8 subpoena?

9 MR. DAY: Yes, Your Honor.

10 THE COURT: All right. Mr. Dame, you're
11 free to go. On the other hand, if you'd like to
12 remain, you can remain, but you are free to go. It's
13 up to you.

14 THE WITNESS: I'm going to stick around for
15 a while.

16 THE COURT: All right.

17 Call your next witness.

18 THE WITNESS: Thank you.

19 MR. DAY: Judge, plaintiffs don't have any
20 additional witness evidence at this point, and we
21 would rest.

22 THE COURT: All right.

23 Is the defense ready to call a witness?

24 MR. HOCH: We are.

25 THE COURT: All right. Call your witness.

1 MR. HOCH: Defense will call Mr. Tim Austin.

2 THE COURT: Mr. Austin, please come forward,
3 be sworn.

4 **TIMOTHY R. AUSTIN,**
5 called as a witness on behalf of the Defendants, having
6 first been duly sworn, testified as follows:

7 **DIRECT EXAMINATION**

8 **BY MR. HOCH:**

9 Q. Tim, would you introduce yourself to Judge Bribiesca,
10 please, by stating your full name and your home
11 address.

12 A. Full name is Timothy R. Austin, I live at 1215
13 Dougherty, D-O-U-G-H-E-R-T-Y, in Wichita, Kansas.

14 Q. And what's your occupation?

15 A. I am a licensed civil engineer.

16 Q. In the state of Kansas?

17 A. That's correct, in the state of Kansas.

18 Q. When did you obtain your civil engineering license?

19 A. In 1989.

20 Q. And I think I just answered the next question here,
21 what discipline do you practice in?

22 A. I'm a civil engineer.

23 Q. What does that mean as a practical matter?

24 A. Civil can mean very many disciplines. My specialty is
25 in municipal design work and working with private

1 development.

2 Q. And unpack that last answer a little more. When you
3 say municipal design work, what types of improvements
4 do you design?

5 A. We look at a number of improvements that cities,
6 municipalities would be interested in, such as street
7 design, water, sanitary sewer drainage.

8 Q. Do you practice with an engineering firm?

9 A. I do.

10 Q. What's the name of that firm?

11 A. The firm's name is Poe & Associates, Poe, P as in
12 Paul, O-E.

13 Q. What services do Poe & Associates provide?

14 A. Their primary specialty, at least for the Wichita
15 office -- they also have offices in Tulsa and Oklahoma
16 City -- but in the Wichita operation, it's primarily
17 municipal design services.

18 Q. Does that include surveying?

19 A. Yes, it does.

20 Q. And tell Judge, if you would, about your experience on
21 the development side of the practice.

22 A. One of the things that we provide, and especially
23 through myself, is working with private landowners and
24 developers to evaluate properties for various issues,
25 access, drainage, infrastructure needs, and try to

- 1 draw some conclusions as to what those costs might be
2 or how solutions might be derived.
- 3 Q. Now, in 2006, FYG dedicated to the city of Wichita a
4 right-of-way for a -- a street called Emporia Court
5 running south of 25th Street. Were you involved in
6 that process?
- 7 A. Yes, I was.
- 8 Q. Would you tell us, please, what you did.
- 9 A. The exhibit, I don't remember what -- Exhibit 3 of
10 their exhibit, represents a right-of-way location to
11 show how the area -- actually the other exhibit might
12 be better.
- 13 Q. I'm sorry.
- 14 A. I'm sorry.
- 15 Q. This is Plaintiffs' Exhibit 19 for this hearing.
- 16 A. Sorry about that. What we looked at was how this area
17 could be utilized to its highest and best use and what
18 was the most efficient, economical means to provide
19 access for that site to be developed.
- 20 Q. Now, what were the constraints as you studied the most
21 effective or most efficient way to develop the
22 property?
- 23 A. Well, there are a number of constraints to the site,
24 some of them are physical, some of them may be legal,
25 but the site east of this drainage ditch, this is --

1 this is a drainage ditch that's owned by the city of
2 Wichita, was originally acquired for use by the North
3 Wichita Drainage District back in the late twenties, I
4 believe, and condemned for drainage, drains areas up
5 to Park City. This is a significant ditch. We went
6 out and surveyed it, measured it, did some cost
7 estimates as to how a crossing might be constructed
8 and what that cost might be. We also looked at how
9 the site would be developed with sanitary sewer and
10 with water service for any end users who might want to
11 develop that site. And then we looked at the access
12 issues in addition to coming here, looking at the 25th
13 Street corridor, where -- where the rail access is and
14 the subject of today's discussion.

15 Q. As a result of that effort, did FYG make a dedication
16 of land to the city of Wichita and did the city accept
17 that dedication?

18 A. That's correct.

19 Q. Now, in 2008, did you prepare a set of sealed drawings
20 for the construction of Emporia Court as it had been
21 dedicated to the city?

22 A. Yes, we did.

23 Q. And were the drawings for that street construction
24 work approved by the city of Wichita?

25 A. Yes, they were.

1 Q. This fall in anticipation of this hearing today, did
2 you do some additional work on the property just south
3 of 25th Street that FYG Investments owns?

4 A. Yes, we did.

5 Q. And what did you do?

6 A. Well, the first thing that we needed to do was
7 establish what the -- what the ownership boundaries
8 are, the actual street right-of-way, the physical
9 locations of improvements that are in the
10 right-of-way, the physical location of the railroad
11 tracks, basically just to assess exactly what was out
12 in that corridor.

13 Q. How did you do that? Physically, what -- what was
14 done?

15 A. Sorry about that. In order to establish property
16 boundaries, we reviewed the quarter section maps that
17 are available with the Register of Deeds office,
18 looked at the right-of-way that was in there, and
19 actually had our surveyor, who is a licensed land
20 surveyor, go out, survey and determine what the
21 right-of-way is and where it was in relationship to
22 the railroad tracks.

23 Q. Have you prepared a -- a drawing that shows the
24 intersection of proposed Emporia Court with 25th
25 Street, that includes some of this preliminary

1 background information about who owns what and how big
2 things are in this neighborhood?

3 A. That's correct. And that's reflected on the exhibit
4 that you're holding.

5 MR. HOCH: Judge, do you have a preference
6 of whether I number exhibits or letter exhibits?

7 THE COURT: Well, yours would be letter
8 exhibits.

9 MR. HOCH: Okay.

10 THE COURT: Are you moving to admit A?

11 MR. HOCH: I am moving to admit Exhibit A.

12 THE COURT: Any objection?

13 MR. DAY: Is this the one you previously
14 e-mailed to me, Wyatt?

15 MR. HOCH: This is the one that I e-mailed
16 to you yesterday. It has a little bit of additional
17 information from the one I e-mailed to you a week ago.

18 MR. DAY: No objection.

19 THE COURT: All right. Defendants' Exhibit
20 A shall be admitted.

21 Q. (By Mr. Hoch) All right. Tim, if you would take us
22 through with the blow-up of Exhibit A on this kind of
23 foundation information, if you would, please.

24 A. Okay. First thing that the surveyor wanted to do was
25 to establish the actual property boundaries within the

1 25th Street right-of-way.. And you'll see this dash
2 line here at the bottom. Actually, we call that a
3 hidden line type. It's reflected over here
4 (indicating). It shows the quarter sections for the
5 property, all property within the city of Wichita is
6 based on townships, ranges and sections of land, and
7 we establish where those section lines are.

8 THE COURT: You want to move the mike a
9 little toward the diagram there, so the -- you don't
10 have any difficulty speaking into it? There. Okay.

11 THE WITNESS: Okay. Thank you, Your Honor.

12 THE COURT: Go ahead.

13 A. Okay. So that's what's reflected right here is the
14 actual section line. You'll see a notation here.
15 This talks about the north sixteenth corner of the
16 southwest quarter of section 4, township 27 south,
17 range 1 east. Then there is also another notation on
18 the left-hand side of the diagram, which is tying into
19 the northwest corner of section -- or southwest
20 quarter of section 4 township, and basically, that
21 establishes, for lack of a better term, a base line or
22 the section line for which we determine ownership
23 boundaries for the private owners.

24 The second thing that we did is to look at and
25 review the quarter section maps, again, by the

1 Register of Deeds to determine how much public
2 right-of-way exists relative to this section line.
3 And you'll see a notation here on both sides. There
4 is 60 foot of right-of-way that has been previously
5 acquired by the city, either through dedication or
6 abandonment or fee title, but there's 60 foot of
7 street right-of-way, and what we show on the north
8 side here, which is a line with two little dashes,
9 intermittent dashes, that shows the property boundary
10 on the north side of 25th Street, so if and when the
11 city chooses to build 25th Street, barring acquisition
12 of additional right-of-way, the street improvements
13 for 25th have to fit within the 60 feet of
14 right-of-way. That's why we establish those things.

15 Q. (By Mr. Hoch) Okay. Now, how did you locate Emporia
16 Court east to west along 25th Street?

17 A. The location of Emporia Court was defined by legal
18 description through the prior dedication, and so our
19 surveyor reviewed that location and that legal
20 description and related it to the right-of-way.

21 Q. How does the 60-foot wide right-of-way relate to the
22 dirt road that's currently being called 25th Street?

23 A. Well, I'll try to answer your question as you asked
24 it, but the dirt road on 25th Street lies within
25 the -- entirely within the 60 feet right-of-way. I

1 think as some of the photographs in the earlier
2 testimony by Mr. Mooney accurately reflected, there
3 are some utilities that are also located within the
4 right-of-way, and most utility companies, in fact, all
5 of the utility companies have franchise agreements
6 with the city of Wichita for legal right to be within
7 the right-of-way and to provide services to the
8 property owners that are adjacent to the right-of-way.
9 And so the utilities, such as the power lines and the
10 water lines, those exist there. Normally, we try to
11 have utilities at the back of the right-of-way. In
12 this particular case, the utilities are in -- kind of
13 in the middle of the right-of-way.

14 Q. I'm going to show you -- I'm going to set this down
15 for a minute.

16 A. Okay.

17 Q. Mr. Austin, would you tell us what Exhibit B is,
18 please.

19 A. Exhibit B is a photograph along 25th Street. It's
20 along the north side of 25th at the east end that I
21 took on Friday, it's facing west, and what I was
22 attempting to show was the location of the
23 right-of-way relative to the -- where the traffic is
24 in terms of the north edge of the gravel.

25 Q. And does this photograph, Exhibit B, accurately depict

1 the conditions that were present along 25th Street
2 east of Broadway on November 17th?

3 A. Yes, it does.

4 MR. HOCH: We'd move to admit Exhibit B.

5 MR. DAY: No objection.

6 THE COURT: All right. Defendants' Exhibit
7 B shall be admitted.

8 Q. (By Mr. Hoch) Now that Judge has a copy of this, Tim,
9 would you explain to us what this photograph, Exhibit
10 B, shows.

11 A. Yes, sir. If you'll look on the photograph, and
12 you'll see on the -- on the north side here on the --
13 kind of on the right-hand side, you'll see a woven
14 wire fence. That's the approximate location of the
15 north right-of-way of 25th Street. And what you'll
16 see there is you'll see a transformer box, electrical
17 box, little kind of aquamarine box there, pretty
18 typical, you'll see a white post with a orange top,
19 that's a fiber optic line for phone company, and then
20 those are generally at the back of the right-of-way,
21 and so those are properly located. And then on the
22 left-hand side of the photograph, you'll see a series
23 of posts with an overhead line, that is actually out
24 in the right-of-way.

25 Q. At this point, the street, such as it is built, I

1 mean, it's pretty crude, looks like a blade hadn't
2 been run down the street for quite a while, is located
3 on the south half of the right-of-way?

4 A. That -- that's correct. And it's not very well
5 maintained, and you're correct. It's -- gravel is
6 kind of a stretch, too.

7 Q. All right. Mr. Austin, what I'd like to do is ask you
8 what's required to build a crossing in compliance with
9 the MUTCD at 25th Street and Emporia Court, using this
10 Exhibit A and the -- the manual, which Mr. Day marked
11 as Exhibit No. 2.

12 A. I have a copy of it --

13 Q. All right.

14 A. -- of part 8 of the 2009 Edition of the MUTCD with me.
15 To answer your question, I think the first thing that
16 we, as design engineers, have to look at is, you know,
17 what are the physical parameters or physical
18 conditions of the site, of the corridor, in this case,
19 of the right-of-way corridor that might provide some
20 constraints to good design. And what I mean by good
21 design is that the MUTCD sets out some standards,
22 standards that make sense from an engineering
23 standpoint, that provide good guidance, standards that
24 we should meet when the opportunity and ability to do
25 so presents itself. But the MUTCD also acknowledges

1 that sometimes we can't meet all the standards. And
2 that's where good engineering judgment and study is
3 necessary to determine why there might be a deviation
4 from the standards, what -- what's happening in the
5 corridor, and there's many, many factors that have to
6 be considered. We -- we have to take into account the
7 safety aspect of the drivers, we have to take into
8 account the general area where the improvement's
9 happening, what's the nature of the area, what's the
10 type of traffic, what's the speed of the traffic, the
11 volume of the traffic, are there obstructions to site
12 distances, many, many things that can come into play,
13 number of drive openings, et cetera.

14 And then we documented it. We document why
15 there's a deviation, and usually, it's a fluid
16 process. Obviously, you asked Mr. Mooney about a
17 diagnostic assessment. We tend to do that in our
18 design practice on any public improvement. We work
19 very closely with the city engineer's office to
20 determine what makes sense for a particular location,
21 so -- so having said that, I just wanted to establish
22 that we don't always adhere to standards. We do --
23 MUTCD does provide with some provisions that allow us
24 that latitude when, in our engineering judgment, it
25 makes sense.

1 Q. And if you look at Exhibit 2, page 747, in section
2 8A.02, is that one of the places where the MUTCD
3 affords flexibility for the design engineers in the
4 design of signage and traffic control systems for
5 crossings?

6 A. That -- that's correct.

7 THE COURT: Excuse me. Give me the page
8 number.

9 MR. HOCH: Yes, 747. It should be the first
10 page behind the cover.

11 THE WITNESS: If it would help the Court, I
12 could read the provision.

13 THE COURT: No. I have it right here.

14 MR. HOCH: Right at the bottom of the page,
15 8A.02.

16 THE COURT: All right.

17 Q. (By Mr. Hoch) And then is there a guidance provision
18 at the top of the next page?

19 A. That's correct. It -- it sets out a standard. It
20 sets out the support, and then it provides some
21 general guidance to give direction to the design team
22 as to what should be considered in final
23 determination.

24 Q. Now, does the Federal Railroad Administration also
25 have a Highway Grade Crossing Handbook that it

1 publishes?

2 A. They do.

3 Q. And does that handbook provide design exceptions?

4 A. It does, and I brought a copy of it with me to the
5 stand here.

6 Q. And what page -- I'm not going to mark that,
7 Mr. Austin, as an exhibit, but if you would, refer the
8 Court to what edition, what page, and then read the
9 design exception provision that's in that, please.

10 A. Give me a minute.

11 Q. I think it's page 22.

12 A. Right, but I wanted to give you the complete cite.

13 Q. Right.

14 A. Okay. The -- the cite is -- is - this is the Railroad
15 Highway Grade Crossing Handbook, it's published by the
16 U.S. Department of Transportation as part of the
17 Federal Highway Administration. The edition which I'm
18 reading, which is the latest edition, is Revised
19 Second Edition, was published in August of 2007.

20 As it pertains to design considerations, it's
21 section 1, subsection D as in David; subsection 2, and
22 it's paragraph -- I believe paragraph 7 on page 22,
23 and the start of the paragraph is entitled design
24 exceptions. And to read it, it says: All new
25 construction or reconstruction projects should be

1 designed in accordance with accepted standards and
2 criteria, including MUTCD, the latest edition of,
3 quote, the title, A Policy for Geometric Design of
4 Highways and Streets (the "Green Book"), AREMA,
5 A-R-E-M-A, recommended practices and state standards
6 and design policies. All efforts should be made to
7 adhere to the specified criteria. However, under
8 unusual conditions, it may be necessary to use values
9 different from or less than the values that have been
10 established. These departures and the reasons for
11 them should be carefully documented, and the
12 documentation should be retained in the permanent
13 project file by both the public entity and the
14 railroad.

15 Q. All right. Now, looking back to Exhibit A, which is
16 your concept drawing of this intersection and its
17 relationship to 25th Street, okay?

18 A. Okay.

19 Q. Taking out where you've shown in this drawing, Exhibit
20 A, where the railroad tracks are and this dynamic
21 envelope that has been testified about this morning.

22 A. Okay. In Exhibit A, what it shows is the center line
23 of both -- both rail tracks, the north rail line and
24 the south rail line, and then we give a dimension from
25 the section line, which I alluded to earlier, to --

- 1 Q. That's the property line?
- 2 A. The section line would also be the south line of the
3 public right-of-way. And it gives a dimension to the
4 center line of the -- of the north rail line, and that
5 dimension is over here on the left.
- 6 Q. And is how much?
- 7 A. 7.21 feet.
- 8 Q. So the center line of the --
- 9 A. North rail line right here (indicating).
- 10 Q. -- of the north rail line, 7.21 feet from where?
- 11 A. It's -- pardon me. Read my own drawing wrong.
- 12 THE WITNESS: Let me correct that, Your
13 Honor.
- 14 THE COURT: Try not to whisper up there.
- 15 THE WITNESS: Oh, I feel like I'm talking,
16 yelling.
- 17 THE COURT: No.
- 18 THE WITNESS: Sorry about that.
- 19 A. From the -- from the section line, and I --
- 20 THE WITNESS: Sorry about that, Your Honor.
21 I gave the wrong dimension.
- 22 A. From the section line to the north rail line is -- is
23 actually about seven feet, going to take this 12-foot
24 dimension from the dynamic envelope, less the 4.71, so
25 it's about 7.3 feet.

- 1 Q. (By Mr. Hoch) All right. So now you have dimensioned
2 here 7.21 feet on the left side of the drawing. What
3 is that dimension for?
- 4 A. That is the -- that is the encroachment of the dynamic
5 envelope into the -- no, I take that back, the four --
6 it's 4.71 feet is the dynamic envelope, encroachment
7 into the public right-of-way. These two dimensions,
8 my draftsman got those a little too close.
- 9 Q. All right. And the 7.21 feet, then, is the dimension
10 from --
- 11 A. The dynamic envelope to the south curb line of a
12 proposed street right-of-way.
- 13 Q. Now, in this Exhibit A, have you assumed the 25th
14 Street would be improved and that it would have curb
15 and gutter, like on a new typical city of Wichita
16 street?
- 17 A. That's correct.
- 18 Q. And what distance across, how wide a street did you
19 anticipate here?
- 20 A. Typically, the city of Wichita standard for industrial
21 streets is 41 feet from back of curb to back of curb.
- 22 Q. Is that what you've drawn here?
- 23 A. Yes.
- 24 Q. And based upon the geometry of the layout, will a
25 41-foot street fit within the public right-of-way as

1 it exists today?

2 A. Yes, it can.

3 Q. Now, have you also, then, located the warning signs
4 associated with the crossing on this drawing, Exhibit
5 A?

6 A. I did.

7 Q. And would you take us through each of those, please.

8 A. Okay. After review of the MUTCD, looking at just a
9 very preliminary look at this crossing, this location,
10 based on some of the land uses and trips and observing
11 traffic over a couple different days, looked at a
12 signage layout of starting on the -- on the left, at
13 the west end, we see a designation of W10-3, it's a
14 sign that's 36 inches square, and that would control
15 traffic coming from the west.

16 Q. And is that shown as the top sign in the sign legend?

17 A. Yes, it is.

18 Q. Okay. The next sign location, then?

19 A. The next sign location, which is right at the
20 intersection on either side, is an R15-1, that is
21 what's commonly referred to as the crossbuck. That's,
22 again, designated here on the lower left. With that
23 crossbuck is an R15-2P sign designation, which is,
24 again, shown to reflect two tracks, and that's
25 requirement on multiple tracks, according to the

1 MUTCD.

2 And then as I go further east for the westbound
3 traffic approaching intersection on the north side of
4 the right -- of the street improvement, north side of
5 the right-of-way, there would also be another W10-3.
6 You want me to talk to the south ones?

7 Q. Yes, please.

8 A. Okay. And then on the -- on the south side of the
9 railroad tracks, for the Emporia Street Court, which
10 is -- I should note is a cul-de-sac, so any -- any
11 people entering the cul-de-sac are the same people
12 exiting the cul-de-sac, I've shown a double -- double
13 set of R15-1 and R15-2P, and then because of the
14 proximity where this connection is on 25th Street, for
15 people to stop to make sure they can safely cross the
16 railroad tracks, I put a R1-1, which is a stop sign,
17 and also coupled it with a do not stop on track sign,
18 so we don't want vehicle traffic stopping on the -- on
19 the railroad tracks in order to enter 25th Street,
20 stop 'em short of that.

21 Q. Now, under the concept plan that you've prepared and
22 laid out here in Exhibit A, what happens to the
23 telephone poles, to the -- the -- looks like there may
24 be five or six telephone poles that are shown, for
25 instance, in Exhibit B that run down the middle of the

1 25th Street right-of-way at this point?

2 A. Yeah. The utility poles would have to be relocated.

3 Q. They'd be moved to the --

4 A. Back side of the right-of-way.

5 Q. Which would the north side?

6 A. That's correct. We have -- we have a little bit of
7 green space between what would be the north line of
8 the back of curb to the north line of the
9 right-of-way.

10 Q. Have you met with city of Wichita traffic engineer
11 Paul Gunzelman to review the -- your conceptual plan,
12 this Exhibit A, for the lay-out in the signage?

13 A. I did.

14 Q. And has he informally approved this plan?

15 MR. DAY: Objection. Hearsay.

16 THE COURT: Is he here available for cross?

17 MR. HOCH: He's -- he is not here.

18 THE COURT: Is he going to be called as a
19 witness?

20 MR. HOCH: I have not anticipated calling
21 him.

22 THE COURT: Well, how do you get around
23 hearsay rule?

24 MR. HOCH: Well, I'm not sure that I do.

25 THE COURT: Sustained.

1 Q. (By Mr. Hoch) Now, important point is you've met with
2 him, right?

3 A. I met with him, and he didn't raise any objection.

4 MR. DAY: Okay. Judge, objection.

5 THE COURT: Sustained.

6 THE WITNESS: Sorry, Your Honor.

7 THE COURT: You can't talk about any
8 discussion you may have had with him.

9 THE WITNESS: Oh, I didn't realize that.
10 I'm sorry, Your Honor.

11 THE COURT: You're free to testify as to
12 what you said, but you can't say what he said.

13 THE WITNESS: Okay.

14 THE COURT: To lay people, maybe that
15 doesn't make sense.

16 THE WITNESS: Yeah. I'm a lay person. It
17 doesn't make sense.

18 Q. (By Mr. Hoch) All right. Mr. Austin, have you
19 reviewed and photographed other locations in the north
20 industrial district for crossing locations and
21 signage?

22 A. Yes, I have.

23 (Time was taken.)

24 Q. Mr. Austin, are photographs that I've marked as
25 Exhibit C and D photos that you took last week in the

1 25th Street right-of-way at the east-end of this -- of
2 this property?

3 A. Yes, they are.

4 Q. And do they accurately depict the conditions that were
5 there on November 17th?

6 A. Yes, they do.

7 MR. HOCH: We'd move to admit Exhibits C
8 and D.

9 THE COURT: Any objection? Would you like
10 to voir dire the witness?

11 MR. DAY: No. No objection, Your Honor.

12 THE COURT: All right. Defendant's C and D
13 shall be admitted.

14 Q. (By Mr. Hoch) Mr. Austin, tell us what Exhibit C is,
15 please.

16 A. Exhibit C is taken at the east end of 25th Street, and
17 it's facing to the west, and I took that photograph to
18 show to the Court what the switching gear looked like
19 at the east end and also to reflect the two spurs that
20 are coming off this track that are servicing property
21 to the north of 25th Street.

22 Q. Now, was there any crossing signage on 25th Street for
23 the two spurs that are shown in this before we get to
24 the -- the twin track situation that the cars are
25 sitting on?

- 1 A. There is -- there's no advance warning signal -- or
2 pardon me, no advance warning signs when you are
3 headed east on 25th Street. There is a crossbuck as
4 an advance warning on 25th, on the north side of 25th
5 when you're heading west, and it's reflected in
6 Exhibit D. You can see it right there in front of
7 the -- kind of the south end of the grain elevator
8 that's in the background. And that's the only signage
9 for these crossings.
- 10 Q. And both of those crossings are at grade --
- 11 A. That's correct.
- 12 Q. -- of the current street, correct?
- 13 A. That's correct.
- 14 Q. What is Exhibit E?
- 15 A. Exhibit E is a photograph also -- also taken on the
16 very east end of 25th Street. As you progress east on
17 25th Street, it has an S turn where it becomes West
18 26th Street -- or pardon me, East 26th Street. It's
19 the west end of 26th Street East. This -- this
20 photograph is taken just a little further east than
21 the photographs in C and D. And this is facing south.
22 It's a picture of a couple private drive crossings to
23 serve the properties on the south side of 25th Street.
24 It's a dirt contractor, Pearson Excavating that's
25 their facility, and I took it to show the lack of

1 signage for the private crossing.

2 Q. And are there more than one private crossing in this
3 Exhibit E?

4 A. There is -- there's a private crossing on the -- on
5 the right, and then there's a private crossing on the
6 left.

7 MR. HOCH: We'd move to admit Exhibit E.

8 THE COURT: Any objection?

9 MR. DAY: Judge, only objection I have is
10 relevancy. I don't think it's material. There's been
11 no foundation laid that the standard is the same for a
12 private crossing. Photograph of a private crossing, I
13 don't think it's relevant.

14 THE COURT: Well, it goes to weight, not
15 admissibility. I'll allow it. Exhibit E shall be
16 admitted. I'll give it what relevance I deem
17 appropriate.

18 Q. (By Mr. Hoch) Would you tell us, please, without
19 going into a lot of detail, what Exhibit F is, please.

20 A. Exhibit F is another photograph that I took. It's on
21 East 33rd Street North. Facility in the -- in the
22 background that you can see with the large buildings
23 is the old Coleman Manufacturing facilities now owned
24 by Johnson Controls. This road dead-ends into their
25 driveway and parking lot facility. Again, it shows an

1 at grade crossing over a public street, and I took
2 this to reflect to the Court, you know, what the
3 typical signage is in the area. I --

4 Q. Before you go on, I want to submit this so Judge can
5 have it.

6 MR. HOCH: We'd move to admit Exhibit F.

7 THE COURT: Any objection?

8 MR. DAY: Lack of foundation, that this is
9 WTA property or BNSF property or UP property. I don't
10 think it's relevant.

11 THE COURT: Well, I'm having some difficulty
12 with this one on relevancy. What -- what do you think
13 the relevancy is --

14 MR. HOCH: Well --

15 THE COURT: -- other than what the witness
16 said, just for purposes of showing what signage is in
17 the area?

18 MR. HOCH: Yeah. I think the relevance is
19 the -- the way that other street crossings in the
20 north industrial district have been historically
21 treated, and what I would say is a different standard
22 being a -- suggested by the WTA for the Emporia Court
23 crossing.

24 THE COURT: Well, if you can get all that in
25 through this witness, I might let it in. Go ahead.

1 Try and lay a foundation before I let it in.

2 MR. HOCH: Okay.

3 Q. (By Mr. Hoch) Mr. Austin, as part of your
4 investigation for this case, did you study other
5 crossing locations in the north industrial district
6 and why?

7 A. Yes. I studied this location. I studied a number of
8 locations in the north industrial district, and the
9 reason why, as I testified earlier, there are a number
10 of factors that engineers will consider in any -- any
11 given design of any public infrastructure.

12 In this particular case, because we're dealing in
13 an area that's highly industrialized, has railroad
14 tracks crossing all over it, it goes back to what are
15 driver expectations. We talk about the safety of the
16 public and how we don't want to violate the public's
17 safety. And there are some things that are readily
18 apparent, and there's sometimes when it's maybe less
19 apparent.

20 But in the context of my assignment to review this
21 crossing in the Emporia Court, in my engineering
22 opinion and expertise, I have to understand the
23 environment in which this improvement is occurring,
24 and it's occurring in a highly industrial area with
25 numerous railroad traffic, people who are entering

1 this area have to recognize that, the people that are
2 servicing this, and so what -- what's their
3 expectation.

4 It's oftentimes a double-edged sword, because we
5 can maybe do sometimes overkill, and then all of a
6 sudden there's liability or expectations as to if
7 you do it for this one location, why aren't you doing
8 it for everything else in that whole area, and it gets
9 into budgets and cost and expenses, and we have to
10 weigh that and consider that in our design
11 development. We -- we have to be consistent with
12 maintaining the drivers' expectations and not
13 violating them.

14 MR. HOCH: We'd move to admit Exhibit F.

15 THE COURT: Any objection after that
16 colloquy?

17 MR. DAY: I -- I don't think it's relevant.
18 I mean, I think I understand what his opinions are,
19 and I just don't think Exhibit F is relevant, and I
20 don't think it is -- there's been a foundation for it.

21 THE COURT: I'll let it in and give it what
22 relevance I deem it should be given. I -- I as well
23 have some reservation about the relevancy, but I'm
24 going to go ahead and let it in.

25 I don't know about your comment about overkill.

1 But go ahead.

2 MR. HOCH: Okay. Judge, it is a couple
3 minutes after noon. I have probably fewer than five
4 questions before I'd be at a natural breaking point.
5 If you want to take lunch.

6 THE COURT: Well, we're not going to finish
7 this morning anyway or past the noon hour. Let's just
8 go ahead and take the recess, because I'm sure Mr. Day
9 has cross.

10 MR. DAY: Yes, Your Honor.

11 THE COURT: So we wouldn't finish with
12 Mr. Austin in a few minutes anyway, so let's go ahead
13 and take the recess. We'll reconvene at 1:30.

14 Sir, you may step down. You'll have to return at
15 1:30.

16 And we will resume with testimony of Mr. Austin.
17 We can go off the record now.

18 (An off-the-record discussion was had,
19 after which the lunch recess was taken
20 from 12:04 p.m. to 1:35 p.m., after
21 which the following:)

22 THE COURT: Good afternoon.

23 THE PARTIES (IN UNISON): Good afternoon.

24 THE COURT: Let the record reflect we're all
25 back in the courtroom. The attorneys are present,

1 Mr. Tim Austin is back on the witness stand. .

2 We're still on Direct Examination. Mr. Hoch?

3 MR. HOCH: Thank you, Judge.

4 Q. (By Mr. Hoch) Mr. Austin, I'd like to start by going
5 back and talking for just a moment about the
6 development aspects of the location of Emporia Court
7 that was dedicated to the city. How does --

8 MR. HOCH: Well, Judge, there is an exhibit
9 from a previous hearing.

10 Paul, this is the sealed set of drawings that was
11 attached to the Collins affidavit in the Motion For
12 Order to Show Cause from the spring of 2009. And I --
13 I have another copy of just a face page of that, that
14 I'm going to ask the witness to refer to.

15 THE COURT: Mr. Day, do you have a copy?

16 MR. DAY: That's not -- somewhere. I -- I
17 don't have any objections to him using -- I mean,
18 using that exhibit. It's -- I think it's been
19 admitted in a previous hearing or I -- it's part of
20 the legal record in the case. I think maybe even went
21 up to the Court of Appeals judge, so I don't have any
22 objection to it.

23 THE COURT: All right.

24 Q. (By Mr. Hoch) Okay. Mr. Austin, I'm going to show
25 you what is sheet 1 of 22, that was the construction

- 1 - plans for the street improvements for Emporia Court
2 dated November -- I'm sorry, December 11 of 2008,
3 right?
- 4 A. That's correct.
- 5 Q. And does this drawing bear your seal?
- 6 A. Yes, it does.
- 7 Q. What I want to visit with you about is the location of
8 Emporia Court relative to the parcel of ground that is
9 shown on this first page. Which way is north on this
10 drawing?
- 11 A. North would be to the left.
- 12 Q. To the 25th Street north --
- 13 A. That's correct.
- 14 Q. -- designation? All right. How does the dedicated
15 location of Emporia Court, as shown on this drawing,
16 play into the highest and best use of the property for
17 that cul-de-sac street that's drawn here?
- 18 A. When land development -- typically, what we see is
19 laying out improvements such that we can maximize the
20 highest and best use of the property. And to do that,
21 we try to create -- when the opportunity presents
22 itself, minimize the number of irregular tracks on a
23 particular piece of property.
- 24 Q. And as -- where is the drainage ditch or the creek, as
25 I've called it, on this drawing?

- 1 A. The drainage.-- drainage ditch, and I'll use the plans
2 for reference, the drainage ditch is this dash line
3 (indicating). There's a center line and then a dash
4 line showing the general location of that drainage
5 ditch.
- 6 Q. From the standpoint of simply the number of linear
7 feet of street required to develop this parcel of
8 ground owned by FYG Investments, how does the location
9 of Emporia Court, as it was dedicated to the city and
10 as you've drawn the construction plans for in this
11 exhibit, compare to if the street has to be located at
12 the northwest corner of the track on the bend where
13 the temporary crossing is located?
- 14 A. Okay. Well, this location is, in my opinion, a better
15 location, because again, it doesn't leave some
16 irregular residual tracks of land. And what I mean by
17 that -- and let me just kind of depict generally here,
18 the -- the temporary crossing would be located
19 approximately right here (indicating) on this
20 particular drawing. And to serve some of this area
21 back here (indicating), we would end up running a road
22 like this, kind of in a northwest to southeast
23 configuration. And what that does is because this
24 area is already fairly narrow, the tracks of land on
25 both sides of it would be very narrow and difficult to

1 develop.

2 Q. All right. Thank you. Now, I want to go back to your
3 drawing, Exhibit No. -- Exhibit A we looked at before
4 lunch and ask you, Mr. Austin, whether, in your
5 opinion, an MUTCD-compliant public crossing can be
6 built at the Emporia Court location with the
7 improvement of 25th Street and with both tracks
8 remaining in service.

9 A. Exhibit A shows that -- in my opinion, that yes, we
10 can build a public street within the available space
11 and be compliant with MUTCD.

12 Q. Now, you've shown in this drawing a 41-foot-wide
13 street back to back, correct?

14 A. That's correct.

15 Q. Why -- what's magic about 41 feet?

16 A. Well, 41 feet is the typical city standard, but
17 similar to the discussion about the standards on the
18 MUT -- MUTCD signage, it is a standard, and so if
19 necessity arises, for reasons if we needed to narrow
20 that down, we could narrow that down.

21 Q. And you could narrow it down to how much?

22 A. Really, it would be up to the discretion of the city,
23 because of the truck traffic, you know, we'd have to
24 look at, and maybe just illustrate that, the standard
25 lane width for road construction in the city of

1 Wichita is 11 feet. Sometimes when you get flatbed
2 semis in industrial areas, they have equipment hanging
3 off it, maybe kind of like a dynamic envelope for the
4 railroad, similar type thing, so typically, we like to
5 maintain a little wider road lane width. In highway
6 construction, for K-DOT, for instance, those are
7 12-foot lanes. Ideally, the city would like to have
8 somewhere around, at least, a 15-foot lane.

9 Q. And that would be a 15-foot lane in each direction?

10 A. That's correct. Fifteen-foot lane, each direction,
11 and -- and the question becomes where the additional
12 width starts coming in is whether there would need to
13 be, like, a turning lane, center turning lane. We
14 would have to look at the traffic going in and out of
15 some of the entrances on the near side of 25th Street
16 to determine what that final lane width really needs
17 to be.

18 Q. All right. Very good. Now, Mr. Austin, Exhibit A
19 anticipates the street work being done. The city of
20 Wichita has kicked the can on the 25th Street capital
21 improvements budget down the road ways. And so what
22 I want to -- I want to ask you about now is whether
23 before 25th Street is improved and paved, what are the
24 options for a crossing at Emporia Court, okay?

25 A. Okay.

- 1 Q. First of all, is there an option for a public crossing
2 at 25th Street and Emporia Court before 25th Street is
3 improved?
- 4 A. It -- it would be difficult to have a public crossing
5 there with the two lanes of railroad traffic.
- 6 Q. And why is that?
- 7 A. Because the -- the physical distance between the north
8 rail of the -- of the north track, the distance, as I
9 measured off, was about 33 feet to the edge of gravel,
10 so if we had to maintain that dynamic envelope, there
11 just really wouldn't be sufficient room to put two
12 lanes of traffic in, plus the signage.
- 13 Q. And is the north side of the gravel at this point
14 basically in alignment with the telephone poles --
- 15 A. That's correct.
- 16 Q. -- that we've looked at in the photographs?
- 17 A. That's correct.
- 18 Q. Now, what's your understanding of whether the
19 telephone poles could be moved without a full
20 improvement of the street?
- 21 A. Yeah. We deal with utility relocations all the time
22 as part of our engineering projects and the design of
23 those projects. As I mentioned previously, all the
24 utilities are in the public right-of-way through a
25 franchise agreement with the city of Wichita.

1 Typically, if there is a public improvement project
2 that's been initiated, the utility companies are
3 obligated to relocate those utilities out of any
4 conflicts. So one option might be to initiate a
5 project, such as the intersection here, and to
6 relocate a portion of those utilities to where we can
7 maintain traveling distance in each direction, plus
8 provide the signage for the crossing.

9 Q. And that would anticipate a city of Wichita public
10 project for construction of the -- of the crossing and
11 Emporia Court Street?

12 A. That -- that's correct. And in this particular deal,
13 where cul-de-sacs are dedicated to the city, the
14 process is, and they're guaranteed by the property
15 owner through special assessment financing, what would
16 trigger that city project would be the landowners
17 offering a letter of credit to the city, and that
18 would initiate a city project.

19 THE COURT: Go ahead.

20 Q. (By Mr. Hoch) At the hearing before Judge Henderson
21 in June of 2009, there was discussion about taking
22 out, I think the record talked about, the north track.
23 Whether that means physically removing the track and
24 the ties or -- or simply closing it off to where it
25 could not be used, I want to talk with you about that

1 - next. If the north track along 25th Street is
2 abandoned and not used, and the crossing and site lane
3 distances on either side of that crossing are
4 implemented, in your opinion, can a public crossing be
5 built at the Emporia Court intersection in accordance
6 with the MUTCD?

7 A. In my opinion, yes.

8 Q. And have you checked the dimensions on all that to
9 support that opinion?

10 A. I did check the dimensions, again, based on the
11 measurements and based on the survey and concluded
12 that if the north track wasn't there, yes, we could
13 put in an intersection and meet MUTCD requirements.

14 Q. And could you draw that on the white board behind you,
15 please.

16 A. Yeah. Grab my notes here.

17 (Witness drawing.)

18 THE COURT: You continue what you're doing
19 there. Don't let me interfere with what you're doing,
20 okay?

21 Is he going to put anything different up there
22 than what is shown in Defendants' Exhibit A?

23 MR. HOCH: Yes. The underlying data is in
24 Defendants' Exhibit A, but we've not dimensioned it to
25 the south track like he's doing here, and that's

1 what's different.

2 THE COURT: Okay.

3 Q. (By Mr. Hoch) Okay. Mr. Austin, tell us what you've
4 drawn up on the drawing.

5 A. Okay. What I've done -- or drawn, sorry, is an
6 illustration just showing dimensionally how things
7 relate to the physical condition out on the ground at
8 the site. This far left line, vertical line,
9 represents the center line of the south set of tracks.
10 We have a 12-foot dynamic envelope which we want to
11 maintain. And so that's what this second line over
12 is, just shows representative of where that dynamic
13 envelope goes.

14 One dimension that I did not have on Exhibit A,
15 Your Honor, was this four feet is the distance from
16 the south track's dynamic envelope to the north rail
17 line of the north track, and as I testified a few
18 moments ago, there's about 33 feet -- or I measured 33
19 feet from the -- of gravel north of the north rail,
20 which gives us a total working dimension of 37 feet.

21 If you use, for instance, a 25-foot roadway,
22 obviously, that would leave 12 feet in advance of the
23 dynamic envelope for signage. And -- and again,
24 this -- these dimensions are -- were a little bit
25 flexible depending on what the city reviews and

1 requires.

2 Q. Okay. Now, if this were to be implemented,
3 Mr. Austin, in the interim before street improvements
4 were made, how do you protect the signs that are, at
5 least a little bit, into the -- into what currently
6 serves as the street?

7 A. Yeah. One -- one of the big challenges in the 25th
8 Street corridor right now is the dynamic envelope
9 isn't being maintained. It's just -- you have the
10 rail and you have the gravel, and it's all just --
11 just one common area almost. So traffic isn't
12 honoring the dynamic envelope. The WTA isn't
13 maintaining the dynamic envelope.

14 I -- I would think that there would need to be
15 some -- some -- maybe some minimal improvements to
16 establish that location where that dynamic envelope
17 is, and -- and then the signage could be put in
18 between the dynamic envelope and -- and whatever that
19 delineation would be as to where the south traffic
20 lane would be.

21 Q. Now, as a practical matter, how would you build the
22 delineation of the south traffic lane as you just
23 described it?

24 A. Well, there's --

25 Q. South curb line.

- 1 A. South curb line, yeah, there's probably a number of
2 ways that could be done. It really depends on the
3 permanency of it. Is it just a temporary solution?
4 We could do it through delineators, if you drive in
5 the city of Wichita, like out at 21st and Maize right
6 now, they have yellow delineators trying to control
7 traffic making left turns by --
- 8 Q. And what are delineators?
- 9 A. They're usually -- they're some type of tall plastic,
10 almost like a rod. Should have probably brought one
11 to illustrate it, but just a tall -- tall plastic
12 that's just to give delineation as to where a car
13 shouldn't travel. We see 'em in construction zones
14 sometimes. They're circular, and they're about four
15 foot tall, and in construction zones they're bright
16 orange. That would be a solution. Putting a curb out
17 there could be a solution. Putting some temporary
18 barrier, again, like what we see in construction
19 zones, we see those big heavy blocks of barrier
20 separating lanes of traffic, sometimes that -- that
21 would also be an option.
- 22 Q. Okay. And this would be a public crossing from a
23 public street, 25th Street to a public street, Emporia
24 Court, right?
- 25 A. That's correct.

1 Q. Is there also a way to configure this intersection
2 with a private crossing?

3 A. I believe so. And in either case, one of the issues,
4 obviously, is maintaining the site distance in the
5 intersection. Mr. Mooney talked about, and I agree, I
6 mean, you have to keep those cars back, provide site
7 distance and everything that we've been talking about,
8 his exhibit and my exhibit, is what we call passive
9 traffic control. It's basically through a series of
10 signage. You could -- you can maintain it in either
11 case as a private rail crossing, we have an example,
12 which -- that I took a photo of what's there, and then
13 there's the temporary crossing to the -- to the west,
14 which I don't think we've seen a photo of it yet, but
15 there are examples of -- of a private crossing to be
16 safely done, but in either case, site distances would
17 have to be maintained.

18 Q. And that the site distances would be the location of
19 parked rail cars relative to the crossing?

20 A. That's correct.

21 Q. They'd have to be kept back the 250 feet that
22 Mr. Mooney talked about?

23 A. That's correct.

24 Q. Now, I didn't ask you, and I need to go back and get
25 it. In your opinion, if the north track of the two

1 that are there right now is abandoned and were not
2 used, and there's a crossing in -- constructed and the
3 site distances are honored by the railroads, can a
4 public crossing be built in compliance with MUTCD at
5 Emporia Court?

6 A. Yes.

7 Q. Now, what about the possibility of a private crossing
8 at Emporia Court?

9 A. A private crossing could be done.

10 Q. And what would be the difference be between a public
11 crossing and a private crossing?

12 A. Well, the difference would be -- is the private
13 crossing would -- personally, I would probably sign it
14 very similarly. In the Railroad Highway Grade
15 Crossing Handbook, it's mentioned, and it's part of
16 the appendix -- appendices to the handbook that
17 private crossings, that there are no national
18 standards that exist. But I think just from a
19 liability safety standpoint, you still want to denote
20 that that crossing is there.

21 Q. Would the installation of a private crossing -- could
22 the installation of a private crossing from an
23 operational standpoint be managed differently by the
24 railroads than what they're doing today?

25 MR. DAY: Objection. Lack of foundation.

- 1 THE COURT: Sustained. Lay a foundation.

2 MR. HOCH: Would you read that question back
3 to me, please.

4 (The question was read back.)

5 Q. (By Mr. Hoch) Under the MUTCD and the Federal Highway
6 Administration Grade Crossing Manual that you've
7 referred to, are there operational procedures that can
8 be implemented by the railroads that would change both
9 site lines and/or the hold-back distances and the
10 signage requirements for a private crossing?

11 A. Yes. The handbook does contemplate that one of the
12 ways to handle crossing issues, again, under the
13 diagnostic approach, is to evaluate all criteria and
14 operations, certainly one of those criteria, to
15 evaluate a crossing on.

16 Q. And in your opinion, if -- in your opinion, can a
17 private crossing be implemented at Emporia Court?

18 A. Yes.

19 Q. With both tracks remaining?

20 A. With both tracks, yes.

21 MR. HOCH: Judge, that's all the questions I
22 have for this witness at this time.

23 THE COURT: Cross?

24 MR. DAY: Yes, Your Honor.

25

- 1 A. That's correct.
- 2 Q. Well, tell us about it. What kind of development is
3 it? What kind of businesses are going in there?
- 4 A. Well, the property is zoned limited industrial, light
5 industrial or industrial, and right now it's currently
6 vacant. Like most developments, we try to take a
7 forward look at how things might progress, but
8 ultimately, it's the market that decides.
- 9 Q. All right. So light industry?
- 10 A. Possibly heavy industry.
- 11 Q. Possibly heavy industry, retail?
- 12 A. Probably not retail.
- 13 Q. Okay. But in any event, there would be additional
14 businesses located in this area on Exhibit No. 19,
15 that shows the Emporia Court Street, correct?
- 16 A. Yes, in that area.
- 17 Q. There's really a triangular piece of property here; do
18 you see that?
- 19 A. If you want to use a loose term, I'm not sure it is
20 triangular.
- 21 Q. Well, I'm not an engineer. Looks kind of like a
22 triangle to me. But just show the Court what -- what
23 area is involved in this proposed development.
- 24 A. Okay. It would be everything east and north of the
25 drainage ditch, and so graphically, what I'll refer to

- 1 is everything right in here (indicating), here's the
2 drainage ditch that goes through here (indicating), so
3 it would be everything all the way to the south
4 property line, everything in this area (indicating).
- 5 Q. More shaped like an upside down shoe than a triangle?
- 6 A. Looks like a backward state of Florida, maybe,
7 something similar to that.
- 8 Q. How many businesses are you proposing go in there?
9 What's the number?
- 10 A. It could be anywhere from one to multiples of one.
- 11 Q. Okay. If it's one, one business of heavy construction
12 could have a number of employees?
- 13 A. Could.
- 14 Q. Yeah. If it's multiple businesses, each one of those
15 businesses would have employees, true?
- 16 A. Possibly.
- 17 Q. Customers?
- 18 A. Possibly.
- 19 Q. All right. And, of course, that increases the traffic
20 on 25th Street, correct?
- 21 A. That's correct.
- 22 Q. Number of cars would go up?
- 23 A. I haven't done any traffic counts, so I can't say
24 whether number of cars go up or not.
- 25 Q. All right. You didn't do a traffic count when you did

- 1 your engineering study of the proposed Emporia Court?
- 2 A. No.
- 3 Q. Why didn't you do a traffic study?
- 4 A. That really wasn't within the scope of what I was
5 looking at.
- 6 Q. Yeah. We're going to talk about what you did and what
7 you didn't do. But you didn't do a traffic count,
8 correct?
- 9 A. Correct.
- 10 Q. But it stands to reason that if you put more
11 businesses in here, there's going to be more traffic,
12 correct?
- 13 A. It would seem logical, yeah.
- 14 Q. Okay. More trucks?
- 15 A. Yes.
- 16 Q. More delivery trucks?
- 17 A. Maybe.
- 18 Q. More semis?
- 19 A. Maybe.
- 20 Q. Okay. And those vehicles would be traveling off of
21 Broadway Street onto 25th Street to access the Emporia
22 Court cul-de-sac, correct?
- 23 A. That would be one location they would be coming from.
- 24 Q. It's a dead-end?
- 25 A. No.

- 1 Q. It's not a dead-end? Emporia Court is not a dead-end?
- 2 A. Pardon my -- I -- when you said dead-end, I thought
- 3 you were referring to 25th Street. Emporia Court
- 4 would be a dead-end, yes.
- 5 Q. All right. So the traffic is not coming from the
- 6 other side of the TreatCo facility to the south,
- 7 correct?
- 8 A. That's correct.
- 9 Q. It's coming in off of Broadway Street?
- 10 A. Right.
- 11 Q. Some of it?
- 12 A. Some of it.
- 13 Q. Okay. Traveling down 25th Street?
- 14 A. Correct.
- 15 Q. And making a right turn on Emporia Court?
- 16 A. That -- that would be one traffic movement.
- 17 Q. Okay. All the traffic that's accessing these new
- 18 businesses, correct?
- 19 A. No. I think we need to recognize that 25th Street is
- 20 a through street and ties into points east, so traffic
- 21 that would access properties on the TreatCo property
- 22 could be coming from multiple directions. That's the
- 23 only thing I would --
- 24 Q. Fair enough, Mr. Austin. My point here is that this
- 25 development will result in more traffic on 25th

1 Street, and under your proposed crossing in the center
2 of the interchange, if those folks are accessing those
3 businesses on Emporia Court, they're going over that
4 crossing, right?

5 A. Yeah. It's relative. You're assuming that when the
6 development comes in that it might be a development
7 such that is a -- is a -- generating a lot of traffic,
8 and -- and you know what, that -- that's a
9 possibility, and I acknowledge that.

10 Q. Sure.

11 A. It could also be -- it could also be a type of
12 development where it generates very little traffic
13 and -- and relative to the traffic that's out there
14 right now, might not be substantially different than
15 what you see today. I think we just need to be -- you
16 know, understand that there is a wide range of
17 possibilities.

18 Q. Okay. You already mentioned it could be heavy
19 industry, correct?

20 A. Correct.

21 Q. And heavy industry typically has -- could have
22 hazardous materials that needed to be delivered to
23 those industries, correct?

24 A. Yes.

25 Q. And if there is a heavy industry that's here on

1 Emporia Court that's utilizing hazardous materials,
2 those trucks are going to across that crossing,
3 correct?

4 A. Yes.

5 Q. All right. You testified on Direct Examination that
6 from an engineering -- I think I got this right, I
7 wrote it down, I probably paraphrased it -- from an
8 engineering perspective with regard to the dedication
9 of a public street, you need to study the unusual
10 conditions and carefully document what unusual
11 conditions exist at the location. Was that a fair
12 paraphrase of what you said?

13 A. I don't think so.

14 Q. Okay. Help me out there. What did you say about the
15 unusual conditions and what you needed to do from an
16 engineering perspective?

17 A. I think my testimony, if my memory serves me right,
18 but sometimes on documenting the deviations from
19 engineering standards is when we start talking about
20 design elements, I don't think I said anything about
21 any kind of documentation relative to the dedication.
22 My -- my comments in dedication is to evaluate the
23 land and to look at those things that might give some
24 type of constraint to the development of land and
25 pick -- you know, pick a solution that makes sense,

1 but I don't think it had anything to do with
2 documenting things.

3 Q. Okay. Let me -- let me ask you the question that --
4 what I'm really driving at.

5 A. Okay.

6 Q. Prior to just a few weeks ago, before this hearing,
7 who at Poe & Associates studied the unusual conditions
8 that exist on the public right-of-way of 25th Street
9 from a grade -- railroad grade crossing perspective?

10 A. No one.

11 Q. All right. Nobody made that study until just a few
12 weeks before this hearing, correct?

13 A. That's correct.

14 Q. And why is it that Poe & Associates didn't address
15 these issues back in 2005 or 2006, when they went to
16 the city to get this street dedicated?

17 A. I'm not sure I understand your question.

18 Q. All right. My question is, why didn't someone at Poe
19 & Associates study and document the unusual conditions
20 in 25th Street with respect to the public grade
21 crossing that you're proposing back when the street
22 dedication occurred?

23 A. Relative to the railroad crossing?

24 Q. Absolutely.

25 A. Okay. Yeah. I -- my recollection of it is, and as --

1 as I probably should point out is on your Exhibit 3,
2 the geometrics of the public road into the site is
3 obviously different than what was ultimately
4 dedicated, as was shown on the construction plans.
5 What -- what we were looking at was the site issues
6 themselves, not necessarily the railroad crossing at
7 the time that -- and this is my memory of going back a
8 number of years, we were looking at things like --
9 like the swamp on the west end there, and there was
10 some discussions ongoing with the city about access to
11 the drainage ditch. We -- we were just evaluating the
12 site conditions. I don't recall that we ever looked
13 at the railroad issue, and quite frankly, prior --
14 prior to today's hearing, when previous counsel and
15 all this stuff has been ongoing for a number of years,
16 we really didn't have any involvement in that.

17 Q. All right. You would agree that this is an unusual
18 situation out there?

19 A. I believe so. Yes.

20 Q. Yeah. You've got a set of railroad tracks that run
21 down a public street, correct?

22 A. No. I would not agree with that.

23 Q. Portion of the tracks run down the public street?

24 A. Based on our survey, the only thing that's encroaching
25 into the public right-of-way is the dynamic envelope.

1 Q. So the tracks are not in the public right-of-way of
2 25th Street?

3 A. That's correct. That's my understanding.

4 Q. And that's based on the survey that you performed?

5 A. That's correct.

6 Q. All right. Let's -- let's talk about your theoretical
7 plan, all right? Your theoretical plan is on -- I
8 believe it was Exhibit A.

9 A. Yeah.

10 Q. This assumes quite a few improvements to 25th Street,
11 correct?

12 A. That's correct.

13 Q. All right. And I want to go through those
14 improvements with you. In order to install an
15 MUTCD-compliant crossing under your theoretical plan,
16 you would have to move the street, is that right?

17 A. Well, certainly, the travel lanes where they're at
18 today are within the right-of-way. The -- under --
19 under that plan, as I've drawn it as a possible
20 solution, the travel way or the travel lanes would not
21 be where they're at today. That's correct.

22 Q. Okay. They'd be moved to the north, correct?

23 A. That's correct.

24 THE COURT: Excuse me. Just for purposes of
25 the record, when you said move the street, you're

1 referring to 25th Street?

2 MR. DAY: The lanes of travel of 25th
3 Street, yes.

4 THE COURT: Right.

5 MR. DAY: Sorry, Your Honor.

6 Q. (By Mr. Day) And that was reflected on Exhibit --
7 Plaintiffs' Exhibit -- I'm sorry, Defendants' Exhibit
8 B, correct?

9 A. That's -- that's correct.

10 Q. Okay. Your theoretical plan would call for re-paving
11 of the street -- or paving of the street, is that
12 correct?

13 A. Possibly.

14 Q. Building curbs?

15 A. Possibly.

16 Q. Building water -- or moving water lines?

17 A. Possibly.

18 Q. Moving utility lines?

19 A. Definitely that.

20 Q. And taking parking from the private businesses that
21 operate there along 25th Street?

22 A. They're parking in public right-of-way. I don't know
23 that they're entitled to that parking.

24 Q. How long have they been doing that, do you know?

25 A. I have no idea.

1 Q. Have you interviewed the folks there at Glickman to
2 see what they think about losing their parking there
3 on 25th Street?

4 A. I have not.

5 Q. All right. The MUTCD, you understand that as the law
6 in the state of Kansas?

7 A. That's correct.

8 Q. It is the law in the city of Wichita, correct?

9 A. Yes.

10 Q. And the MUTCD sets forth certain clearance
11 requirements that need to be complied with when
12 railroad warning devices are installed, correct?

13 A. It sets forth recommendations.

14 Q. All right. We're going to talk about whether they're
15 recommendations or requirements in a minute. But you
16 would agree they set forth standards?

17 A. Yes.

18 Q. Standards for clearance issues with regard to the
19 signs, correct?

20 A. Yes.

21 Q. What warning devices need to be installed at a given
22 location, correct?

23 A. They make recommendations based on engineering
24 studies, yes.

25 Q. All right. And those recommendations, as you're

- 1 calling them, I'll call them standards, are in the
2 interest of public safety; you would agree with that?
- 3 A. Absolutely.
- 4 Q. They are to provide warning to the approaching
5 motorists of the existence of that at-grade crossing,
6 correct?
- 7 A. That's correct.
- 8 Q. To prevent a collision between a train and motor
9 vehicle, correct?
- 10 A. Yes.
- 11 Q. Or to prevent the car from turning and hitting the
12 side of the train, correct?
- 13 A. Yes.
- 14 Q. Now, you're aware that the WTA is responsible for
15 installing and maintaining these warning devices,
16 correct?
- 17 A. I learned that this morning, yes.
- 18 Q. You did. And if the WTA fails to install those
19 warning devices, they could be fined by the State?
- 20 A. I assume that. I don't know that Mr. Dame testified
21 to that, but --
- 22 Q. Fined by the city?
- 23 A. I have no idea what the relationship is with the city.
- 24 Q. Fined by a federal agency?
- 25 A. Probably.

- 1 Q. Okay. If warning devices are installed at a grade -
2 crossing, not in compliance with the MUTCD, Kansas
3 law, would you agree that increases the liability
4 exposure of the WTA, BNSF and UP at the interchange
5 track?
- 6 A. I think if warning device -- warning devices are
7 installed that don't meet the intent of the MUTCD and
8 aren't properly documented when there are deviations
9 with the MUTCD, then yeah, your liability would go up,
10 and they'd probably go up anyway, even if they're
11 documented.
- 12 Q. All right. Would you turn to page 757 of the MUTCD.
13 And I'm sorry, this is section 8, Mr. Austin. I don't
14 know if you've got that separated. I've got -- I've
15 got about three of these things marked today, if you
16 want to use one of mine.
- 17 A. No. That's okay. I've got section 8.
- 18 Q. Are you with me on page 757?
- 19 A. Yes.
- 20 Q. You see sub-paragraph 05?
- 21 A. Yes.
- 22 Q. Would you read that into the record, please.
- 23 A. "A YIELD sign shall be the default traffic control
24 device for Crossbuck Assemblies on all highway
25 approaches to passive grade crossings unless an

1 engineering study performed by the regulatory agency
2 or highway authority having jurisdiction over the
3 roadway approach determines that a STOP sign is
4 appropriate."

5 Q. Okay. You're not aware of any engineering study by
6 the city of Wichita with regard to the appropriate
7 warning devices at this crossing, are you?

8 A. No.

9 Q. Okay. So based on what you know, no one at the city
10 has determined that a stop sign should be there,
11 correct?

12 A. That's correct.

13 Q. So the default position is a yield sign, correct?

14 A. That's correct.

15 Q. And go down to Paragraph 11, if you would. Read that
16 into the record.

17 A. "If a YIELD or STOP sign is installed for a Crossbuck
18 Assembly at a grade crossing on a separate support
19 than the Crossbuck sign (see Figure 8B-3), the YIELD
20 or STOP sign should be placed at a point where the
21 highway vehicle is to stop, or as near to that point
22 as practical, but no closer than 15 feet measured
23 perpendicular from the nearest rail."

24 Q. All right. Now, let me see if I can translate that.
25 That means that the yield sign, if on a different

1 post, has to be 15 feet from the nearest rail,
2 correct?

3 A. What this paragraph says is that, yes.

4 Q. Okay. Now, on your -- on your drawing here, I'm not
5 sure I really understand this, so let me make sure
6 that I understand this. Step up here behind you.
7 This line is the south track, and under this scenario,
8 you've removed the north track that was here
9 (indicating), correct?

10 A. I did not show it.

11 Q. Okay. You didn't put that track in?

12 A. I'd be happy to if you want me to.

13 Q. No. No. No. This is your notes. This is your track
14 removal scenario, right?

15 A. That's the scenario if the north track was removed,
16 yes.

17 Q. Okay. And this line is the dynamic envelope. What is
18 that? What is that supposed to represent?

19 A. That's your clearance zone.

20 Q. All right. And that's 12 feet, correct?

21 A. That's correct.

22 Q. And what is this four-foot measurement that you've
23 tacked in here?

24 A. Again, I was showing how everything related, all the
25 ground physically, and so what -- that four feet was

1 just the difference between the north rail, the north
2 track and where the dynamic envelope would be for the
3 south track.

4 Q. Okay. And under this north track removal scenario, is
5 your -- is your eastbound lane width assumed to be 12
6 feet?

7 A. No. It would be part of the 25 feet.

8 Q. Okay. That's where I'm not tracking you, because
9 you've -- you have a list of improvements that you
10 think need to be done to the street, even if the track
11 were to be removed, correct?

12 A. I don't think that was my testimony.

13 Q. Well, you mentioned delineators. You said -- you said
14 even if the track is removed, there are certain
15 minimal improvements that need to be made, including
16 delineators.

17 A. I think what I was saying is, yeah, if the track was
18 removed, we would have to identify where that dynamic
19 envelope would be.

20 Q. And possibly install delineators?

21 A. Yeah.

22 Q. But you can't tell us where those would be at this
23 point?

24 A. Oh, they would be at 12 feet from the center line of
25 the south track.

- 1 Q. And that's -- that's what you are recommending?
- 2 A. That's presumed with the north track being removed.
- 3 Q. And that's your -- yeah, I understand that. That's
- 4 your recommendation under that scenario, correct?
- 5 A. I think under that scenario.
- 6 Q. And you also recommended curb installation under that
- 7 scenario, correct?
- 8 A. I said that that would be an option.
- 9 Q. Okay. Temporary barriers?
- 10 A. That's an option.
- 11 Q. Okay. Of course, all those things require city
- 12 approval?
- 13 A. That's correct.
- 14 Q. Railroad couldn't go out there, put up delineators and
- 15 curbs and temporary barriers on its own volition,
- 16 could they?
- 17 A. Actually, in this particular case, they could. The --
- 18 the 12 foot of the dynamic envelope, the 12 foot of
- 19 the dynamic envelope off the south rail line, the
- 20 dynamic envelope would not be encroaching into city
- 21 right-of-way, so yes, you could, as the WTA would be
- 22 within their easement rights on private property to
- 23 establish that dynamic envelope delineation.
- 24 Q. Okay. And all -- so all the improvements that you
- 25 mentioned under your track removal scenario, none of

- 1 . those would require city approval?
- 2 A. Obviously, the installation of the intersection and
3 any signage if it's in the city right-of-way or
4 utilities that would need to be relocated, anything of
5 that would be affected by that crossing installation
6 would have to have city approval.
- 7 Q. Sure. Okay. You were here during the testimony of
8 Mr. Mooney, correct?
- 9 A. That's correct.
- 10 Q. You were in the courtroom?
- 11 A. Yes.
- 12 Q. I didn't ask that you be excluded from the courtroom.
13 I think I had the right to do that, but I didn't. You
14 listened to his testimony, correct?
- 15 A. Yes.
- 16 Q. Did you review the exhibits that were introduced into
17 evidence during his testimony?
- 18 A. Not -- not in any great detail.
- 19 Q. Okay.
- 20 A. And not all of the exhibits, too, by the way.
- 21 Q. Let me hand you what were previously introduced into
22 evidence as Plaintiffs' Exhibits 8, 11 and 13. Now,
23 Exhibits 8 and 11, I believe Mr. Mooney testified that
24 that would be the location of a crossbuck and yield
25 sign 12 feet from center line of the existing north

- 1 track; do you recall that testimony?
- 2 A. Yes.
- 3 Q. And in reviewing those exhibits, does that appear to
4 be about 12 feet from the center line of that track?
- 5 A. I see no reason to dispute it.
- 6 Q. All right. And you agree that under the MUTCD, the
7 standard with regard to a crossbuck is 12 feet from
8 center line of track, correct?
- 9 A. Yes.
- 10 Q. All right. And you're not suggesting that a crossbuck
11 be installed in the lane of travel, are you?
- 12 A. No.
- 13 Q. Okay. And Exhibit -- well, it would be hazardous,
14 correct?
- 15 A. We -- we would have -- if we had to install the
16 crossbuck at that dimension location under the current
17 conditions, we would need to move that lane of travel
18 where there was no conflict.
- 19 Q. Right. And that's under your theoretical plan to the
20 north, correct?
- 21 A. Or some interim plan, yeah.
- 22 Q. Exhibit 13, now, that's -- Mr. Mooney testified that's
23 the combination crossbuck and yield sign 15 feet from
24 the nearest rail. You don't have any reason to
25 disagree with that measurement, do you?

- 1 A. No.
- 2 Q. Once again, under existing conditions, under the
3 MUTCD, that crossbuck and yield sign would be
4 basically in the middle of the traveled portion of
5 25th Street?
- 6 A. Certainly appears to be the case.
- 7 Q. Okay. You don't disagree with that, do you?
- 8 A. No.
- 9 Q. All right. And once again, you're not recommending
10 that that occur?
- 11 A. I think the only way for that to occur is it's not
12 just a matter of putting up a sign itself. It's -- if
13 you're going to put up the sign, then you got to deal
14 with the traffic issue, so it would trigger some other
15 types of improvements, like dealing with the roadway,
16 relocate those utility poles and -- yeah.
- 17 Q. Sure. All the list of things that I went through
18 earlier with regard to your --
- 19 A. Among others, there's other things that we have to
20 deal with, like drainage and stuff as well, but --
- 21 Q. Sure. Sure. Okay. Now, the next thing I want to ask
22 you about, Mr. Austin, are some of the pictures that
23 you took. Exhibits -- I think they're D and C that
24 show some switches at the interchange; do you have
25 those in front of you?

- 1 A. I believe so. - Here we go.
- 2 Q. And I think you testified that when you took these
3 photos, there weren't any warning signs at these
4 locations, is that correct, either at the crossing or
5 advance?
- 6 A. No. I testified that the only advance warning sign
7 that was present at that location was a singular
8 crossbuck on the westbound lanes of 25th Street, and
9 it was reflected in Exhibit D.
- 10 Q. Okay. What -- wouldn't the installation of either
11 crossbucks or advance warning signs at the crossings
12 depicted in D and C have the same physical limitations
13 as what is being proposed at Emporia Court?
- 14 A. Yeah. It's an issue.
- 15 Q. It is an issue, isn't it?
- 16 A. For somebody.
- 17 Q. Yeah. Okay. Okay. What's the reason for a dynamic
18 train envelope?
- 19 A. It's to provide safety clearance for, like, any type
20 of load that's overhanging the car or -- or guys
21 riding up and down, hanging off the side of the car, I
22 think that was testified earlier.
- 23 Q. Show you Exhibit 12. You recognize that as a car on
24 the interchange?
- 25 A. It looks to be the case. I'll take your word that it

1 is.

2 Q. Okay. Well, I don't want to put words in your mouth.

3 You see the utility poles there, the two --

4 A. Sure.

5 Q. -- tracks, the gravel road of --

6 A. Sure.

7 Q. -- 25th Street, Broadway in the background; you see

8 all that?

9 A. Yeah. I was going to say a little different time of
10 year. There's trees -- leaves on the trees.

11 MR. DAY: Judge, I'd offer Exhibit No. 12.

12 THE COURT: Any objection to 12?

13 MR. HOCH: No, sir.

14 THE COURT: All right. Plaintiffs' 12 shall
15 be admitted.

16 Q. (By Mr. Day) Now -- sorry, Mr. Austin. I meant to
17 leave one of those with you.

18 A. Okay. Thank you.

19 Q. Is Exhibit 12 a graphic representation --
20 representation of why we need a dynamic train envelope
21 at a grade crossing?

22 A. Not only at a grade crossing, but the entire length of
23 that corridor.

24 Q. Absolutely. Absolutely. Okay. Did you go down to
25 the temporary crossing that's on the west side of the

1 interchange?

2 A. I did.

3 Q. Take any measurements down there?

4 A. I did not.

5 Q. All right. So you don't have any evidence that a
6 crossbuck and yield sign could not be installed at the
7 temporary location in compliance with the 15-foot rule
8 of the MUTCD?

9 A. No. I didn't take any measurements. I did take a
10 picture. I note that there was signage there.
11 Whether the signage that was there and installed, I
12 think by the WTA, meets the MUTCD requirements, I
13 don't have any opinion on it, didn't take any
14 measurements, just a photograph.

15 Q. Okay. Your testimony that the MUTCD, that's just
16 guidelines?

17 A. No. I think my testimony was that the Handbook for
18 Railroad Highway Crossings noted that there was no
19 standard for private rail crossings. The MUTCD is
20 really silent as it pertains to private crossings. I
21 think what my testimony was is even on private
22 crossings, I think it behooves us to provide some type
23 of signage.

24 Q. Sure. I think in your direct testimony even on a
25 private crossing, you ought to comply with the MUTCD.

- 1 A. I'd certainly encourage it.
- 2 Q. Okay. Where in the FRA guidelines, the grade crossing
3 handbook guidelines from the FRA, does it say that it
4 could be acceptable or appropriate to place a warning
5 sign in a public lane of travel?
- 6 A. I don't think the FRA talks about signage as it
7 pertains to the street right-of-way.
- 8 Q. Yeah. Signage portion's covered in the MUTCD, isn't
9 it?
- 10 A. Yeah.
- 11 Q. Okay.
- 12 A. And quite frankly, in the way you phrased the question
13 is all signage is in public right-of-way. Now, you
14 did say lane of travel, I concede that, but it all is
15 in public right-of-way.
- 16 Q. Sure. And as a civil engineer, you're not
17 recommending that the warning devices, either the
18 crossbuck at the crossing and the yield sign or the
19 advance warning sign, be placed in the -- in the
20 public lane of travel; you're not suggesting that?
- 21 A. No.
- 22 Q. Okay. And you recognize that would be hazardous?
- 23 THE COURT: Is that a question?
- 24 Q. (By Mr. Day) That was a question.
- 25 A. Yes.

1 Q. Okay.

2 MR. DAY: Judge, I think I'm about finished.

3 (Mr. Day confers with Mr. Mooney.)

4 MR. DAY: Judge, that's all the questions I
5 have.

6 THE COURT: Redirect?

7 MR. HOCH: I don't have any further
8 questions for Mr. Austin.

9 THE COURT: Well, again, I have a couple of
10 questions, just for clarification purposes. Again,
11 I'm not *sua sponte* opening up any new area of inquiry
12 for the record.

13 **EXAMINATION**

14 **BY THE COURT:**

15 Q. I just want to make sure I heard you correctly,
16 Mr. Austin. Did you say that if both tracks remained,
17 a private crossing as well as a public crossing could
18 be implemented; did I hear you say that?

19 A. Under certain scenarios, yes.

20 Q. What do you mean by that?

21 A. Well, the -- the -- to put a crossing in there today,
22 I mean, there really is -- is physically, as it exists
23 today, can we put a crossing in with what's in there.
24 It would be difficult to do to meet the requirements.
25 It would be difficult to do because of the parallel

1 tracks and their operations and for site distances and
2 stuff.

3 Might be able to squeeze it. I kind of doubt -- I
4 certainly wouldn't want to recommend that. But if we
5 look at -- started looking at other options, like the
6 concept that we brought today or look at some
7 combination like removing the north track, could we do
8 a crossing and meet it, and the answer is yes, we
9 could. So I'm not sure I answered your question. I'm
10 just hopefully trying -- trying to clarify it, not
11 confuse you, Your Honor.

12 Q. Well, just to follow up to what you said, and perhaps
13 I didn't ask or frame the question very well, but with
14 both tracks remaining, can you place a public
15 crossing -- and I'm talking about as far as location,
16 we're talking about the Emporia Court; do you
17 understand that?

18 A. Uh-huh.

19 Q. Okay. So with both tracks remaining where they
20 currently exist, can a public crossing be implemented
21 at that location, Emporia Court, and be in compliance
22 with the MUTCD?

23 A. Yes. But it also requires improvements to 25th Street
24 as well to get utility conflicts out of the way in
25 order to accommodate the crossing.

1 Q. Now, when you said move the track, could you expand on
2 that? I believe that's what you said.

3 A. Okay.

4 Q. And it would be preferable to move the track is the
5 way I interpret what you said.

6 A. Oh, I -- yeah. I don't want -- I think I've confused
7 you. I apologize. My point is today with the -- in
8 reference to -- pardon me, the Exhibit B, obviously,
9 the -- we put the crossing in, we have to delineate
10 the dynamic envelope, and as Mr. Lay [sic] showed, you
11 know, we would have delineation out in the middle of
12 the travel lanes. So the travel lanes have to go get
13 pushed to the north, and the only way to push those to
14 the north is to relocate these utilities. Could it be
15 done? Yes. It could be done. But without moving
16 those utilities, if we put the crossing in today, then
17 we'd have essentially a one-lane road at that
18 location. For 25th Street it would be one lane, and
19 they'd have to, you know, play chicken as who's going
20 through that little opening at any given time. But
21 could it be accommodated? Yes, we could move those
22 utilities out of there and accommodate that crossing.

23 Q. And what is -- what is the difference between a public
24 and private crossing?

25 A. Really, I think it's just -- it's a question of

1 ownership, of maintenance and the desire of the
2 property owner to serve it. If -- it's like the
3 construction company that's down the street, and they
4 have two private drives, those drives are only serving
5 that singular property, people who -- who go to and
6 from that property, ingress and egress on that
7 property, are there at the behalf of the property
8 owner, at the invitation of the property owner. But
9 when you have public, where you have maybe multiple
10 owners as it's intended, you know, requires a little
11 standard -- higher standard of care, maybe there is
12 more traffic, and -- and then it's just a question of
13 who's -- you know, who's accepting responsibility,
14 make sure things are done safely.

15 Q. But in terms of warning signs --

16 A. Well, the -- the -- there's no standard for private
17 rail crossings. Quite frankly, the private rail
18 crossing, the temporary one doesn't meet all the, you
19 know, standards I've shown here. It's just a -- it's
20 just a -- a stop sign, crossbuck and a little warning
21 sign on it and, you know, in my opinion, if we're --
22 if we're going to do it, you know, this is the
23 engineer in me, even though there is no standards, we
24 should be prudent and exercise some level of care to
25 -- to highlight it.

1 At the same time, as I commented this morning, you
2 asked me about the overkill side of it, and I
3 appreciate that. At the same time, I mean, we know
4 this is an industrial area, the people that are
5 traveling there know it. If they're entering the
6 property going over railroad tracks, intuitively, they
7 know when they're exiting the property, they're
8 exiting railroad tracks. That's just the nature of
9 the -- the deal. Just like going through a
10 residential subdivision, you intuitively slow down,
11 because you know kids might be playing in the
12 driveways, and you might get -- people driving to the
13 context of their environment, so, you know, we have to
14 understand that, but at the same time, we have to do
15 everything prudent, so we all don't end up back in
16 here defending our -- our decision to do it one way or
17 another.

18 Q. And then there was another bit of testimony you gave
19 that caught my attention. And that is to implement
20 your plan, you're going to, out of necessity, affect
21 some of the business owners, is that correct?

22 A. Yeah. Every -- every road construction project in the
23 city of Wichita affects business owners, and we have
24 to deal with that all the time on every project. So
25 as -- as Mr. Lay [sic] commented about talking with

1 the property owner to the north, you know, that's
2 really not our job as the consultants when we design
3 street improvements, like the city -- because it
4 becomes a city project, and those conversations are
5 had, I mean, that will happen. It will -- it probably
6 already has.

7 This -- this 25th Street CIP project was in
8 response to a planning study, and I don't remember the
9 year of it, but it was done as part of a planning
10 study to pave that. It connects to 26th Street on the
11 east end, which is unpaved for about a quarter mile,
12 and serves other businesses and industries to the
13 north and east. So there was a study done. It was
14 identified as a priority. It's been pushed back
15 because of funding is my understanding of it. But,
16 you know, a lot of those people, like Mr. Glickman,
17 have participated, been aware of this project for some
18 time. I would dare say that's probably fact. I don't
19 know, he's not here, but most of what the city does
20 when they do these planning studies, they hold public
21 hearings, take public input and send letters to
22 property owners advising them of the proposed project.

23 Q. Do you know from personal knowledge that that
24 procedure was followed in this case?

25 A. I -- I was not involved in that planning study. All I

1 know is that there was a study done, and having done
2 those studies myself on behalf of the city of Wichita,
3 their procedure and policies are pretty consistent as
4 to what's required, so it -- if they didn't notify the
5 property owners and take input from 'em, I'd be -- I'd
6 be dumbfounded, quite frankly, because that's what
7 they do. That's what the city does is they notify
8 people.

9 Q. You've heard the expression, good enough for
10 government work?

11 A. Having served in the government, I said that many
12 times.

13 THE COURT: Well, does anyone have any
14 questions based on --

15 MR. DAY: I do.

16 THE COURT: -- my questions?

17 MR. DAY: I actually do, Your Honor.

18 THE COURT: Okay. Well, let me ask Mr. Hoch
19 since this is his witness.

20 MR. HOCH: Not -- not at this point. I may
21 have a follow-up to Paul, but --

22 THE COURT: All right. Mr. Day?

23 **RE-CROSS-EXAMINATION**

24 **BY MR. DAY:**

25 Q. Mr. Austin, actually, it's Mr. Day, not Mr. Lay.

1 A. I was just sitting here thinking that.

2 Q. I kept -- kept thinking of Ken Lay when you were
3 saying that.

4 A. No. He -- yeah, I was thinking of John Lay, George
5 Lay Sign Company, local business.

6 Q. Judge Bribiesca asked you if you knew the difference
7 between a public crossing and a private crossing.
8 It's my understanding under the law that if there is a
9 public street dedication, that makes the crossing
10 public; is that your understanding?

11 A. I would -- I would probably agree with that. Yes.

12 Q. Okay. So if this were converted somehow to a private
13 crossing, wouldn't you have to vacate the dedication?

14 A. Possibly.

15 Q. Okay.

16 MR. DAY: That's all I have, Judge.

17 THE COURT: Mr. Hoch?

18 **REDIRECT EXAMINATION**

19 **BY MR. HOCH:**

20 Q. And if the -- if the Emporia Court dedication needed
21 to be vacated, could that be done?

22 A. It -- in my opinion, yes. There's -- there's a
23 process in the state statutes that define vacation
24 procedures, goes through a public hearing process.

25 Q. Thank you.

1 THE COURT: Mr. Day, any other questions?

2 MR. DAY: No, Your Honor.

3 THE COURT: All right. Mr. Austin, you may
4 step down.

5 THE WITNESS: Thank you, Your Honor.

6 THE COURT: Call your next witness.

7 MR. HOCH: We don't have another witness.

8 We rest.

9 THE COURT: Is there any rebuttal?

10 MR. DAY: No, Your Honor.

11 THE COURT: All right. Parties care to
12 argue? Mr. Day, you care to argue?

13 MR. DAY: Well, Judge, I -- I haven't
14 discussed this with Mr. Hoch, but Mr. King has
15 suggested to me that it might be beneficial to the
16 Court and the parties to provide some briefing to the
17 Court after this hearing. I'm happy to argue the
18 case, but I was thinking in terms of, in lieu of final
19 arguments, perhaps a short briefing schedule with
20 maybe some limited page numbers.

21 This is a very -- it's somewhat of a complex
22 issue. There is some testimony today from experts, I
23 think, that could benefit from being summarized in
24 some briefs. This is a very important case to my
25 client, I think Mr. Hoch's client. And we've been to

1 the Court of Appeals now twice on this darn thing.
2 And I'm just thinking that it might be beneficial if
3 the Court had the benefit of some briefing in this
4 case. I don't know what your thinking or Wyatt's
5 thinking is on that.

6 THE COURT: Well, I'll share my thinking
7 with you. I think it will make no difference, and
8 here's why: Because I'm not going to be able to make
9 both parties happy. And I think this -- regardless of
10 my decision, it's going to go up a third time.

11 Now, I think the only way that can be prevented is
12 if the parties get together and you come up with a
13 feasible, viable way to put this to rest. Unless it's
14 an agreement by the parties, I don't believe this
15 thing is going to cease at this level, because just
16 based on the testimony, I can't give you a Solomonic
17 decision. Somebody's going to win, and somebody's
18 going to lose.

19 So I just fail to see how delaying it is going to
20 help unless -- unless both parties tell me, well, we'd
21 like to talk about it, Judge. You want me to step out
22 and let you discuss it, and if after talking a little
23 bit, you decide, no, further discussions will not aid
24 in settling the matter, then I'll just come out, hear
25 your arguments, I'll give you my decision. I'm ready

1 to rule. I'm ready to rule right now, but I'll listen
2 to you.

3 MR. DAY: Well, Judge, I'm a little bit
4 hamstrung, because mister -- Mr. Dame took your
5 advice, and he left, and he's my client. So I can't
6 really talk with him about, you know, possible
7 resolutions, and I'd need to talk to the other
8 railroads, too, so maybe -- maybe we should just argue
9 it at this point.

10 THE COURT: Mr. Hoch, I haven't heard from
11 you. I should give you an opportunity to weigh in,
12 see what your thinking is, but I've shared my thoughts
13 with you.

14 MR. HOCH: I've heard you loud and clear on
15 the additional briefing not being helpful, and I
16 appreciate that, as does my client.

17 What I'm struggling with is whether we should ask
18 you for a window of time before we do a final
19 argument, in which to have the conversation with the
20 right people from the railroad available and -- and to
21 find out whether there is a -- an alternative to
22 having you rule on it.

23 And I -- I guess I would ask if we might take
24 three minutes so that I could talk with Jeff and Paul
25 and figure out, I mean, if -- if -- if I'm wasting my

1 breath, then so be it, and we'll come back, and we'll
2 argue it. If I'm not, then we'll come back,
3 hopefully, with a request for you on what we'd like to
4 do.

5 THE COURT: Well, I don't think you're
6 wasting your breath. And also, something that bothers
7 me is whatever decision I make, I'm affecting not only
8 the rights of the parties in front of me, but other
9 parties as well that aren't a party to this action.
10 And there was -- there was some testimony about the
11 city and what the city may have done or what the city
12 may have said or representatives of the city. And, of
13 course, it's testimony about the businesses that are
14 along 25th Street, and -- but be that as it may,
15 they're not here, they're not in the courtroom, and
16 I'm -- I'll make a decision, in spite of those parties
17 not being present. And that's another reason why I
18 think this thing is just going to go up regardless of
19 how I decide.

20 But perhaps it would be helpful to give you a few
21 minutes to talk, and then let me know what you want to
22 do, all right? So I'll take a recess.

23 MR. HOCH: We'll go back in the jury room
24 here for a moment.

25 THE COURT: That's fine.

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(A recess was taken at 2:45 p.m., after
which the proceedings were adjourned
for the day.)

* * * * *

JDG

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

FILED
APP DOCKET NO.
2012 JAN 25 1 P 3:43

WICHITA TERMINAL ASSOCIATION,)
BURLINGTON NORTHERN & SANTA FE)
RAILWAY COMPANY and UNION PACIFIC)
RAILROAD COMPANY,)

Plaintiffs,)

v.)

F.Y.G. INVESTMENTS, INC., and TREATCO, INC.,)

Defendants.)

Case No. 02 C 3688

CLERK OF DIST. COURT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KS
BY

COPY

Pursuant to K.S.A. Chapter 60

**JOURNAL ENTRY ON SECOND REMAND and
PERMANENT INJUNCTION**

This matter came before the Court on November 21, 2011 and December 12, 2011 for a hearing on the options for implementing this court's August 1, 2008 permanent injunction ordering the construction of a permanent rail crossing across 2 sets of tracks at 25th Street and Emporia Court in Wichita. The Kansas Court of Appeals, by Memorandum Opinion dated February 11, 2011, remanded the case to the district court for the presentation of evidence on the options "for viably implementing the injunction in compliance with the MUTCD [Manual on Uniform Traffic Control Devices], including but not limited to removal of the north track at Emporia Court and/or any other legally compliant crossing location." The Wichita Terminal Association, Burlington Northern & Santa Fe Railway Company, and the Union Pacific Railroad Company (together, the "Railroads") appeared by their attorneys of record, K. Paul Day and Jeff King of Lathrop & Gage LLP. Defendants F.Y.G. Investments, Inc. and Treatco, Inc. ("F.Y.G.") appeared by their attorney of record, Wyatt A. Hoch of Foulston Siefkin LLP.

HISTORICAL BACKGROUND

On August 1, 2008, this court issued a Journal Entry on Remand and Permanent Injunction that ordered the Railroads, in pertinent part, to:

construct and install, within 90 days after Defendants' presentation to Plaintiffs of sealed engineering drawings for the construction of Emporia Court street, (i) a permanent railroad crossing at least 32 feet in width at the point where the centerline of the dedicated Emporia Court street intersects the railroad tracks, and (ii) permanent railroad crossing protection in compliance with Federal Railroad Administration requirements.

The court also ordered the Railroads to, in the interim, keep open a temporary, thirty-two (32) foot timber crossing at the northwest corner of F.Y.G.'s property "for the benefit and use of FYG" to provide ingress and egress from 25th Street to F.Y.G.'s property. The location of this temporary crossing is the Railroads' proposed location for the permanent rail crossing.

F.Y.G. triggered the Railroads' obligation to construct the Emporia Court permanent crossing and the associated crossing protection by presenting to the Railroads' counsel, under cover of a letter dated December 18, 2008, a set of sealed engineering drawings approved by the City of Wichita for the construction of Emporia Court street. When the Railroads failed to construct a permanent crossing at Emporia Court, F.Y.G. obtained an Order to Appear and Show cause why the railroads should not be held in contempt. The Railroads in turn filed a Motion for Relief from Judgment or Order under K.S.A. § 60-260(b). After an evidentiary hearing on June 8, 2009, Judge Timothy Henderson found that installation of crossing protection signage at the Emporia Court location was practically impossible without impeding upon the unimproved 25th Street, and modified the injunction to order the Railroads to remove the northern-most of 2 parallel tracks "if that is the only means to construct the crossing and crossing protection without impeding upon 25th Street." The Railroads appealed.

The court of appeals held that Judge Henderson abused his discretion by *sua sponte* ordering removal of the north track without providing the parties an opportunity to address the feasibility of the modification and without determining whether this modification would solve the underlying issue of impossibility. The court therefore remanded the case for a factual determination of the most viable option for implementing the injunction.

FINDINGS AND CONCLUSIONS ON REMAND

On November 21, 2011 the Railroads presented to the district court several hours of testimony and documentary evidence through railway safety consultant Richard Mooney and current Wichita Terminal Association Superintendent Ron Dame. The Railroads then rested their case. F.Y.G. presented testimony and documentary evidence through Kansas civil engineer Timothy Austin, P.E. F.Y.G. then rested. The Railroads did not present any rebuttal evidence. The parties returned to court on December 12, when counsel made their closing arguments.

After hearing the testimony of witnesses and reviewing the court file, exhibits introduced into evidence on November 21, 2011, and F.Y.G and Treatco's Hearing Brief on Remand, the Court makes the following findings of fact and conclusions of law:

1. The court finds that the Railroads' proposed crossing location – the temporary crossing location at the northwest corner of F.Y.G.'s property referred to in the hearing as the "pinch point" – is not the most viable access point to F.Y.G.'s property because of the grade and swampy nature of the land at that location.

2. Given the current, 2-track configuration at Emporia Court, crossing-protection signage cannot be installed in compliance with the MUTCD without intruding into the 25th Street right-of-way. The widening of 25th Street to enable to installation of crossing signage would

impact businesses and utility poles along or in the north side of the 25th Street right-of-way. The court finds that widening of 25th Street to create ample clearance for crossing-protection signage is not the most viable option because of its impact on the existing business owners.

3. The evidence shows that there are no businesses that would be impacted if a new rail line is laid south of the existing tracks. The undeveloped property south of the Railroads' right-of-way is owned by F.Y.G. The court finds that, based on the evidence presented, the most viable option for providing access to F.Y.G.'s property is removal of the north track coupled with the laying of a new track south of the existing tracks. The court finds that removal of the north track would allow the Emporia Court location to be built in compliance with the MUTCD. The court finds that if the new, southern track is installed prior to removal of the north track, the Railroads' concern over losing car-parking space will be alleviated to a great degree.

4. The court therefore orders the Railroads to construct and install (i) a permanent railroad crossing at least 32 feet in width at the point where the centerline of the dedicated Emporia Court Street intersects the railroad tracks; and (ii) permanent railroad crossing protection in compliance with all federal, state, and local laws, regulations, and ordinances. The Railroads must complete construction of the permanent crossing by April 1, 2012.

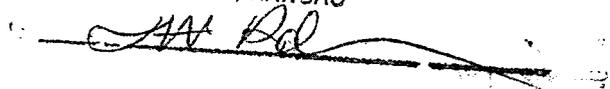
5. Until completion of the permanent crossing, the Railroads must also keep open the temporary timber crossing at the northwest corner of F.Y.G.'s property for the benefit and use of FYG to provide ingress and egress from 25th Street to F.Y.G.'s property.

IT IS SO ORDERED.

Certificate of Clerk of the District Court. The above is a true and correct copy of the original instrument which is on file or of record in this court.

Dated this 2 day of March, 2012

CLERK OF THE DISTRICT COURT
18th JUDICIAL DISTRICT
SEDGWICK COUNTY, KANSAS




Hon. Joseph Bribiesca



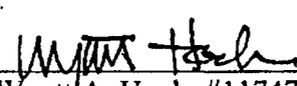
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Court of Appeals of Kansas

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KENDALL PAUL DAY
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Appellate Case No. 12-107666-A
District Court Case No. 02C3688

WICHITA TERMINAL ASSOCIATION,
BURLINGTON NORTHERN & SANTA FE
RAILWAY COMPANY AND UNION PACIFIC
RAILROAD COMPANY,
V.
F.Y.G. INVESTMENTS, INC., AND TREATCO, INC.,

APPELLANTS,
APPELLEES.

THE COURT HAS TAKEN THE FOLLOWING ACTION:

MOTION BY WICHITA TERMINAL ASSOCIATION, ET AL. FOR EXTENSION OF TIME TO FILE BRIEF.

MOTION GRANTED IN PART. BRIEF TO BE FILED ON OR BEFORE MAY 16, 2012.

Date: March 26, 2012

Carol G. Green
Clerk

✓

Court of Appeals of Kansas

301 SW 10th Ave.
Topeka, KS 66612
785.296.3229

KENDALL PAUL DAY
LATHROP & GAGE LLP
2345 GRAND BLVD STE 2200
KANSAS CITY, MO 64108 - 2618

Appellate Case No. 12-107666-A
District Court Case No. 02C3688

WICHITA TERMINAL ASSOCIATION,
BURLINGTON NORTHERN & SANTA FE
RAILWAY COMPANY AND UNION PACIFIC
RAILROAD COMPANY,
V.
F.Y.G. INVESTMENTS, INC., AND TREATCO, INC.,

APPELLANTS,
APPELLEES.

THE COURT HAS TAKEN THE FOLLOWING ACTION:

Date: March 27, 2012

Carol G. Green
Clerk

CASE NO. 107,666

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

WICHITA TERMINAL ASSOCIATION,
BURLINGTON NORTHERN & SANTA FE
RAILWAY COMPANY AND UNION PACIFIC
RAILROAD COMPANY,
Plaintiffs-Appellants,

v.

F.Y.G. INVESTMENTS, INC., AND TREATCO, INC.,
Defendants-Appellees.

ORDER

Appellants' unopposed motion for stay is granted. Appellants are ordered to post a \$250,000 supersedeas bond with the Clerk of the District Court within 30 days of this order.

DATED: March 27, 2012.

FOR THE COURT


DAVID E. BRUNS, Presiding Judge

Court of Appeals of Kansas

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KENDALL PAUL DAY
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Appellate Case No. 12-107666-A
District Court Case No. 02C3688

WICHITA TERMINAL ASSOCIATION,
BURLINGTON NORTHERN & SANTA FE
RAILWAY COMPANY AND UNION PACIFIC
RAILROAD COMPANY,
V.
F.Y.G. INVESTMENTS, INC., AND TREATCO, INC.,

APPELLANTS,
APPELLEES.

THE COURT HAS TAKEN THE FOLLOWING ACTION:

MOTION BY WICHITA TERMINAL ASSOCIATION, ET AL. FOR EXTENSION OF TIME TO FILE BRIEF.

MOTION GRANTED. APPELLANT'S BRIEF TO BE FILED ON OR BEFORE JUNE 15, 2012.

Date: May 22, 2012

Carol G. Green
Clerk

Court of Appeals of Kansas

301 SW 10th Ave.
Topeka, KS 66612
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KANSAS CITY, MO 64108 - 2618

Appellate Case No. 12-107666-A
District Court Case No. 02C3688

WICHITA TERMINAL ASSOCIATION,
BURLINGTON NORTHERN & SANTA FE
RAILWAY COMPANY AND UNION PACIFIC
RAILROAD COMPANY,
V.
F.Y.G. INVESTMENTS, INC., AND TREATCO, INC.,

APPELLANTS,
APPELLEES.

THE COURT HAS TAKEN THE FOLLOWING ACTION:

MOTION BY F.Y.G. INVESTMENTS, INC., ET AL FOR EXTENSION OF TIME TO FILE BRIEF.

MOTION GRANTED. APPELLEES BRIEF TO BE FILED ON OR BEFORE AUGUST 07, 2012.

Date: July 17, 2012

Carol G. Green
Clerk

Court of Appeals of Kansas

301 SW 10th Ave.
Topeka, KS 66612
785.296.3229

KENDALL PAUL DAY
LATHROP & GAGE LLP
2345 GRAND BLVD STE 2200
KANSAS CITY, MO 64108 - 2618

Appellate Case No. 12-107666-A
District Court Case No. 02C3688

WICHITA TERMINAL ASSOCIATION,
BURLINGTON NORTHERN & SANTA FE
RAILWAY COMPANY AND UNION PACIFIC
RAILROAD COMPANY,

APPELLANTS,

V.

F.Y.G. INVESTMENTS, INC., AND TREATCO, INC.,

APPELLEES.

THE COURT HAS TAKEN THE FOLLOWING ACTION:

MOTION BY F.Y.G. INVESTMENTS, INC., ET AL FOR EXTENSION OF TIME TO FILE BRIEF.

MOTION GRANTED. APPELLEES BRIEF TO BE FILED ON OR BEFORE AUGUST 27, 2012.

Date: July 27, 2012

Carol G. Green
Clerk

Court of Appeals of Kansas

301 SW 10th Ave.
Topeka, KS 66612
785.296.3229

KENDALL PAUL DAY
LATHROP & GAGE LLP
2345 GRAND BLVD STE 2200
KANSAS CITY, MO 64108 - 2618

Appellate Case No. 12-107666-A
District Court Case No. 02C3688

WICHITA TERMINAL ASSOCIATION,
BURLINGTON NORTHERN & SANTA FE
RAILWAY COMPANY AND UNION PACIFIC
RAILROAD COMPANY,
V.
F.Y.G. INVESTMENTS, INC., AND TREATCO, INC.,

APPELLANTS,
APPELLEES.

THE COURT HAS TAKEN THE FOLLOWING ACTION:

MOTION BY APPELLEE, F.Y.G. INVESTMENTS, INC AND TREATCO, INC., FOR EXTENSION OF TIME TO FILE BRIEF.

MOTION GRANTED. APPELLEE'S BRIEF DUE SEPTEMBER 26, 2012 OR IT WILL NOT BE CONSIDERED. NO FURTHER EXTENSIONS WILL BE GRANTED ABSENT A SHOWING OF EXCEPTIONAL CIRCUMSTANCES.

Date: August 29, 2012

Carol G. Green
Clerk

Court of Appeals of Kansas

301 SW 10th Ave.
Topeka, KS 66612
785.296.3229

KENDALL PAUL DAY
LATHROP & GAGE LLP
2345 GRAND BLVD STE 2200
KANSAS CITY, MO 64108 - 2618

Appellate Case No. 12-107666-A
District Court Case No. 02C3688

WICHITA TERMINAL ASSOCIATION,
BURLINGTON NORTHERN & SANTA FE
RAILWAY COMPANY AND UNION PACIFIC
RAILROAD COMPANY,
V.
F.Y.G. INVESTMENTS, INC., AND TREATCO, INC.,

APPELLANTS,
APPELLEES.

THE COURT HAS TAKEN THE FOLLOWING ACTION:

MOTION FOR EXTENSION OF TIME TO FILE REPLY BRIEF BY APPELLANT, WICHITA TERMINAL ASSOCIATION, ET AL.

MOTION GRANTED. APPELLANT'S REPLY BRIEF IS DUE OCTOBER 30, 2012.

Date: October 1, 2012

Carol G. Green
Clerk

Court of Appeals of Kansas

301 SW 10th Ave.
Topeka, KS 66612
785.296.3229

KENDALL PAUL DAY
LATHROP & GAGE LLP
2345 GRAND BLVD STE 2200
KANSAS CITY, MO 64108 - 2618

Appellate Case No. 12-107666-A
District Court Case No. 02C3688

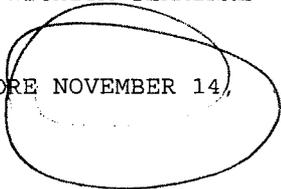
WICHITA TERMINAL ASSOCIATION,
BURLINGTON NORTHERN & SANTA FE
RAILWAY COMPANY AND UNION PACIFIC
RAILROAD COMPANY,
V.
F.Y.G. INVESTMENTS, INC., AND TREATCO, INC.,

APPELLANTS,
APPELLEES.

THE COURT HAS TAKEN THE FOLLOWING ACTION:

MOTION FOR EXTENSION OF TIME TO FILE REPLY BRIEF BY APPELLANT, WICHITA TERMINAL ASSOCIATION, ET AL..

MOTION GRANTED. APPELLANT'S REPLY BRIEF TO BE FILED ON OR BEFORE NOVEMBER 14, 2012. NO FURTHER EXTENSIONS ABSENT EXCEPTIONAL CIRCUMSTANCES.



Date: October 19, 2012

Carol G. Green
Clerk

Court of Appeals of Kansas

301 SW 10th Ave.
Topeka, KS 66612
785.296.3229

KENDALL PAUL DAY
LATHROP & GAGE LLP
2345 GRAND BLVD STE 2200
KANSAS CITY, MO 64108 - 2618

Appellate Case No. 12-107666-A
District Court Case No. 02C3688

WICHITA TERMINAL ASSOCIATION,
BURLINGTON NORTHERN & SANTA FE
RAILWAY COMPANY AND UNION PACIFIC
RAILROAD COMPANY,
V.

APPELLANTS,

F.Y.G. INVESTMENTS, INC., AND TREATCO, INC.,

APPELLEES.

THE COURT HAS TAKEN THE FOLLOWING ACTION:

APPELLANT'S MOTION FOR DESIGNATION OF VENUE BY APPELLANT, WICHITA TERMINAL ASSOCIATION,
ET AL.

GRANTED. ORAL ARGUMENT WILL BE SET IN TOPEKA.

Date: December 11, 2012

Carol G. Green
Clerk

No. 107,666

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

WICHITA TERMINAL ASSOCIATION, BURLINGTON NORTHERN & SANTA FE RAILWAY
COMPANY, and UNION PACIFIC RAILROAD COMPANY,
Appellants,

v.

F.Y.G. INVESTMENTS, INC., and TREATCO, INC.,
Appellees.

SYLLABUS BY THE COURT

1.

The Supremacy Clause of Article VI of the United States Constitution, which establishes the doctrine of federal preemption, invalidates state laws that interfere with, or are contrary to, federal law.

2.

Because federal preemption involves an interpretation of law, appellate courts have an unlimited standard of review.

3.

Federal preemption is ultimately a question of congressional intent. Express preemption occurs when Congress makes its intent known through explicit statutory language. Implied preemption occurs when Congress does not expressly preempt state law, but its intent to do so can be inferred from a statutory or regulatory scheme.

4.

The Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. 10101 *et seq.* (2006), created the Surface Transportation Board to regulate rail transportation in the United States. 49 U.S.C. § 10501(a)(1) (2006).

5.

Congress has granted the Surface Transportation Board exclusive jurisdiction over the construction, acquisition, operation, abandonment, or discontinuance of railroad tracks and facilities. Furthermore, Congress has expressly stated that the remedies with respect to regulation of rail transportation set forth in the ICCTA are exclusive and preempt other remedies provided under federal or state law. 49 U.S.C. § 10501(b).

6.

The ICCTA preempts all state or local laws that may reasonably be said to have the effect of managing or governing the operations of a rail carrier.

7.

States and municipalities may continue to exercise traditional police powers to protect public health and safety so long as the application of such laws or regulations has only a remote or incidental effect on rail transportation.

8.

The Surface Transportation Board has exclusive jurisdiction over the question of whether a rail carrier should be required to remove existing railroad track and construct a new track in order to install a permanent railroad crossing at a specific location. It is also within the exclusive jurisdiction of the Surface Transportation Board to determine whether requiring the construction of a permanent railroad crossing at a specific location unreasonably burdens or interferes with interstate commerce.

Appeal from Sedgwick District Court; JOSEPH BRIBIESCA, judge. Opinion filed May 31, 2013.
Affirmed in part, vacated in part, and remanded with directions.

Jeffrey R. King, of Lathrop & Gage LLP, of Overland Park, and *K. Paul Day* and *Doug Dalgelish*, of the same firm, of Kansas City, Missouri, for appellants.

James D. Oliver, of Foulston Siefkin LLP, of Overland Park, and *Wyatt A. Hoch*, of the same firm, of Wichita, for appellees.

Before PIERRON, P.J., BRUNS and POWELL, JJ.

BRUNS, J.: This is the third appeal in a dispute over access to real property. The Wichita Terminal Association, Burlington Northern & Santa Fe Railway Company, and Union Pacific Railroad (collectively WTA) own and operate railroad tracks in Wichita. F.Y.G. Investments, Inc., and Treatco, Inc. (collectively FYG) own real property adjacent to the WTA's tracks. In 2008, the WTA was ordered to provide access—by way of a permanent railroad crossing—from a public street to FYG's real property.

In the present appeal, although the WTA does not dispute the district court's authority to require it to install a permanent railroad crossing to provide access to FYG's property, it contends that federal law preempts state courts from requiring interstate rail carriers to remove or reconstruct existing tracks in order to install a permanent railroad crossing. Specifically, the WTA argues that provisions of the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. 10101 *et seq.* (2006), preempted the remedies ordered by the district court in a journal entry filed on January 25, 2012. Because we find that federal preemption is applicable to some of the remedies ordered by the district court, we affirm in part, vacate in part, and remand with directions.

FACTS

Wichita City Ordinance No. 5436—which was enacted in 1916—grants the WTA the right to construct, operate, and maintain railroad tracks along 25th Street in Wichita. Pursuant to the ordinance, the WTA continues to own and operate two sets of parallel railroad tracks that run within a 30-foot right-of-way located south of 25th Street. Burlington Northern & Santa Fe and Union Pacific use the tracks as an interchange to move rail traffic between their rail lines. In addition, they temporarily store railcars on the tracks to facilitate the interchange of rail traffic.

In 1996, FYG purchased approximately 27 acres of undeveloped land directly to the south of the WTA's railroad tracks. After the WTA began repairing its railroad tracks in September 2002, FYG claimed that the WTA was a trespasser. Thereafter, on November 6, 2002, the WTA initiated this action, seeking to enjoin FYG from interfering with its right to maintain the railroad tracks. In response, FYG filed a counterclaim requesting an easement to allow vehicles to cross the WTA's tracks in order to access its property from 25th Street.

The district court granted summary judgment in favor of the WTA on January 7, 2004, finding that FYG had no legal right to ingress and egress across the WTA's railroad right-of-way. The district court also found that the city ordinance gave the WTA the right to construct, operate, and maintain railroad tracks along 25th Street. On appeal, a panel of this court reversed the district court's ruling and remanded the case to the district court "to determine if an injunction to provide ingress and egress [was] appropriate." See *Wichita Terminal Association v. F.Y.G. Investments, Inc.*, No. 92,132, 2005 WL 824042, *4 (Kan. App. 2005) (unpublished opinion) (*Wichita Terminal Association I*).

On February 20, 2007, the district court held an evidentiary hearing on remand. After hearing the testimony of several witnesses, the district court announced its decision

on the record. The district court found that 25th Street—although undeveloped—is a public street and that the city ordinance required the WTA to provide ingress and egress over its railroad tracks to FYG's real property. In addition, the district court announced that it was entering a mandatory injunction requiring the WTA to construct and install a permanent railroad crossing and, in the interim, to keep a temporary crossing open to provide access to FYG's land adjacent to the railroad tracks. Following the hearing, the district court filed a minute order and directed FYG's attorney to prepare a journal entry.

Because the parties could not agree on the terms of the journal entry, one was not filed until August 1, 2008. In the journal entry, the district court ordered the WTA to:

"construct and install, within 90 days after [FYG's] presentation to [the WTA] of sealed engineering drawings . . . , (i) a permanent railroad crossing at least 32 feet in width at the point where the centerline of the dedicated Emporia Court street intersects with the railroad tracks, and (ii) permanent railroad crossing protection in compliance with Federal Railroad Administration requirements."

No appeal was filed from this journal entry, and it became a final order of the district court.

On December 18, 2008, FYG presented the WTA with a set of engineering drawings approved by the City of Wichita for the construction of a permanent railroad crossing at Emporia Court. Under the terms of the journal entry, the WTA was obligated to complete a permanent railroad crossing at Emporia Court by March 22, 2009. Because work on the project had not commenced as of April 2, 2009, FYG filed a motion for order to appear and show cause. The motion requested that the court hold the WTA in contempt for failing to begin work on the Emporia Court crossing and for failing to keep the temporary crossing open as required by the journal entry filed on August 1, 2008.

In response, the WTA moved for relief from judgment under K.S.A. 60-260(b). In the motion, the WTA argued that the installation of a permanent railroad crossing at the Emporia Court location would be impractical, if not impossible, because the placement of crossing protection devices would impede the public right-of-way on 25th Street and would violate the Manual on Uniform Traffic Control Devices (MUTCD). Moreover, in its response to FYG's contempt motion, the WTA also argued that the Surface Transportation Board (STB) had express or implied jurisdiction to review the matter under the ICCTA because a railroad crossing at Emporia Court would have a substantial impact on interstate commerce.

On June 9, 2009, a different district judge conducted an evidentiary hearing to consider both FYG's contempt motion and the WTA's K.S.A. 60-260(b) motion. At the hearing, the judge questioned an employee of Burlington Northern & Santa Fe regarding whether the WTA could construct the Emporia Court crossing in compliance with the MUTCD if it removed the north track to allow more room for the placement of crossing protection devices. The judge also questioned the employee regarding whether the WTA could install an underpass or overpass at Emporia Court.

At the conclusion of the hearing, the district court granted the WTA's K.S.A. 60-260(b) motion and denied FYG's contempt motion. Specifically, the district court found that "the installation of traffic protection for a crossing over two tracks at Emporia Court is practically impossible . . . without impeding traffic on the unimproved 25th Street." Hence, the district court concluded that the WTA had shown good cause for failing to timely construct and install a permanent crossing at Emporia Court. The district court, however, rejected the WTA's suggestion that the permanent crossing be placed at the location of the temporary crossing because no appeal was taken from the journal entry filed on August 1, 2008.

In a journal entry entered on July 20, 2009, the district court ordered the WTA:

"to construct and install (i) a permanent railroad crossing at least 32 feet in width at the point where the centerline of the dedicated Emporia Court Street intersects the railroad tracks, and (ii) permanent railroad crossing protection in compliance with all federal, state, and local laws, regulations, and ordinances. This crossing shall not impede in any manner in the public right-of-way of 25th Street. [The WTA] must remove the north track in the area of the crossing if that is the only means to construct the crossing and crossing protection without impeding 25th Street. . . . [The WTA] must construct the crossing and crossing protection within 90 days after the entry of [this] Journal Entry. . . . All other provisions of the August 1, 2008 Journal Entry . . . will remain in effect."

On the same day the journal entry was filed, the WTA filed an objection to the proposed journal entry, arguing that it contained inaccurate statements and failed to remedy the problems with the August 2008 journal entry. Further, the WTA argued that the district court exceeded its jurisdiction and authority because the removal of railroad tracks falls under the exclusive jurisdiction of the ICCTA. The WTA also argued that because of its substantial impact on interstate commerce, the ICCTA impliedly preempted an order requiring removal of the north track. In addition, the WTA argued that even if the north track were removed, compliance with the MUTCD was not possible without placing crossing protection devices that would impede 25th Street. The WTA also requested that the action be stayed so that it could "pursue appropriate authorizations from the STB before proceeding any further with any proposed scenario that would require interference with the existing tracks." It appears from a review of the record that the court never ruled upon the objection or the request for stay.

In the second appeal, a panel of this court affirmed the district court's granting of the WTA's K.S.A. 60-260(b) motion "based on the impossibility of the remedy ordered" in the journal entry filed on August 1, 2008. But the panel reversed that portion of the district court's ruling in which it "sua sponte required a remedy [of removal of a railroad

track] that was neither proposed by the parties nor supported by the evidence."

Accordingly, the case was again remanded to the district court to "give both parties a limited time period in which to propose and address the options for viably implementing the injunction in compliance with the MUTCD, including but not limited to removal of the north track at Emporia Court and/or any other legally compliant crossing." Although the panel mentioned the issue of federal preemption, it did not reach the issue in its opinion. *Wichita Terminal Association v. F.Y.G. Investments, Inc.*, No. 103,015, 2011 WL 588505, at *11 (Kan. App. 2011) (unpublished opinion) (*Wichita Terminal Association II*).

Following the second remand, the original district judge held an evidentiary hearing. Following the hearing, the district court entered a journal entry filed on January 25, 2012, finding that "the most viable option for providing access to F.Y.G.'s real property is removal of the north track coupled with the laying of a new track south of the existing tracks." Moreover, the district court found "that removal of the north track would allow the Emporia Court location to be built in compliance with the MUTCD." Based on these findings, the district court ordered that the WTA must "complete construction of the permanent crossing [at Emporia Court] by April 1, 2012." In the interim, the district court required the WTA to "keep open the temporary timber crossing at the northwest corner of F.Y.G.'s property . . . to provide ingress and egress from 25th Street to F.Y.G.'s property." Once again, the issue of federal preemption was not decided.

Subsequently, the WTA filed a timely notice of appeal.

ANALYSIS

Contentions of the Parties

In the present appeal, the WTA contends that the ICCTA preempted the remedies ordered by the district court on January 25, 2012. Specifically, the WTA argues that the ICCTA places the construction and removal of railroad track under the exclusive jurisdiction the STB. Moreover, the WTA contends that the remedies imposed by the district court unreasonably burden interstate commerce. The WTA, however, does not challenge the district court's jurisdiction to require it to provide access to FYG's real property from the adjacent public street.

In response, FYG makes three arguments. First, FYG contends that the WTA did not timely raise federal preemption as a defense. Second, FYG argues that even if the issue of federal preemption was raised in a timely manner, it is not a justification for the WTA to deny FYG's previously determined right of access to a public street. Third, FYG contends that the district court's order was reasonable because the Emporia Court location is the most viable option for a permanent railroad crossing and that the crossing can be constructed in compliance with the MUTCD.

Federal Preemption of State Law

The Supremacy Clause of Article VI of the United States Constitution establishes the doctrine of federal preemption:

"This Constitution and the Laws of the United States which shall be made in Pursuance thereof, . . . shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

"Simply put, the Supremacy Clause invalidates state laws that interfere with, or are contrary to, federal law." *Board of Miami County Comm'rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 294, 255 P.3d 1186 (2011). In determining whether federal preemption is applicable in a given case, we must look to "the language of the pre-emption statute and the 'statutory framework' surrounding it." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996). Accordingly, because federal preemption involves an interpretation of law, our review is unlimited. See *Zimmerman v. Board of Wabaunsee County Comm'rs*, 289 Kan. 926, 974-75, 218 P.3d 400 (2009); see also *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, Syl. ¶ 18, 296 P.3d 1106 (2013).

The Kansas Supreme Court has identified several categories and subcategories of federal preemption:

"Broadly speaking, a preemption analysis divides into two principal categories: express and implied preemption. Implied preemption is further divided into two analytical subcategories: field preemption and conflict preemption. Then, yet a third strata of analytical subcategories is used when examining claims of conflict preemption: per se conflict and obstacle preemption. [Citations omitted.] Even though it is analytically helpful to consider the relationship of these categories, it must be remembered that these analytical categories are not 'rigidly distinct.' *English*, 496 U.S. at 79 n.5. For example, 'field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation.' *English*, 496 U.S. at 79 n.5." *Board of Miami County Comm'rs*, 292 Kan. at 294-95.

Express preemption is applicable "when Congress makes its intent known through explicit statutory language." 292 Kan. at 295 (citing *English*, 496 U.S. at 79). On the other hand, implied preemption is applicable "when Congress does not expressly preempt state law, but its intent to do so can be inferred from a statutory or regulatory scheme."

292 Kan. at 296 (citing *English*, 496 U.S. at 79). Thus, federal preemption is ultimately a question of congressional intent. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992).

In the present appeal, the WTA argues both express and implied preemption. Although the WTA asserts that the ICCTA expressly preempts state law regarding the removal and reconstruction of railroad tracks, it concedes that federal law does not expressly preempt the resolution of railroad crossing disputes by state courts. Nevertheless, it argues the congressional intent to preempt state courts from entering orders that would place an unreasonable burden on interstate commerce can be inferred from the language of the ICCTA.

Interstate Commerce Commission Termination Act

Congress enacted the ICCTA in 1995. The ICCTA abolished the Interstate Commerce Commission (ICC) and created the STB to regulate rail transportation in the United States. 49 U.S.C. § 10501(a)(1) (2006). Prior to the adoption of the ICCTA, there was confusion regarding the roles of federal and state governments to regulate railroads. Hence, the ICCTA was enacted "to reflect the direct and complete preemption of state economic regulation of railroads." H.R. Rep. 104-311, at 95-96 (1995).

The ICCTA provides that the jurisdiction of the STB over:

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

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located,

or intended to be located, entirely in one State, *is exclusive*." (Emphasis added.) 49 U.S.C. § 10501(b).

Furthermore, the ICCTA contains an *express* preemption provision, which states:

"Except as otherwise provided in this part, the *remedies provided* under this part with respect to regulation of rail transportation *are exclusive and preempt* the remedies provided under Federal or State law." (Emphasis added.) 49 U.S.C. § 10501(b).

Accordingly, "congressional intent is clear, and the preemption of rail activity is a valid exercise of congressional power under the Commerce Clause." *City of Auburn v. U.S. Government*, 154 F.3d 1025, 1031 (9th Cir. 1998). "If a railroad line falls within [the ICCTA's] jurisdiction, the STB's authority over abandonment is both exclusive and plenary." *Railroad Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523, 530 (6th Cir. 2002). In other words, "Congress has delegated to the [STB] exclusive jurisdiction to regulate 'transportation by rail carriers' and 'the construction, acquisition, operation, abandonment, or discontinuance' of rail facilities . . . with the instruction that the agency 'ensure the development and continuation of a sound rail transportation system' [citation omitted]." *City of South Bend, IN v. Surface Transp. Bd.*, 566 F.3d 1166, 1168 (D.C. Cir. 2009).

In *Emerson v. Kansas City Southern Ry. Co.*, 503 F.3d 1126, 1130 (10th Cir. 2007), the United States Court of Appeals for the Tenth Circuit stated:

"[T]he courts have found two broad categories of state and local actions to be preempted regardless of the context or rationale for the action. The first is any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized.

"Second, there can be no state or local regulation of matters directly regulated by the Board—such as the construction, operation, and abandonment of rail lines (*see* 49 U.S.C. §§ 10901-10907); railroad mergers, line acquisitions, and other forms of consolidation (*see* 49 U.S.C. §§ 11321-11328); and railroad rates and service (*see* 49 U.S.C. §§ 10501(b), 10701-10747, 11101-11124)."

Moreover, the Kansas Supreme Court has recognized that "there are areas related to railroads and the possession and use of railroad right-of-way where Congress expressly preempts state law," noting:

"[T]he federal regulation of railroads . . . is both pervasive and comprehensive. See, *e.g.*, *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318, 101 S. Ct. 1124, 67 L. Ed. 2d 258 (1981). Numerous court decisions recognize that Congress has exercised preemptive, if not exclusive, power to regulate the railroads. See, *e.g.*, *Norfolk & Western R. Co. v. Train Dispatchers*, 499 U.S. 117, 128, 111 S. Ct. 1156, 113 L. Ed. 2d 95 (1991) (Congress' intent to exempt railroads from antitrust laws and all other laws, including state and municipal laws, was 'clear, broad and unqualified'); *Chicago & N.W. Tr. Co.*, 450 U.S. at 320 (ICC's [now STB's] abandonment authority is 'plenary' and 'exclusive'); *Missouri Pacific R.R. Co. v. Stroud*, 267 U.S. 404, 408, 45 S. Ct. 243, 69 L. Ed. 683 (1925) (Congress' acts concerning interstate commerce are 'supreme and exclusive').

"In addition, through other legislation, Congress has exercised federal authority over railroad rights-of-way when possessed for railway purposes. For example, the STB preemption statute provides that the STB's jurisdiction over 'the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities . . . is exclusive.' 49 U.S.C. § 10501(b) (2010). This provision continues with an express statement of preemption: '[T]he remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.' 49 U.S.C. § 10501(b)." *Board of Miami County Comm'rs*, 292 Kan. at 295-98.

As such, it is apparent "that a state or local law that permits a non-federal entity to restrict or prohibit the operations of a rail carrier is preempted under the ICCTA." *Norfolk*

Southern Ry Co. v. City of Alexandria, 608 F.3d 150, 158 (4th Cir. 2010). But states and municipalities "may exercise traditional police powers . . . to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions." *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005). Therefore, the ICCTA "preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation." *Adrian & Blissfield R. Co. v. Village of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008).

Application of ICCTA

FYG argues that the WTA waived its right to assert federal preemption as a defense. Based on our review of the record, however, we find that the WTA timely asserted that the STB has exclusive jurisdiction over the removal of railroad track. As noted in *Wichita Terminal Association II*, it was the district judge handling the hearing held on June 9, 2009, who *sua sponte* raised the possibility of removing the north railroad track to accommodate the construction of a crossing at Emporia Court. As such, the panel in *Wichita Terminal Association II* found that "the district court abused its discretion in ordering removal of the track" and it reversed "that portion of the [July 20, 2009] order in which the district court sua sponte ordered a remedy that was neither proposed by the parties nor supported by the evidence" 2011 WL 588505, at *6, 11.

A review of the record reveals that counsel for the WTA immediately questioned the district court's authority to order the removal of railroad track when the judge first raised this issue at the hearing on June 9, 2009. In addition, the WTA filed an objection to the proposed journal entry following the hearing on the grounds that the district court exceeded its jurisdiction and authority because the removal of railroad tracks falls under

the exclusive jurisdiction of the STB as set forth in the ICCTA. Furthermore, the WTA expressly presented the issue of STB jurisdiction to a panel of this court in *Wichita Terminal Association II*. In particular, the WTA argued in the second appeal that the remedy ordered by the district court was "preempted by the ICCTA because it forces abandonment of the track and results in an unreasonable burden on interstate commerce." 2011 WL 588505, at *6. Although the panel in *Wichita Terminal Association II* did not reach the issue, we conclude that the WTA timely asserted and therefore preserved the issue of federal preemption.

As indicated above, the ICCTA expressly grants exclusive jurisdiction to the STB over "the construction, acquisition, operation, abandonment, or discontinuance" of railroad tracks. 49 U.S.C. § 10501(b)(2). Likewise, 49 U.S.C. § 10903(d) (2006) requires the approval of the STB before an interstate rail carrier can be lawfully abandoned. "In general, this abandonment licensing requirement applies to all carrier lines, including both 'main' lines and 'branch' lines" *Joseph R. Fox—Petition for Declaratory Order*, 2009 WL 1383503, at *2 (S.T.B. 2009). Furthermore, even a railroad track "excepted under 49 U.S.C. 10906 from the need to obtain Board authority for the construction, abandonment, or operation, is nevertheless subject to the Board's jurisdiction and is not subject to state or local regulation." 2009 WL 1383503, at *3; see also *United Transp. Union v. Surface Transp. Bd.*, 183 F.3d 606, 612 (7th Cir. 1999).

In *Port City Properties v. Union Pacific R. Co.*, 518 F.3d 1186, 1188 (10th Cir. 2008), the Tenth Circuit noted that 49 U.S.C. § 10906 provides that "the STB has no authority over the regulation of spur and industrial tracks as opposed to main railroad lines." But "[t]hat authority is left entirely to railroad management who may contract services as they see fit." 518 F.3d at 1189. "In sum, Congress granted exclusive jurisdiction to the STB over the construction, operation, and abandonment of spur or industrial lines, thereby precluding state regulation" and "then withdrew regulation of

such lines from the STB leaving their management solely to the respective railroads." 518 F.3d at 1189.

In *Union Pacific Railroad Company—Judgment with Order*, 2001 WL 1396718 (S.T.B. 2001), the STB held that a city could not require a rail carrier to remove tracks without filing an application for adverse abandonment. In reaching this holding, the STB noted that "[t]he board and the courts have consistently held that such local regulation [of railroad carriers] is precluded." 2001 WL 1396718, at *3 (citing *New Orleans Terminal Company v. Spencer*, 366 F.2d 160, 163-64 [(5th Cir. 1966)] (an ordinance requiring the removal of railroad crossings was unenforceable); *City of Des Moines, Iowa v. Chicago & N.W. Ry. Co.*, 264 F.2d 454, 457-60 (8th Cir. 1959) (city could not oust a rail carrier from using streets without abandonment authority).

Although it is unfortunate that this action must be further delayed, we are obligated to conclude as a matter of law that the STB has exclusive jurisdiction over the question of whether the WTA should be required to remove the north track and to construct a new track south of the existing tracks. Accordingly, we vacate those portions of the journal entry filed on January 25, 2012, which purport to require the "removal of the north track coupled with the laying of a new track south of the existing tracks." We also conclude that it is within the exclusive jurisdiction of the STB to determine whether constructing a permanent railroad crossing at Emporia Court is impossible or would unreasonably burden interstate commerce—even with the relocation of north track—as the WTA contends.

Under the ICCTA, a rail carrier or a third party may file a petition seeking a declaration of abandonment of a railroad track. See *Modern Handcraft, Inc.*, 363 I.C.C. 969, 971 (1981) (adjacent landowner has standing to bring adverse abandonment action). During oral argument, counsel for the WTA represented that his client was willing to file an application with the STB for determination of the issues within its jurisdiction.

Because the WTA has been under an order to provide access to FYG's real property by installing a permanent railroad crossing at Emporia Court for several years, we believe it is appropriate for the WTA to initiate an action before the STB to obtain a determination of those questions within the STB's jurisdiction. Of course, if FYG would prefer to commence an adverse abandonment action in the STB, it may do so.

"In the case of an 'adverse' abandonment proceeding—one brought by a party other than the carrier whose operating authority is at issue—[a] finding that the public convenience and necessity do not require . . . operation of the track by the carrier in question removes [the STB's] exclusive and plenary jurisdiction as a regulatory obstacle to abandonment, thereby enabling the parties to undertake other legal remedies Where no overriding federal interest exists, [the STB] will not allow [its] jurisdiction to be used to shield a carrier from the legitimate processes of state law. [Citation omitted.]" *CSX Corporation and CSX Transportation, Inc.—Adverse Abandonment Application*, 2002 WL 127074, at *4 (S.T.B. 2002).

Thus, the STB may impose appropriate remedies and/or decide if "removal of [its] jurisdiction as a shield against state law is in the public interest." 2002 WL 127074, at *4.

Finally, we have no reason to dispute the district court's conclusion that "the most viable option for providing access to F.Y.G.'s real property is removal of the north track coupled with the laying of a new track south of the existing tracks." Moreover, we have no reason to dispute the district court's conclusion "that removal of the north track would allow the Emporia Court location to be built in compliance with the MUTCD." Based on our review of the record, we find that substantial evidence supported both of these conclusions. To enforce such a remedy, however, the STB must either relinquish its jurisdiction to the district court or approve of the removal and reconstruction of track to allow for the installation of a permanent railroad crossing at Emporia Court.

CONCLUSION

Accordingly, we remand this case to the district court and direct it to enter an order requiring the WTA to file an application with the STB to resolve any issues concerning the STB's jurisdiction no later than 14 days following the issuance of a mandate from this court. Until the STB has completed its review, the district court shall retain jurisdiction to enforce its order requiring the WTA to keep open a temporary crossing over its railroad tracks in order to provide reasonable access from 25th Street to FYG's real property.

Affirmed in part, vacated in part, and remanded with directions.

Modified Opinion

No. 107,666

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

WICHITA TERMINAL ASSOCIATION, BURLINGTON NORTHERN & SANTA FE RAILWAY
COMPANY, and UNION PACIFIC RAILROAD COMPANY,
Appellants,

v.

F.Y.G. INVESTMENTS, INC., and TREATCO, INC.,
Appellees.

SYLLABUS BY THE COURT

1.

The Supremacy Clause of Article VI of the United States Constitution, which establishes the doctrine of federal preemption, invalidates state laws that interfere with, or are contrary to, federal law.

2.

Because federal preemption involves an interpretation of law, appellate courts have an unlimited standard of review.

3.

Federal preemption is ultimately a question of congressional intent. Express preemption occurs when Congress makes its intent known through explicit statutory language. Implied preemption occurs when Congress does not expressly preempt state law, but its intent to do so can be inferred from a statutory or regulatory scheme.

4.

The Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. 10101 *et seq.* (2006), created the Surface Transportation Board to regulate rail transportation in the United States. 49 U.S.C. § 10501(a)(1) (2006).

5.

Congress has granted the Surface Transportation Board exclusive jurisdiction over the construction, acquisition, operation, abandonment, or discontinuance of railroad tracks and facilities. Furthermore, Congress has expressly stated that the remedies with respect to regulation of rail transportation set forth in the ICCTA are exclusive and preempt other remedies provided under federal or state law. 49 U.S.C. § 10501(b).

6.

The ICCTA preempts all state or local laws that may reasonably be said to have the effect of managing or governing the operations of a rail carrier.

7.

States and municipalities may continue to exercise traditional police powers to protect public health and safety so long as the application of such laws or regulations has only a remote or incidental effect on rail transportation.

8.

The Surface Transportation Board has exclusive jurisdiction over the question of whether a rail carrier should be required to remove existing railroad track and construct a new track in order to install a permanent railroad crossing at a specific location. It is also within the exclusive jurisdiction of the Surface Transportation Board to determine whether requiring the construction of a permanent railroad crossing at a specific location unreasonably burdens or interferes with interstate commerce.

Appeal from Sedgwick District Court; JOSEPH BRIBIESCA, judge. Original opinion filed May 31, 2013. Modified opinion filed July 2, 2013. Affirmed in part, vacated in part, and remanded with directions.

Jeffrey R. King, of Lathrop & Gage LLP, of Overland Park, and *K. Paul Day* and *Doug Dalgelish*, of the same firm, of Kansas City, Missouri, for appellants.

James D. Oliver, of Foulston Siefkin LLP, of Overland Park, and *Wyatt A. Hoch*, of the same firm, of Wichita, for appellees.

Before PIERRON, P.J., BRUNS and POWELL, JJ.

BRUNS, J.: This is the third appeal in a dispute over access to real property. The Wichita Terminal Association, Burlington Northern & Santa Fe Railway Company, and Union Pacific Railroad (collectively WTA) own and operate railroad tracks in Wichita. F.Y.G. Investments, Inc., and Treatco, Inc. (collectively FYG) own real property adjacent to the WTA's tracks. In 2008, the WTA was ordered to provide access—by way of a permanent railroad crossing—from a public street to FYG's real property.

In the present appeal, although the WTA does not dispute the district court's authority to require it to install a permanent railroad crossing to provide access to FYG's property, it contends that federal law preempts state courts from requiring interstate rail carriers to remove or reconstruct existing tracks in order to install a permanent railroad crossing. Specifically, the WTA argues that provisions of the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. 10101 *et seq.* (2006), preempted the remedies ordered by the district court in a journal entry filed on January 25, 2012. Because we find that federal preemption is applicable to some of the remedies ordered by the district court, we affirm in part, vacate in part, and remand with directions.

FACTS

Wichita City Ordinance No. 5436—which was enacted in 1916—grants the WTA the right to construct, operate, and maintain railroad tracks along 25th Street in Wichita. Pursuant to the ordinance, the WTA continues to own and operate two sets of parallel railroad tracks that run within a 30-foot right-of-way located south of 25th Street. Burlington Northern & Santa Fe and Union Pacific use the tracks as an interchange to move rail traffic between their rail lines. In addition, they temporarily store railcars on the tracks to facilitate the interchange of rail traffic.

In 1996, FYG purchased approximately 27 acres of undeveloped land directly to the south of the WTA's railroad tracks. After the WTA began repairing its railroad tracks in September 2002, FYG claimed that the WTA was a trespasser. Thereafter, on November 6, 2002, the WTA initiated this action, seeking to enjoin FYG from interfering with its right to maintain the railroad tracks. In response, FYG filed a counterclaim requesting an easement to allow vehicles to cross the WTA's tracks in order to access its property from 25th Street.

The district court granted summary judgment in favor of the WTA on January 7, 2004, finding that FYG had no legal right to ingress and egress across the WTA's railroad right-of-way. The district court also found that the city ordinance gave the WTA the right to construct, operate, and maintain railroad tracks along 25th Street. On appeal, a panel of this court reversed the district court's ruling and remanded the case to the district court "to determine if an injunction to provide ingress and egress [was] appropriate." See *Wichita Terminal Association v. F.Y.G. Investments, Inc.*, No. 92,132, 2005 WL 824042, *4 (Kan. App. 2005) (unpublished opinion) (*Wichita Terminal Association I*).

On February 20, 2007, the district court held an evidentiary hearing on remand. After hearing the testimony of several witnesses, the district court announced its decision on the record. The district court found that 25th Street—although undeveloped—is a public street and that the city ordinance required the WTA to provide ingress and egress over its railroad tracks to FYG's real property. In addition, the district court announced that it was entering a mandatory injunction requiring the WTA to construct and install a permanent railroad crossing and, in the interim, to keep a temporary crossing open to provide access to FYG's land adjacent to the railroad tracks. Following the hearing, the district court filed a minute order and directed FYG's attorney to prepare a journal entry.

Because the parties could not agree on the terms of the journal entry, one was not filed until August 1, 2008. In the journal entry, the district court ordered the WTA to:

"construct and install, within 90 days after [FYG's] presentation to [the WTA] of sealed engineering drawings . . . , (i) a permanent railroad crossing at least 32 feet in width at the point where the centerline of the dedicated Emporia Court street intersects with the railroad tracks, and (ii) permanent railroad crossing protection in compliance with Federal Railroad Administration requirements."

No appeal was filed from this journal entry, and it became a final order of the district court.

On December 18, 2008, FYG presented the WTA with a set of engineering drawings approved by the City of Wichita for the construction of a permanent railroad crossing at Emporia Court. Under the terms of the journal entry, the WTA was obligated to complete a permanent railroad crossing at Emporia Court by March 22, 2009. Because work on the project had not commenced as of April 2, 2009, FYG filed a motion for order to appear and show cause. The motion requested that the court hold the WTA in contempt for failing to begin work on the Emporia Court crossing and for failing to keep the temporary crossing open as required by the journal entry filed on August 1, 2008.

In response, the WTA moved for relief from judgment under K.S.A. 60-260(b). In the motion, the WTA argued that the installation of a permanent railroad crossing at the Emporia Court location would be impractical, if not impossible, because the placement of crossing protection devices would impede the public right-of-way on 25th Street and would violate the Manual on Uniform Traffic Control Devices (MUTCD). Moreover, in its response to FYG's contempt motion, the WTA also argued that the Surface Transportation Board (STB) had express or implied jurisdiction to review the matter under the ICCTA because a railroad crossing at Emporia Court would have a substantial impact on interstate commerce.

On June 9, 2009, a different district judge conducted an evidentiary hearing to consider both FYG's contempt motion and the WTA's K.S.A. 60-260(b) motion. At the hearing, the judge questioned an employee of Burlington Northern & Santa Fe regarding whether the WTA could construct the Emporia Court crossing in compliance with the MUTCD if it removed the north track to allow more room for the placement of crossing protection devices. The judge also questioned the employee regarding whether the WTA could install an underpass or overpass at Emporia Court.

At the conclusion of the hearing, the district court granted the WTA's K.S.A. 60-260(b) motion and denied FYG's contempt motion. Specifically, the district court found that "the installation of traffic protection for a crossing over two tracks at Emporia Court is practically impossible . . . without impeding traffic on the unimproved 25th Street." Hence, the district court concluded that the WTA had shown good cause for failing to timely construct and install a permanent crossing at Emporia Court. The district court, however, rejected the WTA's suggestion that the permanent crossing be placed at the location of the temporary crossing because no appeal was taken from the journal entry filed on August 1, 2008.

In a journal entry entered on July 20, 2009, the district court ordered the WTA:

"to construct and install (i) a permanent railroad crossing at least 32 feet in width at the point where the centerline of the dedicated Emporia Court Street intersects the railroad tracks, and (ii) permanent railroad crossing protection in compliance with all federal, state, and local laws, regulations, and ordinances. This crossing shall not impede in any manner in the public right-of-way of 25th Street. [The WTA] must remove the north track in the area of the crossing if that is the only means to construct the crossing and crossing protection without impeding 25th Street. . . . [The WTA] must construct the crossing and crossing protection within 90 days after the entry of [this] Journal Entry. . . . All other provisions of the August 1, 2008 Journal Entry . . . will remain in effect."

On the same day the journal entry was filed, the WTA filed an objection to the proposed journal entry, arguing that it contained inaccurate statements and failed to remedy the problems with the August 2008 journal entry. Further, the WTA argued that the district court exceeded its jurisdiction and authority because the removal of railroad tracks falls under the exclusive jurisdiction of the ICCTA. The WTA also argued that because of its substantial impact on interstate commerce, the ICCTA impliedly preempted an order requiring removal of the north track. In addition, the WTA argued that even if the north track were removed, compliance with the MUTCD was not possible without placing crossing protection devices that would impede 25th Street. The WTA also requested that the action be stayed so that it could "pursue appropriate authorizations from the STB before proceeding any further with any proposed scenario that would require interference with the existing tracks." It appears from a review of the record that the court never ruled upon the objection or the request for stay.

In the second appeal, a panel of this court affirmed the district court's granting of the WTA's K.S.A. 60-260(b) motion "based on the impossibility of the remedy ordered" in the journal entry filed on August 1, 2008. But the panel reversed that portion of the

district court's ruling in which it "sua sponte required a remedy [of removal of a railroad track] that was neither proposed by the parties nor supported by the evidence."

Accordingly, the case was again remanded to the district court to "give both parties a limited time period in which to propose and address the options for viably implementing the injunction in compliance with the MUTCD, including but not limited to removal of the north track at Emporia Court and/or any other legally compliant crossing." Although the panel mentioned the issue of federal preemption, it did not reach the issue in its opinion. *Wichita Terminal Association v. F.Y.G. Investments, Inc.*, No. 103,015, 2011 WL 588505, at *11 (Kan. App. 2011) (unpublished opinion) (*Wichita Terminal Association II*).

Following the second remand, the original district judge held an evidentiary hearing. Following the hearing, the district court entered a journal entry filed on January 25, 2012, finding that "the most viable option for providing access to F.Y.G.'s real property is removal of the north track coupled with the laying of a new track south of the existing tracks." Moreover, the district court found "that removal of the north track would allow the Emporia Court location to be built in compliance with the MUTCD." Based on these findings, the district court ordered that the WTA must "complete construction of the permanent crossing [at Emporia Court] by April 1, 2012." In the interim, the district court required the WTA to "keep open the temporary timber crossing at the northwest corner of F.Y.G.'s property . . . to provide ingress and egress from 25th Street to F.Y.G.'s property." Once again, the issue of federal preemption was not decided.

Subsequently, the WTA filed a timely notice of appeal.

ANALYSIS

Contentions of the Parties

In the present appeal, the WTA contends that the ICCTA preempted the remedies ordered by the district court on January 25, 2012. Specifically, the WTA argues that the ICCTA places the construction and removal of railroad track under the exclusive jurisdiction the STB. Moreover, the WTA contends that the remedies imposed by the district court unreasonably burden interstate commerce. The WTA, however, does not challenge the district court's jurisdiction to require it to provide access to FYG's real property from the adjacent public street.

In response, FYG makes three arguments. First, FYG contends that the WTA did not timely raise federal preemption as a defense. Second, FYG argues that even if the issue of federal preemption was raised in a timely manner, it is not a justification for the WTA to deny FYG's previously determined right of access to a public street. Third, FYG contends that the district court's order was reasonable because the Emporia Court location is the most viable option for a permanent railroad crossing and that the crossing can be constructed in compliance with the MUTCD.

Federal Preemption of State Law

The Supremacy Clause of Article VI of the United States Constitution establishes the doctrine of federal preemption:

"This Constitution and the Laws of the United States which shall be made in Pursuance thereof, . . . shall be the supreme law of the Land; and the Judges in every State shall be

bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

"Simply put, the Supremacy Clause invalidates state laws that interfere with, or are contrary to, federal law." *Board of Miami County Comm'rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 294, 255 P.3d 1186 (2011). In determining whether federal preemption is applicable in a given case, we must look to "the language of the pre-emption statute and the 'statutory framework' surrounding it." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996). Accordingly, because federal preemption involves an interpretation of law, our review is unlimited. See *Zimmerman v. Board of Wabaunsee County Comm'rs*, 289 Kan. 926, 974-75, 218 P.3d 400 (2009); see also *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, Syl. ¶ 18, 296 P.3d 1106 (2013).

The Kansas Supreme Court has identified several categories and subcategories of federal preemption:

"Broadly speaking, a preemption analysis divides into two principal categories: express and implied preemption. Implied preemption is further divided into two analytical subcategories: field preemption and conflict preemption. Then, yet a third strata of analytical subcategories is used when examining claims of conflict preemption: per se conflict and obstacle preemption. [Citations omitted.] Even though it is analytically helpful to consider the relationship of these categories, it must be remembered that these analytical categories are not 'rigidly distinct.' *English*, 496 U.S. at 79 n.5. For example, 'field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation.' *English*, 496 U.S. at 79 n.5." *Board of Miami County Comm'rs*, 292 Kan. at 294-95.

Express preemption is applicable "when Congress makes its intent known through explicit statutory language." 292 Kan. at 295 (citing *English*, 496 U.S. at 79). On the

other hand, implied preemption is applicable "when Congress does not expressly preempt state law, but its intent to do so can be inferred from a statutory or regulatory scheme." 292 Kan. at 296 (citing *English*, 496 U.S. at 79). Thus, federal preemption is ultimately a question of congressional intent. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992).

In the present appeal, the WTA argues both express and implied preemption. Although the WTA asserts that the ICCTA expressly preempts state law regarding the removal and reconstruction of railroad tracks, it concedes that federal law does not expressly preempt the resolution of railroad crossing disputes by state courts. Nevertheless, it argues the congressional intent to preempt state courts from entering orders that would place an unreasonable burden on interstate commerce can be inferred from the language of the ICCTA.

Interstate Commerce Commission Termination Act

Congress enacted the ICCTA in 1995. The ICCTA abolished the Interstate Commerce Commission (ICC) and created the STB to regulate rail transportation in the United States. 49 U.S.C. § 10501(a)(1) (2006). Prior to the adoption of the ICCTA, there was confusion regarding the roles of federal and state governments to regulate railroads. Hence, the ICCTA was enacted "to reflect the direct and complete preemption of state economic regulation of railroads." H.R. Rep. 104-311, at 95-96 (1995).

The ICCTA provides that the jurisdiction of the STB over:

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

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, *is exclusive*." (Emphasis added.) 49 U.S.C. § 10501(b).

Furthermore, the ICCTA contains an *express* preemption provision, which states:

"Except as otherwise provided in this part, the *remedies provided* under this part with respect to regulation of rail transportation *are exclusive and preempt* the remedies provided under Federal or State law." (Emphasis added.) 49 U.S.C. § 10501(b).

Accordingly, "congressional intent is clear, and the preemption of rail activity is a valid exercise of congressional power under the Commerce Clause." *City of Auburn v. U.S. Government*, 154 F.3d 1025, 1031 (9th Cir. 1998). "If a railroad line falls within [the ICCTA's] jurisdiction, the STB's authority over abandonment is both exclusive and plenary." *Railroad Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523, 530 (6th Cir. 2002). In other words, "Congress has delegated to the [STB] exclusive jurisdiction to regulate 'transportation by rail carriers' and 'the construction, acquisition, operation, abandonment, or discontinuance' of rail facilities . . . with the instruction that the agency 'ensure the development and continuation of a sound rail transportation system' [citation omitted]." *City of South Bend, IN v. Surface Transp. Bd.*, 566 F.3d 1166, 1168 (D.C. Cir. 2009).

In *Emerson v. Kansas City Southern Ry. Co.*, 503 F.3d 1126, 1130 (10th Cir. 2007), the United States Court of Appeals for the Tenth Circuit stated:

"[T]he courts have found two broad categories of state and local actions to be preempted regardless of the context or rationale for the action. The first is any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized.

"Second, there can be no state or local regulation of matters directly regulated by the Board—such as the construction, operation, and abandonment of rail lines (*see* 49 U.S.C. §§ 10901-10907); railroad mergers, line acquisitions, and other forms of consolidation (*see* 49 U.S.C. §§ 11321-11328); and railroad rates and service (*see* 49 U.S.C. §§ 10501(b), 10701-10747, 11101-11124)."

Moreover, the Kansas Supreme Court has recognized that "there are areas related to railroads and the possession and use of railroad right-of-way where Congress expressly preempts state law," noting:

"[T]he federal regulation of railroads . . . is both pervasive and comprehensive. See, *e.g.*, *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318, 101 S. Ct. 1124, 67 L. Ed. 2d 258 (1981). Numerous court decisions recognize that Congress has exercised preemptive, if not exclusive, power to regulate the railroads. See, *e.g.*, *Norfolk & Western R. Co. v. Train Dispatchers*, 499 U.S. 117, 128, 111 S. Ct. 1156, 113 L. Ed. 2d 95 (1991) (Congress' intent to exempt railroads from antitrust laws and all other laws, including state and municipal laws, was 'clear, broad and unqualified'); *Chicago & N.W. Tr. Co.*, 450 U.S. at 320 (ICC's [now STB's] abandonment authority is 'plenary' and 'exclusive'); *Missouri Pacific R.R. Co. v. Stroud*, 267 U.S. 404, 408, 45 S. Ct. 243, 69 L. Ed. 683 (1925) (Congress' acts concerning interstate commerce are 'supreme and exclusive').

"In addition, through other legislation, Congress has exercised federal authority over railroad rights-of-way when possessed for railway purposes. For example, the STB preemption statute provides that the STB's jurisdiction over 'the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities . . . is exclusive.' 49 U.S.C. § 10501(b) (2010). This provision continues with an express statement of preemption: '[T]he remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.' 49 U.S.C. § 10501(b)." *Board of Miami County Comm'rs*, 292 Kan. at 295-98.

As such, it is apparent "that a state or local law that permits a non-federal entity to restrict or prohibit the operations of a rail carrier is preempted under the ICCTA." *Norfolk Southern Ry Co. v. City of Alexandria*, 608 F.3d 150, 158 (4th Cir. 2010). But states and municipalities "may exercise traditional police powers . . . to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions." *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005). Therefore, the ICCTA "preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation." *Adrian & Blissfield R. Co. v. Village of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008).

Application of ICCTA

FYG argues that the WTA waived its right to assert federal preemption as a defense. Based on our review of the record, however, we find that the WTA timely asserted that the STB has exclusive jurisdiction over the removal of railroad track. As noted in *Wichita Terminal Association II*, it was the district judge handling the hearing held on June 9, 2009, who *sua sponte* raised the possibility of removing the north railroad track to accommodate the construction of a crossing at Emporia Court. As such, the panel in *Wichita Terminal Association II* found that "the district court abused its discretion in ordering removal of the track" and it reversed "that portion of the [July 20, 2009] order in which the district court sua sponte ordered a remedy that was neither proposed by the parties nor supported by the evidence" 2011 WL 588505, at *6, 11.

A review of the record reveals that counsel for the WTA immediately questioned the district court's authority to order the removal of railroad track when the judge first raised this issue at the hearing on June 9, 2009. In addition, the WTA filed an objection to

the proposed journal entry following the hearing on the grounds that the district court exceeded its jurisdiction and authority because the removal of railroad tracks falls under the exclusive jurisdiction of the STB as set forth in the ICCTA. Furthermore, the WTA expressly presented the issue of STB jurisdiction to a panel of this court in *Wichita Terminal Association II*. In particular, the WTA argued in the second appeal that the remedy ordered by the district court was "preempted by the ICCTA because it forces abandonment of the track and results in an unreasonable burden on interstate commerce." 2011 WL 588505, at *6. Although the panel in *Wichita Terminal Association II* did not reach the issue, we conclude that the WTA timely asserted and therefore preserved the issue of federal preemption.

As indicated above, the ICCTA expressly grants exclusive jurisdiction to the STB over "the construction, acquisition, operation, abandonment, or discontinuance" of railroad tracks. 49 U.S.C. § 10501(b)(2). Likewise, 49 U.S.C. § 10903(d) (2006) requires the approval of the STB before an interstate rail carrier can be lawfully abandoned. "In general, this abandonment licensing requirement applies to all carrier lines, including both 'main' lines and 'branch' lines" *Joseph R. Fox—Petition for Declaratory Order*, 2009 WL 1383503, at *2 (S.T.B. 2009). Furthermore, even a railroad track "excepted under 49 U.S.C. 10906 from the need to obtain Board authority for the construction, abandonment, or operation, is nevertheless subject to the Board's jurisdiction and is not subject to state or local regulation." 2009 WL 1383503, at *3; see also *United Transp. Union v. Surface Transp. Bd.*, 183 F.3d 606, 612 (7th Cir. 1999).

In *Port City Properties v. Union Pacific R. Co.*, 518 F.3d 1186, 1188 (10th Cir. 2008), the Tenth Circuit noted that 49 U.S.C. § 10906 provides that "the STB has no authority over the regulation of spur and industrial tracks as opposed to main railroad lines." But "[t]hat authority is left entirely to railroad management who may contract services as they see fit." 518 F.3d at 1189. "In sum, Congress granted exclusive jurisdiction to the STB over the construction, operation, and abandonment of spur or

industrial lines, thereby precluding state regulation" and "then withdrew regulation of such lines from the STB leaving their management solely to the respective railroads." 518 F.3d at 1189.

In *Union Pacific Railroad Company—Judgment with Order*, 2001 WL 1396718 (S.T.B. 2001), the STB held that a city could not require a rail carrier to remove tracks without filing an application for adverse abandonment. In reaching this holding, the STB noted that "[t]he board and the courts have consistently held that such local regulation [of railroad carriers] is precluded." 2001 WL 1396718, at *3 (citing *New Orleans Terminal Company v. Spencer*, 366 F.2d 160, 163-64 [(5th Cir. 1966)] (an ordinance requiring the removal of railroad crossings was unenforceable); *City of Des Moines, Iowa v. Chicago & N.W. Ry. Co.*, 264 F.2d 454, 457-60 (8th Cir. 1959) (city could not oust a rail carrier from using streets without abandonment authority).

Although it is unfortunate that this action must be further delayed, we are obligated to conclude as a matter of law that the STB has exclusive jurisdiction over the question of whether the WTA should be required to remove the north track and to construct a new track south of the existing tracks. Accordingly, we vacate those portions of the journal entry filed on January 25, 2012, which purport to require the "removal of the north track coupled with the laying of a new track south of the existing tracks." We also conclude that it is within the exclusive jurisdiction of the STB to determine whether constructing a permanent railroad crossing at Emporia Court is impossible or would unreasonably burden interstate commerce—even with the relocation of north track—as the WTA contends.

Under the ICCTA, a rail carrier or a third party may file a petition seeking a declaration of abandonment of a railroad track. See *Modern Handcraft, Inc.*, 363 I.C.C. 969, 971 (1981) (adjacent landowner has standing to bring adverse abandonment action). During oral argument, counsel for the WTA represented that his client was willing to file

an application with the STB for determination of the issues within its jurisdiction. Because the WTA has been under an order to provide access to FYG's real property by installing a permanent railroad crossing at Emporia Court for several years, we believe it is appropriate for the WTA to initiate an action before the STB to obtain a determination of those questions within the STB's jurisdiction. Of course, if FYG would prefer to commence an adverse abandonment action in the STB, it may do so.

"In the case of an 'adverse' abandonment proceeding—one brought by a party other than the carrier whose operating authority is at issue—[a] finding that the public convenience and necessity do not require . . . operation of the track by the carrier in question removes [the STB's] exclusive and plenary jurisdiction as a regulatory obstacle to abandonment, thereby enabling the parties to undertake other legal remedies Where no overriding federal interest exists, [the STB] will not allow [its] jurisdiction to be used to shield a carrier from the legitimate processes of state law. [Citation omitted.]" *CSX Corporation and CSX Transportation, Inc.—Adverse Abandonment Application*, 2002 WL 127074, at *4 (S.T.B. 2002).

Thus, the STB may impose appropriate remedies and/or decide if "removal of [its] jurisdiction as a shield against state law is in the public interest." 2002 WL 127074, at *4.

Finally, we have no reason to dispute the district court's conclusion that "the most viable option for providing access to F.Y.G.'s real property is removal of the north track coupled with the laying of a new track south of the existing tracks." Moreover, we have no reason to dispute the district court's conclusion "that removal of the north track would allow the Emporia Court location to be built in compliance with the MUTCD." Based on our review of the record, we find that substantial evidence supported both of these conclusions. To enforce such a remedy, however, the STB must either relinquish its jurisdiction to the district court or approve of the removal and reconstruction of track to allow for the installation of a permanent railroad crossing at Emporia Court.

CONCLUSION

Accordingly, we remand this case to the district court and direct it to enter an order requiring the WTA to file an application with the STB to resolve any issues concerning the STB's jurisdiction no later than 60 days following the issuance of a mandate from this court. Until the STB has completed its review, the district court shall retain jurisdiction to enforce its order requiring the WTA to keep open a temporary crossing over its railroad tracks in order to provide reasonable access from 25th Street to FYG's real property.

Affirmed in part, vacated in part, and remanded with directions.

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

FILED
RECEIVED NO. _____
2013 AUG 21 P 3:45
CLERK OF DIST. COURT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KS

WICHITA TERMINAL ASSOCIATION,)
BURLINGTON NORTHERN & SANTA FE)
RAILWAY COMPANY and UNION PACIFIC)
RAILROAD COMPANY,)
)
Plaintiffs,)
)
v.)
)
F.Y.G. INVESTMENTS, INC., and TREATCO, INC.,)
)
Defendants.)

Case No. 02 C 3688

COPY

Pursuant to K.S.A. Chapter 60

ORDER ON THIRD REMAND

Defendant F.Y.G. Investments, Inc. seeks enforcement of its right of access to 25th Street in Wichita from its 26-acre property just east of the intersection with North Broadway. Access is blocked by two side, railroad tracks owned and operated by the Wichita Terminal Association, Burlington Northern Santa Fe Railway Company, and Union Pacific Railway Company (together, the "WTA").

On July 2, 2013 the Kansas Court of Appeals entered its Modified Opinion on the third appeal of this case. After the second appeal, this court had heard evidence and entered its judgment on January 25, 2012. F.Y.G.'s right of access had been previously established by final judgment, ordering the crossing to be provided at the platted location of Emporia Court Street, and on remand after the second appeal, the court was directed to consider again whether the crossing should be afforded at the Emporia Court location. After hearing the

evidence this court determined that the alternate location proposed by the Railroads was not viable and that: “the most viable option for providing access to F.Y.G.’s real property is removal of the north track coupled with the laying of a new track south of the existing tracks.” This Court further concluded “that removal of the north track would allow the Emporia Court location to be built in compliance with the MUTCD.” On the third appeal, the Court of Appeals found that the court’s conclusions were supported by substantial evidence, and affirmed the judgment in part. Memorandum Opinion, p. 17. The Court of Appeals further concluded that “[t]o enforce such a remedy, however, the STB must either relinquish its jurisdiction to the district court or approve of the removal and reconstruction of track to allow for the installation of a permanent railroad crossing at Emporia Court.” *Id.*

The Court of Appeals felt it was “obligated to conclude as a matter of law that the STB has exclusive jurisdiction over the question of whether the WTA should be required to remove the north track and to construct a new track south of the existing tracks.” The Court of Appeals therefore vacated “those portions of the journal entry filed on January 25, 2012, which purport to require the ‘removal of the north track coupled with the laying of a new track south of the existing tracks.’” Memorandum Opinion, p. 16. The Court of Appeals further found that the Surface Transportation Board has jurisdiction to determine that construction of a crossing at Emporia Court “is impossible or would unreasonably burden interstate commerce—even with the relocation of north track—as the WTA contends.”

Accordingly, this court’s judgment of January 25, 2012, is affirmed except with

respect to the remedy ordered in Paragraph 4, and this Court hereby complies with the mandate of the Court of Appeals by entering its Order as follows:

WTA is hereby required and directed to file an application with the STB to resolve any issues concerning the STB's jurisdiction no later than October 4, 2013. Until the STB has completed its review, this court shall retain jurisdiction to enforce its order requiring the WTA to keep open a temporary crossing over its railroad tracks in order to provide reasonable access from 25th Street to FYG's real property.

Each of the parties is directed to file with this court, on or before January 15, March 15, June 15, and September 15 of each year until the STB proceeding (including any judicial review thereof) is completed, a report on the status of the STB proceedings.

IT IS SO ORDERED.

JOSEPH BRIBIESCA

Hon. Joseph Bribiesca

Approved by:

LATHROP & GAGE LLP
2345 Grand Boulevard, Suite 2200
Kansas City, MO 64108-2618
Phone: (816) 292-2000
Fax: (816) 292-2001

By: 

K. Paul Day, #16964
Attorneys for the WTA

FOULSTON SIEFKIN LLP
1551 N. Waterfront Parkway, Ste. 100
Wichita, Kansas 67206
316.267.6371 phone
316.267.6345 fax

By: Wyatt A Hoch
Wyatt A. Hoch, #11747
Attorneys for Defendants

The following documents are a complete set of pleadings submitted to the Kansas District and Appellate courts by either or both parties after the February 20, 2007 bench trial and before the August 1, 2008 journal entry.

FILED 20

YOUNG, BOGLE, McCAUSLAND,
WELLS & BLANCHARD, P.A.
106 West Douglas, Suite 923
Wichita, Kansas 67202-3392
Tel: 316-265-7841; Fx: 316-265-3956
e-mail: g.young@youngboglelaw.com

2008 FEB 11 PM 3 25

CLERK OF DIST. COURT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KS

BY _____

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

WICHITA TERMINAL ASSOCIATION,)
BURLINGTON NORTHERN & SANTA FE)
RAILWAY COMPANY and UNION PACIFIC)
RAILROAD COMPANY,)
Plaintiffs,)
v.)
F.Y.G. INVESTMENTS, INC., and TREATCO, INC.,)
Defendants.)

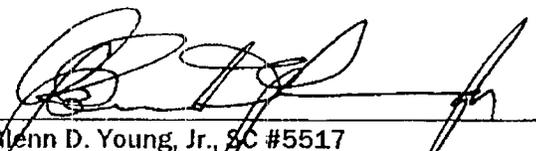
Case No. 02 C 3688

Pursuant to K.S.A. Chapter 60

NOTICE OF SERVICE OF
JOURNAL ENTRY UNDER RULE 170

COMES NOW Wichita Terminal Association, Plaintiff herein, and gives the Court notice under Supreme Court Rule 170 that it has served the Defendant, F.Y.G. Investments, Inc., with a copy of the proposed journal entry pursuant to Rule 170 by U.S. Mail, postage prepaid, on the 8th day of February, 2008.

YOUNG, BOGLE, McCAUSLAND,
WELLS & BLANCHARD, P.A.
106 West Douglas, Suite 923
Wichita, Kansas 67202-3392
Tel: 316-265-7841; Fax: 316-265-3956
E-mail: g.young@youngboglelaw.com

By 
Glenn D. Young, Jr., SC #5517
Attorneys for Wichita Terminal Association

2.11.08

CERTIFICATE OF SERVICE

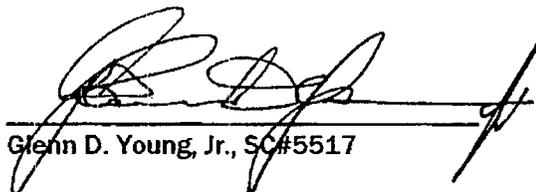
I hereby certify that on this 8th day of February, 2008, a true and correct copy of the above and foregoing Notice of Service of Journal Entry Under Rule 170 was served by U.S. Mail, postage prepaid, as follows:

Margie Thomas
2300 N. Broadway
Wichita, KS 67219

James A. Thompson
MALONE, DWIRE AND JONES
305 W. Central
Wichita, KS 67201-2082

and a copy was hand delivered as follows:

Hon. Joseph Bribiesca
District Court Judge, Div 22
Sedgwick County District Court
525 N. Main, Rm 8-2
Wichita, KS 67203-3790


Glenn D. Young, Jr., SC#5517

NOTICE OF HEARING

Notice is hereby given that the foregoing Motion to Withdraw will be heard on the 22nd day of February, 2008, at 9:00 a.m., in the Civil Department, Sedgwick County Courthouse, 525 N. Main, Wichita, Kansas.

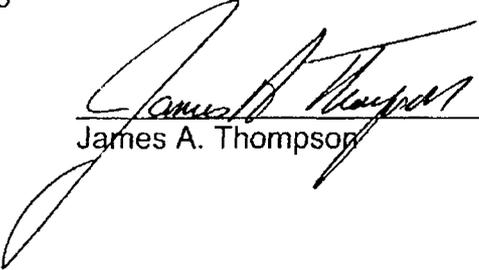
CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing Motion to Withdraw and Notice of Hearing was mailed on this 11th day of February, 2008, postage prepaid and properly addressed to:

Glenn D. Young, Jr.
Young, Bogle, McCausland,
Wells & Blanchard, P.A.
106 W. Douglas, Suite 923
Wichita, Kansas 67202-3392

Margie Thomas
F.Y.G. Investments, Inc.
2300 N. Broadway
Wichita, Kansas 67219

Hon. Joseph Bribiesca
District Court Judge, Div. 22
Sedgwick County District Court
525 N. Main, Rm. 8-2
Wichita, Kansas 67203-3790



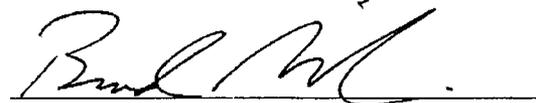
James A. Thompson

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the above and foregoing Entry of Appearance was served upon counsel herein by depositing the same in the United States mail, postage prepaid, and properly addressed to:

Glenn D. Young, Jr., #5517
Young, Bogle, McCausland, Wells & Blanchard, P.A.
106 West Douglas, Suite 923
Wichita, KS 67202-3392
Attorneys for Wichita Terminal Association

on this 19th day of February, 2008.


Bradley C. Mirakian

FOULSTON SIEFKIN LLP
1551 N. Waterfront Parkway, Suite 100
Wichita, KS 67206-4466
316.267.6371

FILED

APP DOCKET NO. _____

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

2008 AUG -1 A 11:54

CLERK OF DIST. COURT
18TH JUDICIAL DISTRICT
SEDCWICK COUNTY, KS

BY _____

WICHITA TERMINAL ASSOCIATION,)
BURLINGTON NORTHERN & SANTA FE)
RAILWAY COMPANY and UNION PACIFIC)
RAILROAD COMPANY,)
Plaintiffs,)
v.)
F.Y.G. INVESTMENTS, INC., and TREATCO, INC.,)
Defendants.)

COPY

Case No. 02 C 3688

Pursuant to K.S.A. Chapter 60

**JOURNAL ENTRY ON REMAND
and PERMANENT INJUCTION**

NOW, on this 25th day July, 2008, this matter comes on for remand pursuant to the Kansas Court of Appeals Order of Remand. Glenn D. Young, Jr., of Young, Bogle, McCausland, Wells & Blanchard, P.A., appears on behalf of the Plaintiffs. Wyatt A. Hoch of Foulston Siefkin LLP appears on behalf of the Defendants. There are no other appearances.

WHEREUPON, this Court considers its findings of fact and conclusions of law made at the hearing before this Court of February 20, 2007, when the Court, in reviewing the opinion of the Court of Appeals in its unpublished memorandum of April 8, 2005, in Case No. 92,132, determined the following issues on remand:

1. Is 25th Street a public street?
2. If so, does F.Y.G. Investments, Inc., have a right of ingress and egress over the tracks to 25th Street based on Section 2 of the City of Wichita Ordinance No. 5436 adopted in 1916?
3. Does F.Y.G. Investments, Inc., have a right to ingress and egress to and from 25th

EXHIBIT A-2

Street, based upon the common law right of access?

4. If so, is an injunction appropriate to provide ingress and egress to and from 25th

Street?

WHEREUPON, the Court, in its hearing on February 20, 2007, made the following findings of fact:

FINDINGS OF FACT

1. Twenty-fifth (25th) Street, East of Broadway, in Wichita, Kansas, is a public road and thoroughfare maintained by the City of Wichita.
2. The City of Wichita permitted WTA, by Ordinance No. 5436, to construct railroad tracks on 25th Street, in Wichita, subject to specified conditions as set forth in Section 2 of said Ordinance.
3. Pursuant to Ordinance No. 5436, as amended, WTA did construct its tracks on 25th Street as 25th Street was designated in the Ordinance, but 25th Street was never constructed as so designated.
4. Wichita City Ordinance No. 5436 provides that the said Association (WTA) shall construct and maintain in good order the portion of sidewalks and railway crossings and shall keep said track in good repair and in such condition that teams and vehicles on such street can safely pass over tracks at any point on said street.
5. WTA has an obligation to provide FYG ingress and egress over the tracks based on Section 2 of the Wichita Ordinance 5436, as amended.
6. FYG's land abuts the railroad tracks and right-of-way which, in turn, abuts a gravel road designated 25th Street. FYG does not currently have access to 25th Street as ingress and egress are blocked by WTA's railroad tracks.
7. To achieve the intent of Ordinance 5436 and/or the Kansas common law right of access, with present conditions, F.Y.G. Investments, Inc., gave to the public an

Access Dedication, Exhibit M-1, a Dedication for right-of-way purposes, Exhibit M-2, and Access Control Dedication, Exhibit M-3, to establish a location for the crossing installation, pursuant to the Wichita City Code, Title 12, Railroads.

8. The City of Wichita accepted the Dedications on September 19, 2006, Exhibit M-4.

WHEREUPON, the Court, in its hearing on February 20, 2007, made the following

Conclusions of Law:

- A. F.Y.G. Investments, Inc.'s land abuts the Plaintiff's tracks and right-of-way, which abuts 25th Street.
- B. The Kansas common law right of access to public streets obligates Plaintiffs to provide, construct and maintain ingress and egress over the 25th Street tracks, which abuts 25th Street, a public roadway, and F.Y.G. Investments, Inc.'s abutting property.
- C. The language of City of Wichita Ordinance 5436 requires WTA to construct an ingress and egress crossing over WTA's tracks to FYG's abutting property, following the language of Section 2 Ordinance 5436, in accordance with Wichita City Code Title 12, Railroads.
- D. Pursuant to City of Wichita Ordinance 5436, WTA had the privilege of running its tracks on 25th Street, which mandated that WTA provide the public and the abutting land owner the ability to cross the tracks at any point.
- E. This Court, as a Court of equity, takes cognizance that the parties to this action seek to enforce Wichita City Ordinance No. 5436, which granted rights to and imposed restrictions on land use, which are clear and reasonable, and in compliance with Kansas common law rights of ingress and egress to abutting landowners of roadways and not adverse to the public interest, making an injunction appropriate to provide ingress and egress from 25th Street to FYG's property.

WHEREUPON, the Court, at the hearing on February 20, 2007, made the following orders:

IT IS, THEREFORE, BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED THAT:

1. An injunction is hereby entered for WTA and its principal Plaintiffs to construct a crossing to allow ingress and egress to FYG's abutting property and directing Plaintiffs to keep the crossing clear in accordance with the Wichita City Code 12.04.080.
2. The parties are instructed to work out the issue of FYG's right of ingress and egress so as to reach the best economic alternative with the least impact on interstate commerce.
3. The Court cannot order an absolute solution to FYG's right of ingress and egress at this point and the parties are ordered to renew discussions with the City of Wichita to determine where a crossing shall be constructed as a best economic alternative with the least impact on interstate commerce.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that findings of fact numbered 1-8 should be and the same are hereby incorporated by reference as though fully set forth and made the Order of the Court.

On July 25, 2008, this Court finds that the Plaintiffs, in order to meet the requirements of paragraph 1 above, have temporarily provided F.Y.G. Investments, Inc., with ingress and egress from 25th Street to FYG's property as required by the Court's order by installing a thirty-two (32) foot timber crossing which will remain open for the benefit and use of FYG.

WHEREUPON, the court orders Plaintiffs to construct and install, within 90 days after Defendants' presentation to Plaintiffs of sealed engineering drawings for the construction of Emporia Court street, (i) a permanent railroad crossing at least 32 feet in width at the point where the centerline of the dedicated Emporia Court street intersects the railroad tracks, and (ii) permanent railroad crossing protection in compliance with Federal Railroad Administration requirements.

WHEREUPON, upon the completion of the required railroad crossing and railroad crossing protection, said injunction shall be lifted and terminated.

IT IS SO ORDERED.

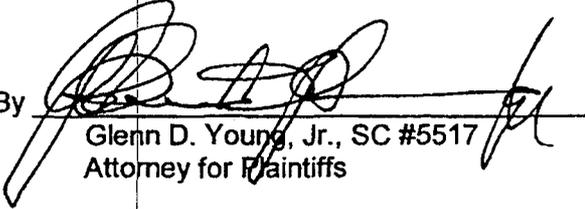
JAMES R. FLEETWOOD

Hon. Joseph Bribiesca
District Court Judge

APPROVED:

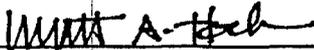
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By


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FILED
APP DOCKET NO. 15

2007 FEB 21 A 9:35

CLERK OF DIST. COURT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KS

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

WICHITA TERMINAL ASSOCIATION,)
BURLINGTON NORTHERN & SANTA FE)
RAILWAY COMPANY and UNION PACIFIC)
RAILROAD COMPANY,)
Plaintiff,)
vs.)
F.Y.G. INVESTMENTS, INC., and)
TREATCO, INC.,)
Defendants.)

Case No. 02 C 3688

MEMORANDUM OF LAW FOR REMAND HEARING

This remand hearing involves a dispute regarding two railroad tracks running parallel on 25th Street, Wichita, Kansas.

F.Y.G. Investments, Inc. appealed alleging that the Court erred in:

- 1) Failing to enforce Section 2 of Wichita Ordinance No. 5436, which required Wichita Terminal Association's use of the tracks to be in conformance with the ordinance, which required the tracks to be maintained;

"in such condition that teams and vehicles on such street can safely pass over such tracks at any point on said street."

and

- 2) Granting summary judgment to WTA on FYG's right of access, that

“plaintiffs have no legal duty to provide the defendants with ingress and egress as abutting property owners over and across plaintiff’s railroad easement.”

The Appellate Court acknowledged it was undisputed that FYG owned the land abutting 25th Street, and cited Sebree v. Board of Shawnee County Comm’rs, 251 Kan. 776,785, 840 P.2d 1125, (1992), holding:

“It is recognized law of this state that the right of access to and from an existing public street or highway is one of the incidents of ownership of the land abutting thereon.”

but the trial court made no finding as to whether 25th Street is a public street, although it was an issue in the pretrial order and may be considered under Section 2 of the city ordinance or the common law right of access.

The Court of Appeals in its Opinion states at page 9:

“On appeal, FYG asserts a right to ingress and egress over the tracks based on *Section 2 of the city ordinance* or the *common-law right of access*. Under the facts of this case, FYG has standing to raise the issue of ingress and egress over the tracks based on either theory.” (emphasis added) (attached Exhibit A)

ISSUES:

1. **Is 25th Street a public street?**
2. **Does WTA have an obligation to provide FYG ingress and egress over the tracks based on Section 2 of Wichita Ordinance 5436, as amended?**
3. **Does WTA have an obligation to provide ingress and egress over the tracks based on the common-law right of access?**

ISSUE 1: Is 25th Street a public street?

ANSWER: Yes.

REASONING:

25th Street is a Public Street;

25th Street in Wichita Kansas is a public street. K.S.A. 8-1473 defines streets as:

“Street means the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular traffic.”

In the Kansas Supreme Court case of Dunn v. The City of Emporia, 181 Kan. 334, 338, 311 P.2d 296 (1957), the Supreme Court defined the term “street” as commonly used denotes a public thoroughfare or highway in a city or village. In its broad sense as used herein the street embraces the entire public easement including the sidewalk and parking or parkway.

In the Kansas Supreme Court case of City of Abilene v. Wright, 4 Kan. App. 708, 711 (1896), the Supreme Court defined the term “highway” as commonly used denotes a city street or evidence of dedication:

“Evidence that a street through a city of the second class has been generally traveled by the public as a thoroughfare, and has been taken charge of and kept in repair by the municipal officers and recognized as a public street, is sufficient, prima facie, to show that such street has been duly laid out and accepted as a public highway, and that the city is liable for its negligence in failing to maintain the same in a reasonably safe condition for public travel.”

As can be seen by the attached photographs, the City of Wichita has placed signage on that portion of 25th Street in issue. Testimony from FYG and the City of Wichita will also establish that the City has maintained this street along with posting the signage (attached Ex. H).

Agreement and Admissions of Counsel Bind Client:

Agreement with the Court:

In Judge Bribiesca's Order on Defendant's Motion to Alter or Amend (attached Exhibit B) the Court stated;

".....3. Both parties agree that there is in existence City of Wichita Ordinance 5624, of 1916, which was amended in 1917, granted the principals of Wichita Terminal Association permission to lay track and to maintain that track; and both parties agree that the ordinance has not been revoked, amended, or modified in any way, to the best of their knowledge.

4. Both parties agree that there is no evidence to present that the City of Wichita, at any time, abandoned through some City action, any interest in that piece of property described in the City of Wichita 1916 Ordinance 5624, as amended.

5. Based on the agreements of the parties, review of City of Wichita Ordinance 5624, as amended in 1917, the Court finds that the ordinance grants a license from 1916 to the present and under the case of Taylor Investment Company vs. Kansas City Power and Light, 182 Kan. 511, use of land under a mere license will not ripen into an easement by prescription; and the order of November 20, 2003, herein, is so modified."

Admissions of Counsel:

Counsel for WTA has also bound WTA to his admissions in numerous letters, correspondence and pleadings that 25th Street is a public street in the City of Wichita.

It is a well established point under the laws of this state that a party shall be held to the actions and admissions of their legal counsel. Meyer v. Meyer, 209 Kan. 31, 39, 495 P.2d 942 (1972); Dick v. Drainage District No. 2, 187 Kan. 520, 525, 358 P.2d 744 (1961); Anderson v. Thomas, 184 Kan. 240, 252, 336 P.2d 821 (1959); In re: Estate of Carrell, 183 Kan. 491, 496,

327 P.2d 883 (1958).

The Tenth Circuit of the United States Court of Appeals was confronted with similar factual circumstances in the case of Frank v. Bloom, 634 F.2d 1245, 1251, 7 Fed.R.Evid.Serv. 1059 (1980). In Frank, supra statements contained in a letter prepared by the counsel for one of the parties were held to be admissions, thereby binding his client from later making allegations to the contrary. ID. at 1251.

It is disingenuous for WTA to contest whether 25th Street is a public street since WTA in their own contentions in the Pretrial Order refer to 25th Street nineteen (19) times (attached Exhibit C) and again in their Memorandum in Support of Plaintiff's Motion for Summary Judgment against Defendants F.Y.G. Investments, Inc. and Treatco, Inc. Nature of the Case and Plaintiffs' Statement of Uncontroverted Facts, they refer to 25th Street another nineteen (19) times (attached Exhibit D).

As further evidence, as early as June 28, 2002 Glenn D. Young, Jr. in a letter on behalf of his client, Wichita Terminal Association to Edgar Wm. Dwire, attorney for the Defendant, F. Y. G., states in his first paragraph:

“When we discussed this matter a few days ago, I advised you that I would write you and set forth the Wichita Terminal Association's legal position in maintaining its trackage on 25th Street and more specifically, along the north side of the property of your client, Treat Co., Inc.”

and as a last paragraph Mr. Young states:

“In summary, the Wichita Terminal Association operates over the trackage in question under a prescriptive easement to operate along 25th Street.” (attached Exhibit E)

In October of 2002 in a letter to Mr. Dwire, Mr. Young states ... “The Wichita Terminal

Association will commence the upgrade of both of its tracts along 25th Street ... “ (attached Exhibit F).

On January 6, 2004 Mr. Young writes Mr. Dwire concerning who will testify from WTA as the tract repair is being done along 25th Street back in September, 2002 (attached Exhibit G).

Exhibits of Admission:

WTA’s own Chief Engineer’s Office map revised on April 3, 2002 reflects that the WTA tracks are within the confines of 25th Street as surveyed (see uncontroverted fact #12, page 6, in WTA’s Memorandum in Support of Plaintiff’s Motion for Summary Judgment against Defendants F.Y.G. Investments, Inc. and Treatco, Inc.) (attached Exhibit D).

“12. The Burlington Northern Santa Fe station map prepared by the Chief Engineer’s office and revised April 3, 2002, reflects that *the Wichita Terminal Association tracks are within the confines of 25th Street as surveyed* (Exhibit “J”). Said station map is approximately 4 feet by 8 feet and has been made available to opposing counsel for examination. Said map will be made available at the time of hearing.” (Emphasis added)

Both the binding and persuasive authority on this issue come to the same conclusion, that when an attorney makes admissions to the Court and opposing counsel, the counsel will be bound to their word. Under the circumstances of our case, counsel for WTA made it very clear in writing that the position they were taking was that 25th Street was a designated Wichita street and in fact WTA attempted to get a prescriptive easement which was denied by the Court of Appeals for the very fact that they were operating under a Wichita ordinance which permitted WTA to operate over 25th Street and thus under the law a prescriptive easement could not be taken against the City of Wichita.

Courts are correct to hold parties responsible for the statements made by their legal counsel because it requires a legal counsel to honor his word to the Court and other legal professionals. Enforcing the admission of legal counsel allows the Court to guarantee a necessary level of candor in all the proceedings before the Court. For these reasons, the Court would be correct to disregard any attempts by WTA to now disavow their previous position on the fact that 25th Street is a street in the City of Wichita.

ISSUE 2: Does WTA have an obligation to provide FYG ingress and egress over the tracks based on Section 2 of the Wichita Ordinance 5436, as amended?

ANSWER: Yes.

REASONING:

Kansas Law:

Considering the issue of construction of statutes, the Kansas Supreme Court, in the case of *Martindale v. Terry*, 250 Kan. 621, 829 P.2d 561 (1992), in Syl. 4, the Court states as follows:

“It is a cardinal rule of construction that all statutes are to be so construed as to sustain them rather than ignore or defeat them; to give them operation of the language will permit, instead of treating them as meaningless.

The overriding principal of statutory construction is that the intent of the legislature governs if that intent can be ascertained from the plain language of the statute. When a statute is plain and unambiguous, the Court must give effect to the intent of the legislature. When an act is clear on its face, there is no need to consult legislative history or extrinsic materials. *Gehring v. State*, 20 Kan. App.2, 246, 248, 886 P.2d 370, 373 (1994).

In the case of *Johnston v. Tony's Pizza Service*, 232 Kan. 848, 658 P.2d 1047 (1983), the Court stated at page 850:

“... where a statute is plain and unambiguous, Kansas Courts must give effect to the intention of the legislature as expressed rather than determine what the law should or should not be.”

This is followed in the case of *In re Marriage of Schoneman*, 13 Kan. App.2d, 536, 775 P.2d 194 (1989) at page 538:

“The interpretation of a statute presents a question of law, and it is the function of a court to interpret the statute in a manner that will give it the effect the legislature intended. *State, ex rel. v. United School District*, 218 Kan. 47, 49, 542 P.2d 664 (1975). This purpose ‘is not discovered by an examination of one sentence or one section, but by a comparison of the pertinent provisions of the various sections, and by construing them in the light of the purpose to be accomplished.’ “

In the case of *State, ex rel., v. Moore* 154 Kan. 193, 117 P.2d 598 (1941) at page 97, the Supreme Court, citing *Bridge Company v. K.P. Rly. Co.*, 12 Kan. 409 (1874) at page 413:

“... a statute should be so construed that effect be given if possible to every clause and section of it.”

Ordinance 5436: (attached Exhibit I)

This Court, following the cases as listed above, can look at City of Wichita Ordinance 5436, approved on the 5th day of September 1916, and find that permission was granted to the WTA to construct, operate and maintain industrial tracks and switches... along and across what is known and called 25th Street, and find that such permission, pursuant to Section 2, is subject to the following conditions, terms and stipulations;

The said Association shall construct and maintain in good order the portion of sidewalks and railway crossings, and shall keep said track in good repair, and in such condition that teams and vehicles

on such street can safely pass over tracks at any point on said street.

This language is clear and unambiguous, and distinctly sets out that if W.T.A. constructs tracks, it shall keep said track in good repair and in such condition that teams and vehicles on such street can safely pass over such tracks at any point on said street.

This Court will note that Section 2 of City of Wichita Ordinance 5436 in several places contain the mandatory word "shall" concerning the duty of WTA in regard to the railroad tracks and crossings. Following the Kansas Court of Appeals opinion in *In re Guardianship and Conservatorship of Fogle*, 17 Kan. App.2d 357 (1992) at page 361, the Court of Appeals stated that words used in statutes are to be given their ordinary meaning and further, as used in statutes, the word "shall" is generally imperative or mandatory.

Where a fair interpretation of a statute shows that the legislature intended compliance to be essential to the validity of the act, the statute must be regarded as mandatory. *Hole in One, Inc. v. Kansas Industrial Land Corp.*, 22 Kan App.2d 197, 913 P.2d 1225 (1996) at page 200.

At no time has WTA alleged that the language of Ordinance 5436 is not clear or is ambiguous.

WTA, contrary to Section 2 of City of Wichita Ordinance 5436, has failed to provide a crossing at any point to 25th Street from FYG's abutting land to the south, while continuing to benefit from the use aspects of Ordinance 5436.

Resolution Today:

It is the position of FYG that a fair and complete interpretation of City of Wichita Ordinance 5436 calls for a crossing presently refused by the party requesting enforcement of the

Ordinance.

City of Wichita Ordinance 5436 requires WTA to construct a crossing; following the language of Section 2 of Ordinance 5436, in accordance with Wichita City Code, Title 12, Railroads (attached Exhibit J), which the Court is asked to take judicial notice of.

To achieve the intent of Ordinance 5436, with present conditions, F.Y.G., Inc. has conferred with the City of Wichita and Poe & Associates, Inc., Consulting Engineers, to establish and give an Access Dedication to the Public, Exhibit M-1, a Dedication to the public for right of way purposes, Exhibit M-2, and a Access Control Dedication to the public, Exhibit M-3, to establish a location for the crossing installation, pursuant to the Wichita City Code, Title 12, Railroads.

The Dedications were accepted by the City of Wichita, September 19, 2006, Exhibit M-4.

The Dedications are more clearly defined in the Sketch Plat of TreatCo Industrial Addition, Exhibit M-5.

ISSUE 3: Does WTA have an obligation to provide ingress and egress over the tracks based on the common-law right of access?

ANSWER: Yes.

REASONING:

The Court of Appeals stated that Kansas law provides what is often described as common law right of access to public highways. That rule of law is synthesized in the cases and essentially provides that an owner of land abutting a public highway has a right of access thereto, or ingress or egress from his lands. The rule has been variously stated in the cases. In Riddle v.

State Highway Commission, 184 Kan. 603, 610, 339 P.2d 301 (1959), the Supreme Court noted:

Since statehood this court has consistently held that an abutting property owner has special private rights in existing streets and highways, the more important of which is the right of access to and from the street or highway, which may not be taken from him by the public without just compensation (C.B.U.P. Rld. Co. V. Andrews, 30 Kan. 590, 2 Pac. 677; Highbarger v. Milford, 71 Kan. 331, 80 Pac. 633; Longnecker v. Railroad Co., 80 Kan. 413, 102 Pac. 492; Simmons v. State Highway Commission, 178 Kan 26, 283 P.2d 392; Ruthstrom v. Peterson, 72 Kan. 679, 83 Pac. 825; G.S. 1957 Supp. 68-1903). (Emphasis by the Court.)

In a decision rendered the same year, Smith v. State Highway Commission, 185 Kan. 445, 451, 346 P.2d 259 (1959), the Court stated the rule as follows:

It has consistently been held in this jurisdiction the right of access to and from an existing public street or highway is one of the incidents of ownership of land abutting thereon, sometimes called a common law right of access, which may not be taken from the owner by the public without just compensation. C.B. Milford, 71 Kan. 331; 80 Pac. 633; Longnecker v. Railroad Co., 80 Kan. 413, 102 Pac. 492; Simmons v. State Highway Commission, 178 Kan 26, 283 P.2d 392; Atkinson v. State Highway Commission, 184 Kan. 658, 339 P.2d 334, and see Ruthstrom v. Peterson, 72 Kan. 679, 83 Pac. 825; G.S. 1957 Supp. 68-1903). (Emphasis supp.)

Six years later, in Brock v. State Highway Commission, 1955 Kan. 361, 367, 404 P.2d 934 (1965), the Court stated:

The appellants contend that the construction of a frontage of a service road between appellants' property and the pre-existing U.S. Highway 24 constitutes a taking of the common-law right of direct access as a matter of law. Whether we desire to refer to the access rights of an owner of land abutting a highway as "common law rights" or "case made rights" they are rights which have been developed by the courts and not by the legislature.

Regardless of the source of origin there has developed a universal rule that the owner of land abutting on a street or highway has a private right in such street or highway, distinct from that of the

public, which cannot be taken or materially interfered with without just compensation...(Emphasis supplied).

In Brock, supra, the Court also noted that the rules relating to the rights of abutting landowners with respect to access to an existing street or highway:

...were adopted and applied to conventional or land service roads. At the time the rules were developed roads were constructed largely for the benefit of local inhabitants...

In the case of Teachers Insurance & Annuity Association of America v. City of Wichita, 221 Kan. 325, 330, 559 P.2d 347 (1977), the rule was phrased as follows:

...it is recognized in the law of this state that the right of access to and from an existing public street or highway is one of the incidents of ownership of the land abutting thereon. It is a property right which may not be taken from the owner by the public without his consent, except upon payment of full compensation and due process of law. (Smith v. State Highway Commission, 195 Kan. 361, 404 P.2d 934. (Emphasis supplied.)

See also, Kohn Enterprises, Inc. V. City of Overland Park, 221 Kan. 230, 559 P.2d 771 (1977); McCall Service Station v. City of Overland Park, 215 Kan. 390, 532 P.2d 1058 (1974); and Ray v. State Highway Commission, 196 Kan. 12, 310 P.2d 278 (1966).

Each of the above cited cases involved disputes concerning a landowner's right of access to controlled access facilities, rather than to country roads, city streets, or other conventional or land designated, designed, or constructed by a state, county, or city highway authority pursuant to K.S.A. 68-1902, each has as its starting point the common law right of access to public highways as it was enunciated in Highbarger v. Milford, 71 Kan. 331, 339, 80 Pac. 633 (1905), and cases following it. Each of these cases demonstrates that the common law right of access to a public highway, though stated by the court in slightly varying language over the years, remains

unchanged and, as such, the expression of the rule of law contained in each is applicable to the case at bar though not so considered by the court below. The rule, as enunciated in the above cited cases and cases cited therein, clearly contains two requisites to be met before it may be concluded as a matter of law that a landowner is vested with the right of access. First, the roadway must be a public highway; second, the landowner must be an abutting owner.

The common law right of access as stated in the cases has two requisites to be met before it becomes applicable. The first is that the roadway to which access is sought must be a public highway. In order for a roadway to be a public highway it must be one which falls within one of the following three categories: a state highway as designated in K.S.A. 68-406, a county or township road, K.S.A. 68-501, et. seq., or a city street.

The Kansas Supreme Court has defined the term “abut” and “abutting” to mean the lands in question actually touch. In an early case decided in 1873, the court wrote:

We know that in narrow and restricted sense the term “abutting” is used in reference to that which touches a lot at the end and “adjoining” to that which is on the side, (1 Bouvier’s Law Dic., Abuttals;) but we do not think the term is used in this statute in such restricted sense, but rather includes everything which touches the lot, whether in front or on the sides. (City of Lawrence v. Killam, 11 Kan. 499, 511 (1873))

In a case handed down forty years later, the court broadly defined the terms “abutting” and adjacent” in the following manner:

“Abutting” is an apt term to use as applied to a reversion where there is a vacation of a street or alley, for in such a case lots touch or adjoin them, but it is not appropriate to express the idea that lots are lying near to but do not actually adjoin the vacated reservation. “Adjacent” is a suitable term to use when lots face upon a park or public square and there is a street intervening between them. (City of Hutchinson v. Danley, 88 Kan. 437, 441,

129 Pac. 163 (1913).

The definitions for terms “abut,” “abutter,” and “abutting owner,” taken from the Revised Fourth Edition of Black’s Law Dictionary, are as follows:

ABUT. To reach, to touch. In old law, the ends were said to abut, the sides to adjoin. Cro. Jack. 184. And see Lawrence v. Killiam, 11 Kan. 499, 511; Springfield v. Green, 120 Ill., 269, 11 N.E. 261. To take a new direction; as where a bounding line changes its course. Spelman, Gloss. Abuttare. To touch at the end; be contiguous; join at the border or boundary; terminate; to end at; to border on; to reach or touch with an end. Assessment of property, Hensler v. City of Anacortes, 140 Wash. 184, 248 P. 406, 407. The term “abutting” implies a closer proximity than the term “adjacent.” Reversion of vacated park land, City of Hutchinson v. Danley, 88 Kan. 437, 129 P. 163, 164. “Contiguous” synonymous, both conveying idea that lot borders on improvement. Reynard v. City of Caldwell, 55 Idaho 342, 42 P.2d 292, 296.

ABUTTER. One whose property abuts, is contiguous, or joins at a border or boundary, as where no other land, or street intervenes.

ABUTTING OWNER. An owner of land which abuts or adjoins. The term usually implies that the relative parts actually adjoin, but is sometimes loosely used without implying more than close proximity. See Abut.

In this connection FYG would note the common and popular denotations of the above terms closely parallel the above definitions. The following definitions are found in Webster’s New World Dictionary (2d edition, 1978):

(A)but. To join end to end, to end (on) or lean (upon); border (on); terminate (against) -- to end at; border upon.

(A)butter. The owner of abutting land.

FYG, the abutting landowner to WTA’s tracks on 25th Street, has a common law right of access to 25th Street, and said right should be enforced by this Court.

CONCLUSION

Legal counsel for WTA presented admissions to legal counsel for F.Y.G., Inc. pursuant to the current proceedings before the Court. The admissions given by counsel for WTA demonstrate that 25th Street is a public street. The Court is guided by the case law to hold WTA accountable for the admissions made in the pleadings, orders and letters written by its counsel. FYG encouraged the Court to adopt the positions found in the letters, orders and pleadings in question explicitly stating that WTA built its railroad on 25th Street in Wichita, Kansas.

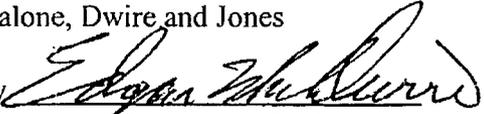
Pursuant to City of Wichita Ordinance 5436, WTA had the privilege of running its tracks on 25th Street and the Ordinance mandated that WTA provide the public and the abutting land owner the ability to cross the tracks at any point.

WTA's privilege to lay tracks on and along 25th street obligated WTA to maintain it in such condition that vehicles could safely pass over the track at any point on the street under Section 2, of Ordinance 5436. Regulation and transportation safety guidelines have changed with time and today Section 2 of Ordinance 5436 obligates WTA to provide ingress and egress over the tracks in accordance with Wichita City Code, Chapter 12, Railroads.

WTA requests that said crossing be located in the center of its property abutting 25th Street, between the east line of FYG's property line and the east end of the railroad road easement on the west side of FYG's property, (approximately 389.70 feet west of FYG's east property line) in accordance with the current Wichita City Code Section 12.04.010, etc., as amended, relating to railroad crossings, as set forth in FYG's Proposed Findings of Fact and

Conclusions of Law, Exhibit K, and Exhibits M-1 through M-5.

Respectfully submitted,
Malone, Dwire and Jones

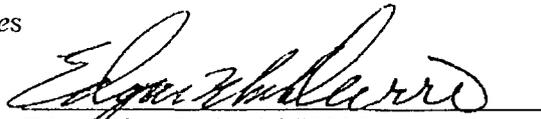
By 

Edgar Wm. Dwire SC#5985
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Malone, Dwire and Jones
305 W. Central PO Box 2082
Wichita, KS 67201
(316) 265-4248
Attorneys for Defendant-Appellants
FYG Investments, Inc. and Treatco, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Memorandum of Law for Remand Hearing was served upon the following by delivery, on the 14th day of February, 2007, addressed to:

Glenn Young
Young, Bogle, McCausland, Wells & Blanchard
106 West Douglas, Suite 923
Wichita, Kansas 67202-3392
Attorneys for Appellees


Edgar Wm. Dwire SC#5985

- M Exhibit M: M-1 Access Dedication to the Public.
M-2 Dedication to the public for right of way purposes
M-3 Access Control Dedication to the public
M-4 Acceptance of Dedications by the City of Wichita
M-5 Sketch Plat of location of crossing and street.

No. 09-103015-A

FILED

SEP 24 2009

IN THE COURT OF APPEALS OF THE STATE OF KANSAS
CAROL G. GREEN
CLERK OF APPELLATE COURTS

WICHITA TERMINAL ASS'N, ET AL.)
)
 Plaintiff,)
)
 vs.)
)
 F.Y.G. INVESTMENTS, INC.,)
 and)
 TREATCO, INC.,)
)
 Defendants.)

County Appealed From: Sedgwick
 District Court Case No.: 02-C-3688
 Proceeding Under Chapter: 60
 Parties Filing Cross Appeal: Defendants
 Parties Who Will Appear as Cross Appellee:
 Plaintiffs

CROSS-APPEAL DOCKETING STATEMENT – CIVIL

1. Civil Classification: From the list of civil topic sub-types listed below, choose the **one** which best describes the **primary** issue in this appeal: **Real Property**

2. Proceedings in the District Court:

a. Trial Judge from whose decision this appeal is taken:

The Honorable Timothy H. Henderson

b. List any other judge who has signed orders to conducted hearings in this matter:

The Honorable Joseph Bribiesca

c. Was this case disposed of in the district court by:

- Jury Trial
- Bench Trial
- Summary Judgment
- Dismissal

d. Length of trial, measured in days (if applicable): **One**
(*Post-trial motion to enforce judgment by contempt proceeding*)

- e. State the name of each court reporter and/or transcriptionist who has reported or transcribed any or all of the record for the case on appeal. (This is not a substitute for a request for transcript served on the individual reporter or transcriptionist pursuant to Rule 3.03.): **Belinda Westerfield, C.S.R.**
- f. State the legal name of all entities who are NOT listed in the case caption (including corporations, associations, parent, subsidiary, or affiliate business entities) who are parties or who have a direct involvement in the case on appeal:

BNSF Railway Company and Union Pacific Railway Company are plaintiffs identified in the caption of this Docketing Statement as "et al."
- g. State the name, address, and telephone number of every attorney who has represented a party in district court if that attorney's name does NOT appear on the certificate of service attached to this docketing statement. Clearly identify each party represented. **None**

3. Jurisdiction:

- a. Date journal entry or judgment form filed: **July 20, 2009**
- b. Is the order appealed from a final order, i.e., does it dispose of the action as to all claims by all parties? **Yes**
- c. If the order is not a final disposition as to all claims by all parties, did the district court direct the entry of judgment in accordance with K.S.A. § 60-254(b)? **Not applicable**
- d. Date any post-trial motion filed: **Not applicable**
- e. Date disposition of any post-trial motion filed: **Not Applicable**
- f. Date notice of appeal filed in district court:
August 12, 2009; Notice of Cross-Appeal September 3, 2009
- g. Other relevant dates necessary to establish this court's jurisdiction to hear the appeal, i.e., decisions of administrative agencies or municipal courts and appeals therefrom: **None**
- h. Statutory authority for appeal: **K.S.A. 60-2101(a) and 60-2102(h)**

- i. Are there any proceedings in any other court or administrative agency, state or federal, which might impact this case or this court having jurisdiction (yes or no)? **No**

If yes, identify the court or agency where the related proceeding is pending. List the case captions and the case or docket numbers.

Not applicable

4. Constitutional Challenges to Statutes or Ordinances:

Was any statute or ordinance found to be unconstitutional by the trial court (yes or no)? **No**

If yes, what statute or ordinance? **Not applicable**

5. Related Cases/Prior Appeals:

- a. Is there any case now pending or about to be filed in the Kansas Appellate Courts which:

- (1) Arises from substantially the same case or controversy as this appeal (yes or no)? **No**

If yes, give case caption and docket number. **Not applicable**

- (2) Involves an issue that is substantially the same, similar or related to an issue in this appeal (yes or no)? **No**

If yes, give case caption and docket number. **Not applicable**

- b. Has there been any prior appeal involving this case or controversy (yes or no)? **Yes**

If yes, give case caption and docket number.

Wichita Terminal Association, Burlington Northern & Santa Fe Rail Way Company, and Union Pacific Railway Company, Appellees v. F.Y.G., Inc., and Treatco, Inc., Appellants, No. 92,132

6. Brief statement (less than one page), without argument, of the material facts. This is not intended to be a substitute for the factual statement which will appear in the brief.

By Journal Entry on Remand and Permanent Injunction entered on August 1, 2008, defendant F.Y.G., Inc. was found to be entitled to access from 27-acre property adjoining 25th Street, a public street of the City of Wichita, via the dedicated location of Emporia Court street. The plaintiff Railroads were ordered to construct a railroad crossing for Emporia Court street over sidetracks used for parking rail cars and switching cars and to not block the crossing. The

crossing was required to be built within 90 days after delivery of sealed engineering drawings for the construction of Emporia Court street, which occurred on December 18, 2008. The Railroads communicated no excuse for refusing to build the crossing, but did not do so. On April 1, 2009, defendants moved for an order to show cause why the Railroads should not be cited in contempt for failure to comply with the permanent injunction, and the order was granted.

At a day-long evidentiary hearing on June 8, 2009, Plaintiffs sought to excuse their failure to comply with the injunction on the ground that compliance was impracticable because the injunction said the crossing was to comply with applicable regulations of the "Federal *Railroad* Administration" when it should have said "Federal *Highway* Administration," which is the agency that issues regulations on highway crossings for railroads. The source of this misnomer was the trial testimony of the Wichita Terminal Association Superintendent called by the Railroads at the 2007 trial to testify concerning regulation of railroad crossings. The misnomer was invited and approved by the Railroads, and was immaterial to their duty to construct the crossing.

At the hearing of June 8, 2009, the Railroads did not recall the trial witness, but instead sought to contradict his testimony with two new witnesses who had never been listed or deposed. The new witnesses testified that construction of the crossing as required by the final judgment was "impractical," and the Railroads sought relief from the final judgment on that ground. The district court found the Railroads had waived the purported defense by not presenting it before final judgment, but declined to find the Railroads in contempt and gave them another 90 days after the July 20, 2009 order to construct the crossing, without compensating defendants for damages for delay by sanctions or attorneys fees.

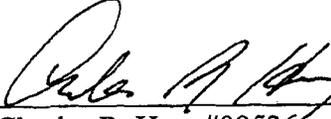
7. Concise statement of the issues proposed to be raised. You will not be bound by this statement but should include issues now contemplated. Avoid general statements such as "the judgment is not supported by the law."

- a. Whether the district court erred as a matter of law in allowing the Railroads to rely on invited, immaterial misnomer in the Journal Entry of Judgment as excuse for violating a permanent injunction.
- b. Whether the district court abused its discretion in failing to find the Railroads in contempt and award appropriate compensation and sanctions to Defendants.

Respectfully submitted,

FOULSTON SIEFKIN LLP
Bank of America Tower, Suite 1400
534 South Kansas Avenue
Topeka, KS 66603-3436
785-233-3600
Fax: 785-233-1610

By



Charles R. Hay, #08536

and

Wyatt A. Hoch, #11747
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and

James D. Oliver #8604
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9200 Indian Creek Parkway
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913-498-2100
Fax: 913-498-2101

Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing **Cross-Appeal Docketing Statement – Civil** was sent via electronic mail to counsel of record as follows:

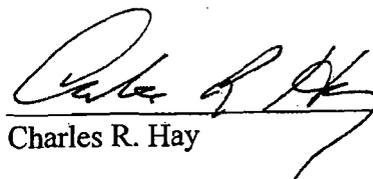
K. Paul Day, #16964
Patrick N. Fanning, #19015
LATHROP & GAGE LLP
2345 Grand Boulevard, Suite 2200
Kansas City, MO 64108-2618
Fax: (816) 292-2001
PDay@LathropGage.com

-and-

Jeffrey R. King, #20735
LATHROP & GAGE LLP
Building 82, Suite 1000
10851 Mastin Boulevard
Overland Park, KS 66210-1669
Fax: (913) 451-0875

Attorneys for Plaintiffs

on this 24th day of September, 2009.



Charles R. Hay

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the above and foregoing Entry of Appearance was served upon counsel herein by depositing the same in the United States mail, postage prepaid, and properly addressed to:

Glenn D. Young, Jr., #5517
Young, Bogle, McCausland, Wells & Blanchard, P.A.
106 West Douglas, Suite 923
Wichita, KS 67202-3392
Attorneys for Wichita Terminal Association

on this 25th day of February, 2008.



Bradley C. Mirakian

LATHROP & GAGE_{LLP}

pld.

K. PAUL DAY
DIRECT LINE: (816) 460-5509
EMAIL: KDAY@LATHROPGAGE.COM
WWW.LATHROPGAGE.COM

2345 GRAND BOULEVARD, SUITE 2200
KANSAS CITY, MISSOURI 64108-2618
PHONE: (816) 292-2000
FAX: (816) 292-2001

November 5, 2009

VIA FEDEX STANDARD OVERNIGHT

Clerk of the Civil Division
Sedgwick County District Court
525 N. Main Street, 11th Floor
Wichita, KS 67203

Re: *Wichita Terminal Association, et al. v. F.Y.G. Investments, Inc., et al.*
Case No. 02 C 3688

Dear Clerk:

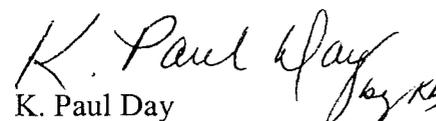
This letter is a formal request under Kansas Supreme Court Rule 3.02 for supplementing the record in the above-captioned case. Specifically, plaintiffs/appellants Wichita Terminal Association, *et al.*, wish to supplement the record on appeal with all exhibits admitted into the record at the **June 8, 2009** hearing before the District Court.

Attached are copies of exhibits that were admitted at the June 8 hearing. Specifically, Exhibits 7-16 were admitted on page 30 of the June 8 transcripts, Exhibits 3 & 5-6 were admitted on page 40, Chapter 8 of the Manual on Uniform Traffic Control Devices was admitted on page 74, and Exhibits 2 & 17 were admitted on page 91.

Thank you for your assistance with this request. If you have any questions about inclusion of these documents in the record on appeal, please do not hesitate to contact me.

Very truly yours,

LATHROP & GAGE LLP

By: 
K. Paul Day

Enclosures

cc: Carol Green, Clerk of the Appellate Courts
Wyatt A. Hoch

CALIFORNIA

COLORADO

ILLINOIS

KANSAS

MISSOURI

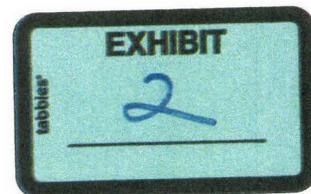
NEW YORK

Manual on Uniform Traffic Control Devices

for Streets and Highways

2003 EDITION

U.S. Department of Transportation
Federal Highway
Administration



ATSSA
SAFER ROADS SAVE LIVES



ite
Institute of Transportation Engineers

INTERSTATE

22



SCHOOL

Part 8

Traffic Controls for Highway-Rail Grade Crossings

NO
RIGHT
TURN
ACROSS
TRACKS



PART 8. TRAFFIC CONTROLS FOR HIGHWAY-RAIL GRADE CROSSINGS

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CHAPTER 8A. GENERAL

Section 8A.01 Introduction

Support:

Traffic control for highway-rail grade crossings includes all signs, signals, markings, other warning devices, and their supports along highways approaching and at highway-rail grade crossings. The function of this traffic control is to permit reasonably safe and efficient operation of both rail and highway traffic at highway-rail grade crossings.

For purposes of installation, operation, and maintenance of traffic control devices at highway-rail grade crossings, it is recognized that the crossing of the highway and rail tracks is situated on a right-of-way available for the joint use of both highway traffic and railroad traffic.

The highway agency or authority with jurisdiction and the regulatory agency with statutory authority, if applicable, jointly determine the need and selection of devices at a highway-rail grade crossing.

In Part 8, the combination of devices selected or installed at a specific highway-rail grade crossing is referred to as a "traffic control system."

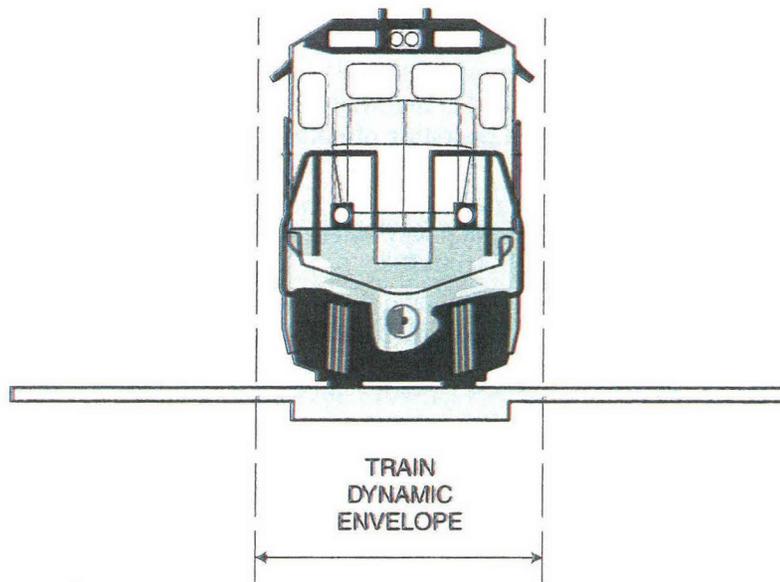
Standard:

The traffic control devices, systems, and practices described herein shall be used at all highway-rail grade crossings open to public travel, consistent with Federal, State, and local laws and regulations.

To promote an understanding of common terminology between highway and railroad signaling issues, the following definitions shall be used:

1. **Advance Preemption**—the notification of an approaching train that is forwarded to the highway traffic signal controller unit or assembly by the railroad equipment in advance of the activation of the railroad warning devices.
2. **Advance Preemption Time**—the period of time that is the difference between the required maximum highway traffic signal preemption time and the activation of the railroad warning devices.
3. **Cantilevered Signal Structure**—a structure that is rigidly attached to a vertical pole and is used to provide overhead support of signal units.
4. **Clear Storage Distance**—the distance available for vehicle storage measured between 1.8 m (6 ft) from the rail nearest the intersection to the intersection stop line or the normal stopping point on the highway. At skewed highway-rail grade crossings and intersections, the 1.8 m (6 ft) distance shall be measured perpendicular to the nearest rail either along the centerline or edge line of the highway, as appropriate, to obtain the shorter distance. Where exit gates are used, the distance available for vehicle storage is measured from the point where the rear of the vehicle would be clear of the exit gate arm. In cases where the exit gate arm is parallel to the track(s) and is not perpendicular to the highway, the distance is measured either along the centerline or edge line of the highway, as appropriate, to obtain the shorter distance.
5. **Design Vehicle**—the longest vehicle permitted by statute of the road authority (State or other) on that roadway.
6. **Dynamic Envelope**—the clearance required for the train and its cargo overhang due to any combination of loading, lateral motion, or suspension failure (see Figure 8A-1).
7. **Dynamic Exit Gate Operating Mode**—a mode of operation where the exit gate operation is based on the presence of vehicles within the minimum track clearance distance.
8. **Exit Gate Clearance Time**—for Four-Quadrant Gate systems, the exit gate clearance time is the amount of time provided to delay the descent of the exit gate arm(s) after entrance gate arm(s) begin to descend.
9. **Exit Gate Operating Mode**—for Four-Quadrant Gate systems, the mode of control used to govern the operation of the exit gate arms.
10. **Flashing-Light Signals**—a warning device consisting of two red signal indications arranged horizontally that are activated to flash alternately when a train is approaching or present at a highway-rail grade crossing.
11. **Interconnection**—the electrical connection between the railroad active warning system and the highway traffic signal controller assembly for the purpose of preemption.
12. **Maximum Highway Traffic Signal Preemption Time**—the maximum amount of time needed following initiation of the preemption sequence for the highway traffic signals to complete the timing of the right-of-way transfer time, queue clearance time, and separation time.
13. **Minimum Track Clearance Distance**—for standard two-quadrant railroad warning devices, the minimum track clearance distance is the length along a highway at one or more railroad tracks, measured either from the highway stop line, warning device, or 3.7 m (12 ft) perpendicular to the track centerline, to 1.8 m (6 ft) beyond the track(s) measured perpendicular to the far rail, along

Figure 8A-1. Train Dynamic Envelope



the centerline or edge line of the highway, as appropriate, to obtain the longer distance. For Four-Quadrant Gate systems, the minimum track clearance distance is the length along a highway at one or more railroad tracks, measured either from the highway stop line or entrance warning device, to the point where the rear of the vehicle would be clear of the exit gate arm. In cases where the exit gate arm is parallel to the track(s) and is not perpendicular to the highway, the distance is measured either along the centerline or edge of the highway, as appropriate, to obtain the longer distance.

14. **Minimum Warning Time—Through Train Movements**—the least amount of time active warning devices shall operate prior to the arrival of a train at a highway-rail grade crossing.
15. **Preemption**—the transfer of normal operation of highway traffic signals to a special control mode.
16. **Pre-signal**—supplemental highway traffic signal faces operated as part of the highway intersection traffic signals, located in a position that controls traffic approaching the highway-rail grade crossing in advance of the intersection.
17. **Queue Clearance Time**—the time required for the design vehicle of maximum length stopped just inside the minimum track clearance distance to start up and move through and clear the entire minimum track clearance distance. If presignals are present, this time shall be long enough to allow the vehicle to move through the intersection, or to clear the tracks if there is sufficient clear storage distance. If a Four-Quadrant Gate system is present, this time shall be long enough to permit the exit gate arm to lower after the design vehicle is clear of the minimum track clearance distance.
18. **Right-of-Way Transfer Time**—the maximum amount of time needed for the worst case condition, prior to display of the track clearance green interval. This includes any railroad or highway traffic signal control equipment time to react to a preemption call, and any traffic control signal green, pedestrian walk and clearance, yellow change, and red clearance intervals for conflicting traffic.
19. **Separation Time**—the component of maximum highway traffic signal preemption time during which the minimum track clearance distance is clear of vehicular traffic prior to the arrival of the train.
20. **Simultaneous Preemption**—notification of an approaching train is forwarded to the highway traffic signal controller unit or assembly and railroad active warning devices at the same time.
21. **Timed Exit Gate Operating Mode**—a mode of operation where the exit gate descent is based on a predetermined time interval.
22. **Vehicle Intrusion Detection Devices**—a detector or detectors used as a part of a system incorporating processing logic to detect the presence of vehicles within the minimum track clearance distance and to control the operation of the exit gates.
23. **Wayside Equipment**—the signals, switches, and/or control devices for railroad operations housed

within one or more enclosures located along the railroad right-of-way and/or on railroad property.

Section 8A.02 Use of Standard Devices, Systems, and Practices

Support:

Because of the large number of significant variables to be considered, no single standard system of traffic control devices is universally applicable for all highway-rail grade crossings.

Guidance:

The appropriate traffic control system to be used at a highway-rail grade crossing should be determined by an engineering study involving both the highway agency and the railroad company.

Option:

The engineering study may include the Highway-Rail Intersection (HRI) components of the National Intelligent Transportation Systems (ITS) architecture, which is a USDOT accepted method for linking the highway, vehicles, and traffic management systems with rail operations and wayside equipment.

Support:

More detail on Highway-Rail Intersection components is available from USDOT's Federal Railroad Administration, 1120 Vermont Ave., NW, Washington, DC 20590, or www.fra.dot.gov.

Standard:

Traffic control devices, systems, and practices shall be consistent with the design and application of the Standards contained herein.

Before any new highway-rail grade crossing traffic control system is installed or before modifications are made to an existing system, approval shall be obtained from the highway agency with the jurisdictional and/or statutory authority, and from the railroad company.

Guidance:

To stimulate effective responses from vehicle operators and pedestrians, these devices, systems, and practices should use the five basic considerations employed generally for traffic control devices and described fully in Section 1A.02: design, placement, operation, maintenance, and uniformity.

Support:

Many other details of highway-rail grade crossing traffic control systems that are not set forth in Part 8 are contained in the publications listed in Section 1A.11.

Section 8A.03 Uniform Provisions

Standard:

All signs used in highway-rail grade crossing traffic control systems shall be retroreflectorized or illuminated as described in Section 2A.08 to show the same shape and similar color to an approaching road user during both day and night.

No sign or signal shall be located in the center of an undivided highway, except in a raised island.

Guidance:

Such signs or signals should be installed with a clearance of at least 0.6 m (2 ft) from the outer edge of the raised island to the nearest edge of the sign or signal, except as allowed in Section 2A.19.

Where the distance between tracks, measured along the highway between the inside rails, exceeds 30 m (100 ft), additional signs or other appropriate traffic control devices should be used.

Section 8A.04 Highway-Rail Grade Crossing Elimination

Guidance:

Because highway-rail grade crossings are a potential source of crashes and congestion, agencies should conduct engineering studies to determine the cost and benefits of eliminating these crossings.

Standard:

When a highway-rail grade crossing is eliminated, the traffic control devices for the crossing shall be removed.

If the existing traffic control devices at a multiple-track highway-rail grade crossing become improperly placed or inaccurate because of the removal of some of the tracks, the existing devices shall be relocated and/or modified.

Guidance:

Any highway-rail grade crossing that cannot be justified should be eliminated.

Where a roadway is removed from a highway-rail grade crossing, the roadway approaches in the railroad right-of-way should also be removed and appropriate signs should be placed at the roadway end in accordance with Section 3C.04.

Where a railroad is eliminated at a highway-rail grade crossing, the tracks should be removed or paved over.

Option:

Based on engineering judgment, the TRACKS OUT OF SERVICE (R8-9) sign (see Figure 8B-3) may be temporarily installed until the tracks are removed or paved over. The length of time before the tracks will be removed or paved over may be considered in making the decision as to whether to install the sign.

Section 8A.05 Temporary Traffic Control Zones

Support:

Temporary traffic control planning provides for continuity of operations (such as movement of traffic, pedestrians and bicycles, transit operations, and access to property/utilities) when the normal function of a roadway at a highway-rail grade crossing is suspended because of temporary traffic control operations.

Standard:

Traffic controls for temporary traffic control zones that include highway-rail grade crossings shall be as outlined in Part 6.

When a highway-rail grade crossing exists either within or in the vicinity of a temporary traffic control zone, lane restrictions, flagging, or other operations shall not be performed in a manner that would cause vehicles to stop on the railroad tracks, unless a law enforcement officer or flagger is provided at the highway-rail grade crossing to minimize the possibility of vehicles stopping on the tracks, even if automatic warning devices are in place.

Guidance:

Public and private agencies, including emergency services, businesses, and railroad companies, should meet to plan appropriate traffic detours and the necessary signing, marking, and flagging requirements for operations during temporary traffic control zone activities. Consideration should be given to the length of time that the highway-rail grade crossing is to be closed, the type of rail and highway traffic affected, the time of day, and the materials and techniques of repair.

Temporary traffic control operations should minimize the inconvenience, delay, and crash potential to affected traffic. Prior notice should be given to affected public or private agencies, emergency services, businesses, railroad companies, and road users before the free movement of vehicles or trains is infringed upon or blocked.

Temporary traffic control zone activities should not be permitted to extensively prolong the closing of the highway-rail grade crossing.

The width, grade, alignment, and riding quality of the highway surface at a highway-rail grade crossing should, at a minimum, be restored to correspond with the quality of the approaches to the highway-rail grade crossing.

CHAPTER 8B. SIGNS AND MARKINGS

Section 8B.01 Purpose

Support:

Passive traffic control systems, consisting of signs and pavement markings, identify and direct attention to the location of a highway-rail grade crossing and advise motorists, bicyclists, and pedestrians to take appropriate action.

Section 8B.02 Sizes of Grade Crossing Signs

Standard:

The sizes of grade crossing signs shall be as shown in Table 8B-1.

Option:

Signs larger than those shown in Table 8B-1 may be used (see Section 2A.12).

Section 8B.03 Highway-Rail Grade Crossing (Crossbuck) Sign (R15-1) and Number of Tracks Sign (R15-2)

Standard:

The Highway-Rail Grade Crossing (R15-1) sign, commonly identified as the Crossbuck sign, shall be retroreflectorized white with the words RAILROAD CROSSING in black lettering, mounted as shown in Figure 8B-1.

As a minimum, one Crossbuck sign shall be used on each highway approach to every highway-rail grade crossing, alone or in combination with other traffic control devices.

If automatic gates are not present and if there are two or more tracks at the highway-rail grade crossing, the number of tracks shall be indicated on a supplemental Number of Tracks (R15-2) sign of inverted T shape mounted below the Crossbuck sign in the manner and at the height indicated in Figure 8B-1.

Option:

The supplemental Number of Tracks sign may also be used at highway-rail grade crossings with automatic gates.

Standard:

The Crossbuck sign shall be installed on the right side of the highway on each approach to the highway-rail grade crossing. Where restricted sight distance or unfavorable highway geometry exists on an approach to a highway-rail grade crossing, an additional Crossbuck sign shall be installed on the left side of the highway, possibly placed back-to-back with the Crossbuck sign for the opposite approach, or otherwise located so that two Crossbuck signs are displayed for that approach.

A strip of retroreflective white material not less than 50 mm (2 in) in width shall be used on the back of each blade of each Crossbuck sign for the length of each blade, at all highway-rail grade crossings, except those where Crossbuck signs have been installed back-to-back.

A strip of retroreflective white material, not less than 50 mm (2 in) in width, shall be used on each support at passive highway-rail grade crossings for the full length of the front and back of the support from the Crossbuck sign or Number of Tracks sign to within 0.6 m (2 ft) above the edge of the roadway, except on the side of those supports where a STOP (R1-1) or YIELD (R1-2) sign or flashing lights have been installed or on the back side of supports for Crossbuck signs installed on one-way streets.

Guidance:

Crossbuck signs should be located with respect to the highway pavement or shoulder in accordance with the criteria in Chapter 2A and Figures 2A-1 and 2A-2, and should be located with respect to the nearest track in accordance with Figure 8D-2.

The minimum lateral clearance for the nearest edge of the Crossbuck sign should be 1.8 m (6 ft) from the edge of the shoulder or 3.7 m (12 ft) from the edge of the traveled way in rural areas (whichever is greater), and 0.6 m (2 ft) from the face of the curb in urban areas.

Where unusual conditions make variations in location and lateral clearance appropriate, engineering judgment should be used to provide the best practical combination of view and safety clearances.

Table 8B-1. Sign Sizes for Grade Crossing Signs (Sheet 1 of 2)

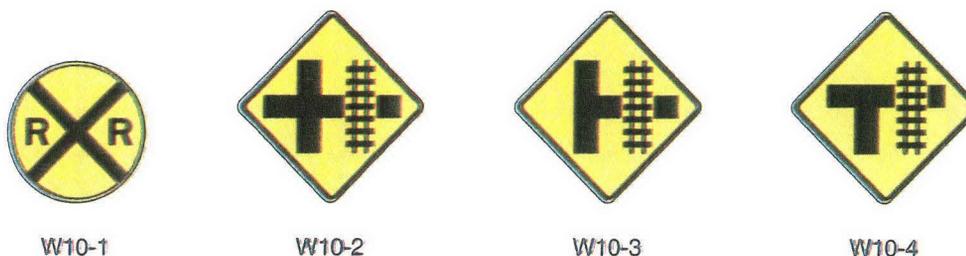
Sign	MUTCD Code	Section	Conventional Road	Expressway	Minimum	Oversized
No Right Turn Across Tracks	R3-1a	8B.06, 10C.09	600 x 750 (24 x 30)	—	—	—
No Left Turn Across Tracks	R3-2a	8B.06, 10C.09	600 x 750 (24 x 30)	—	—	—
Do Not Stop on Tracks	R8-8	8B.07, 10C.05	600 x 750 (24 x 30)	—	—	—
Tracks Out of Service	R8-9	8B.09, 10C.06	600 x 600 (24 x 24)	—	—	—
Stop Here When Flashing	R8-10	8B.10, 10C.08	600 x 900 (24 x 36)	—	—	—
Stop Here on Red	R10-6	8B.11, 10C.07	600 x 900 (24 x 36)	—	—	—
No Turn on Red	R10-11a	8D.07, 10C.09	600 x 750 (24 x 30)	—	—	—
Highway-Rail Grade Crossing (Crossbuck)	R15-1	8B.03, 10C.02	1200 x 225 (48 x 9)	—	—	—
Number of Tracks	R15-2	8B.03 10C.02	675 x 450 (27 x 18)	—	—	—
Exempt	R15-3	8B.05, 10C.10	600 x 300 (24 x 12)	—	—	—
Light Rail Only Right Lane	R15-4a	10C.13	600 x 750 (24 x 30)	—	—	—
Light Rail Only Left Lane	R15-4b	10C.13	600 x 750 (24 x 30)	—	—	—
Light Rail Only Center Lane	R15-4c	10C.13	600 x 750 (24 x 30)	—	—	—
Light Rail Do Not Pass	R15-5	10C.14	600 x 750 (24 x 30)	—	—	—
Do Not Pass Stopped Train	R15-5a	10C.14	600 x 750 (24 x 30)	—	—	—
Do Not Drive On Tracks Light Rail Symbol	R15-6	10C.12	600 x 600 (24 x 24)	—	—	—
Do Not Drive On Tracks	R15-6a	10C.12	600 x 750 (24 x 30)	—	—	—
Light Rail Divided Highway Symbol	R15-7	10C.11	600 x 600 (24 x 24)	—	—	—
Light Rail Divided Highway Symbol (T-Intersection)	R15-7a	10C.11	600 x 600 (24 x 24)	—	—	—
Look	R15-8	8B.16, 10C.03	900 x 450 (36 x 18)	—	—	—
Highway-Rail Grade Crossing Advance Warning	W10-1	8B.04, 10C.15	900 Dia. (36 Dia.)	—	—	—
Exempt	W10-1a	8B.05, 10C.10	600 x 300 (24 x 12)	—	—	—
Highway-Rail Grade Crossing Advance Warning	W10-2,3,4	8B.04, 10C.15	900 x 900 (36 x 36)	—	—	—
Low Ground Clearance Highway-Rail Grade Crossing	W10-5	8B.17, 10C.16	900 x 900 (36 x 36)	—	—	—
Light Rail Activated Blank-Out Symbol	W10-7	10C.17	600 x 600 (24 x 24)	—	—	—
Trains May Exceed 130 km/h (80 MPH)	W10-8	8B.13	900 x 900 (36 x 36)	—	—	—
No Train Horn	W10-9	8B.14	600 x 450 (24 x 18)	—	—	—
No Signal	W10-10	8B.15	600 x 450 (24 x 18)	—	—	—
Storage Space Symbol	W10-11	8B.18, 10C.18	900 x 900 (36 x 36)	—	—	—

Table 8B-1. Sign Sizes for Grade Crossing Signs (Sheet 2 of 2)

Sign	MUTCD Code	Section	Conventional Road	Expressway	Minimum	Oversized
Storage Space XX Meters (Feet) Between Tracks & Highway	W10-11a	8B.18, 10C.18	750 x 900 (30 x 36)	—	—	—
Storage Space XX Meters (Feet) Between Highway & Tracks Behind You	W10-11b	8B.18, 10C.18	750 x 900 (30 x 36)	—	—	—
Skewed Crossing	W10-12	8B.19, 10C.19	900 x 900 (36 x 36)	—	—	—
No Gates or Lights	W10-13	8B.15	600 x 450 (24 x 18)	—	—	—
Next Crossing	W10-14	8B.17	7600 x 450 (24 x 18)	—	—	—
Use Next Crossing	W10-14a	8B.17	600 x 450 (24 x 18)	—	—	—
Rough Crossing	W10-15	8B.17	600 x 450 (24 x 18)	—	—	—
Light Rail Station Symbol	I-12	10C.20	600 x 600 (24 x 24)	—	—	—
Emergency Notification	I-13	8B.12, 10C.21	750 x 750 (30 x 30)	—	—	—
Emergency Notification	I-13a	8B.12, 10C.21	750 x 450 (30 x 18)	—	—	—

Notes:

1. Larger signs may be used when appropriate.
2. Dimensions are shown in millimeters followed by inches in parentheses and are shown as width x height.

Figure 8B-2. Advance Warning Signs**Guidance:**

If the distance between the railroad tracks and the parallel highway, from the edge of the tracks to the edge of the parallel roadway, is 30 m (100 ft) or more, a W10-1 sign should be installed in advance of the highway-rail grade crossing, and the W10-2, W10-3, or W10-4 signs should not be used on the parallel highway.

Section 8B.05 EXEMPT Highway-Rail Grade Crossing Signs (R15-3, W10-1a)**Option:**

When authorized by law or regulation, a supplemental EXEMPT (R15-3) sign (see Figure 8B-3) with a white background bearing the word EXEMPT may be used below the Crossbuck sign or Number of Tracks sign, if present, at the highway-rail grade crossing, and a supplemental EXEMPT (W10-1a) sign (see Figure 8B-5) with a yellow background bearing the word EXEMPT may be used below the Highway-Rail Advance Warning (W10-1) sign.

Support:

These supplemental signs inform drivers of vehicles carrying passengers for hire, school buses carrying students, or vehicles carrying hazardous materials that a stop is not required at certain designated highway-rail grade crossings, except when a train, locomotive, or other railroad equipment is approaching or occupying the highway-rail grade crossing, or the driver's view is blocked.

Section 8B.06 Turn Restrictions During Preemption**Guidance:**

At a signalized intersection that is located within 60 m (200 ft) of a highway-rail grade crossing, measured from the edge of the track to the edge of the roadway, where the intersection traffic control signals are preempted by the approach of a train, all existing turning movements toward the highway-rail grade crossing should be prohibited during the signal preemption sequences.

Option:

A blank-out or changeable message sign and/or appropriate highway traffic signal indication or other similar type sign may be used to prohibit turning movements toward the highway-rail grade crossing during preemption. The R3-1a and R3-2a signs shown in Figure 8B-3 may be used for this purpose.

Standard:

Turn prohibition signs that are associated with preemption shall be visible only when the highway-rail grade crossing restriction is in effect.

Section 8B.07 DO NOT STOP ON TRACKS Sign (R8-8)**Guidance:**

Whenever engineering judgment determines that the potential for vehicles stopping on the tracks is high, a DO NOT STOP ON TRACKS (R8-8) sign (see Figure 8B-3) should be used.

The sign, if used, should be located on the right side of the highway on either the near or far side of the highway-rail grade crossing, depending upon which side provides better visibility to approaching drivers.

Option:

DO NOT STOP ON TRACKS signs may be placed on both sides of the track.

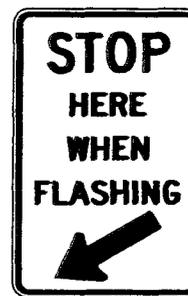
On divided highways and one-way streets, a second DO NOT STOP ON TRACKS sign may be placed on the near or far left side of the highway-rail grade crossing to further improve visibility of the sign.

Figure 8B-3. Regulatory SignsR3-1a
Activated Blank-OutR3-2a
Activated Blank-Out

R8-8



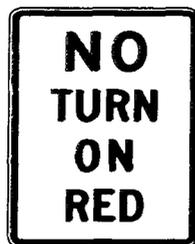
R8-9



R8-10



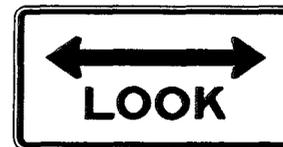
R10-6



R10-11a



R15-3



R15-8

Section 8B.08 STOP (R1-1) or YIELD (R1-2) Signs at Highway-Rail Grade Crossings**Option:**

At the discretion of the responsible State or local highway agency, STOP (R1-1) or YIELD (R1-2) signs (see Figure 2B-1) may be used at highway-rail grade crossings that have two or more trains per day and are without automatic traffic control devices.

Support:

Two or more trains per day means an average of two or more trains per day operating over the highway-rail grade crossing for a 12-month period prior to the installation of the STOP or YIELD control sign.

Option:

For other highway-rail grade crossings with passive warning devices, STOP or YIELD signs may be used based on an engineering study.

Guidance:

The engineering study should take into consideration such factors as highway and train traffic characteristics (including volume and speed), collision history, the need for active control devices, and sight distance to the approaching train.

Option:

If a STOP or YIELD sign is installed at a highway-rail grade crossing, it may be installed on the Crossbuck post or on a separate post at a point where the vehicle is to stop, or as near to that point as practical.

Standard:

For all highway-rail grade crossings where STOP or YIELD signs are installed, the placement shall conform to the requirements of Sections 2B.06 and 2B.10. Stop Ahead (W3-1) or Yield Ahead (W3-2) Advance Warning signs (see Figure 2C-4) shall also be installed if the criteria for their installation given in Section 2C.29 is met.

Section 8B.09 TRACKS OUT OF SERVICE Sign (R8-9)**Option:**

The TRACKS OUT OF SERVICE (R8-9) sign (see Figure 8B-3) may be used at a highway-rail grade crossing instead of a Crossbuck (R15-1) sign and a Number of Tracks (R15-2) sign (see Figure 8B-1) when railroad tracks have been temporarily or permanently abandoned, but only until such time that the tracks are removed or paved over.

Standard:

When tracks are out of service, traffic control devices and gate arms shall be removed and the signal heads shall be removed or hooded or turned from view to clearly indicate that they are not in operation.

The R8-9 sign shall be removed when the tracks have been removed or covered or when the highway-rail grade crossing is returned to service.

Section 8B.10 STOP HERE WHEN FLASHING Sign (R8-10)**Option:**

The STOP HERE WHEN FLASHING (R8-10) sign (see Figure 8B-3) may be used at a highway-rail grade crossing to inform drivers of the location of the stop line or the point at which to stop when the flashing-light signals (see Section 8D.02) are activated.

Section 8B.11 STOP HERE ON RED Sign (R10-6)**Support:**

The STOP HERE ON RED (R10-6) sign (see Figure 8B-3) defines and facilitates observance of stop lines at traffic control signals.

Option:

A STOP HERE ON RED sign may be used at locations where vehicles frequently violate the stop line or where it is not obvious to road users where to stop.

Guidance:

If possible, stop lines should be placed at a point where the vehicle driver has adequate sight distance along the track.

Section 8B.12 Emergency Notification Sign (I-13 or I-13a)**Guidance:**

An Emergency Notification (I-13 or I-13a) sign (see Figure 8B-4) should be installed at all highway-rail grade crossings to provide for emergency notification. The sign should have a white message on blue background.

Location and placement should be decided cooperatively by the railroad company and the public or private highway agencies based on specific site conditions. However, these signs are typically located on the railroad right-of-way.

This sign, which is for emergency notification, should convey a clear and simple message that is visible to anyone stalled or disabled on the railroad tracks, and to anyone with other emergencies.

Support:

Examples of sign messages are shown in Figure 8B-4.

Section 8B.13 TRAINS MAY EXCEED 130 km/h (80 MPH) Sign (W10-8)**Guidance:**

Where trains are permitted to travel at speeds exceeding 130 km/h (80 mph), a TRAINS MAY EXCEED 130 km/h (80 MPH) (W10-8) sign (see Figure 8B-5) should be installed facing road users approaching the highway-rail grade crossing.

If used, the TRAINS MAY EXCEED 130 km/h (80 MPH) signs should be installed between the Highway-Rail Grade Crossing Advance Warning (W10-1) sign (see Figure 8B-2) and the highway-rail grade crossing on all approaches to the highway-rail grade crossing. The locations should be determined based on specific site conditions.

Figure 8B-4. Emergency Notification Signs

I-13

I-13a

Section 8B.14 NO TRAIN HORN Sign (W10-9)**Standard:**

A **NO TRAIN HORN (W10-9)** sign (see Figure 8B-5) shall be installed at each highway-rail grade crossing where there is a Federal Railroad Administration authorization for trains to not sound a horn. The sign shall be mounted as a supplemental plaque below the Highway-Rail Grade Crossing Advance Warning (W10-1) sign (see Figure 8B-2).

Section 8B.15 NO SIGNAL Sign (W10-10) or NO GATES OR LIGHTS Sign (W10-13)**Option:**

A **NO SIGNAL (W10-10)** sign or a **NO GATES OR LIGHTS (W10-13)** sign (see Figure 8B-5) may be installed at highway-rail grade crossings that are not equipped with automated signals.

The **NO SIGNAL (W10-10)** sign or the **NO GATES OR LIGHTS (W10-13)** sign may be mounted as a supplemental plaque below the Advance Warning (W10-1) sign.

Section 8B.16 LOOK Sign (R15-8)**Option:**

At highway-rail grade crossings, the **LOOK (R15-8)** sign (see Figure 8B-3) may be mounted as a supplemental plaque on the Crossbuck (R15-1) sign post, or as a separate sign in the immediate vicinity of the highway-rail grade crossing on the railroad right-of-way.

Section 8B.17 Low Ground Clearance Highway-Rail Grade Crossing Sign (W10-5)**Guidance:**

If the highway profile conditions are sufficiently abrupt to create a hang-up situation for long wheelbase vehicles or for trailers with low ground clearance, the **Low Ground Clearance Highway-Rail Grade Crossing (W10-5)** sign (see Figure 8B-5) should be installed in advance of the highway-rail grade crossing.

Standard:

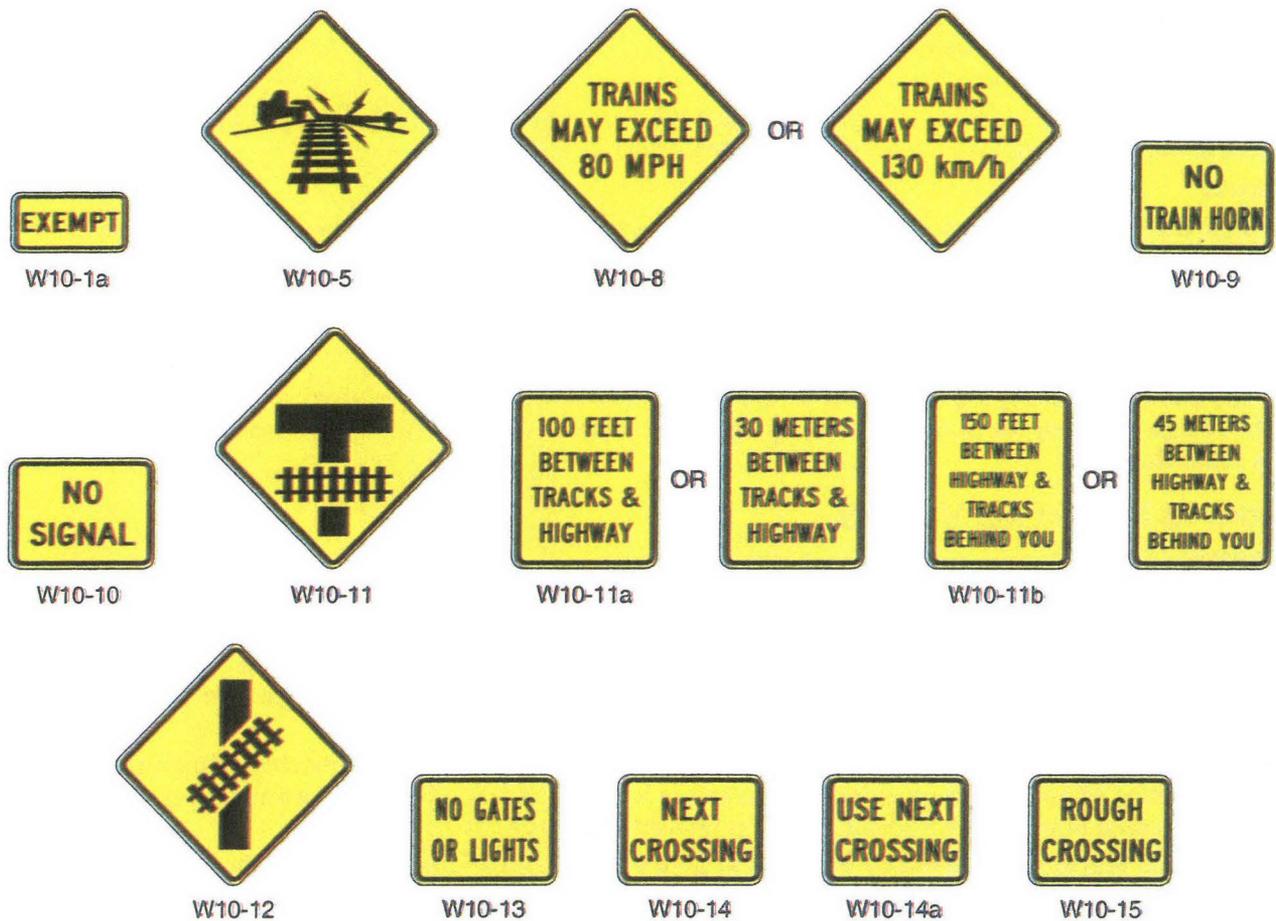
Because this symbol might not be readily recognizable by the public, the **Low Ground Clearance Highway-Rail Grade Crossing (W10-5)** warning sign shall be accompanied by an educational plaque, **LOW GROUND CLEARANCE**. The **LOW GROUND CLEARANCE** educational plaque shall remain in place for at least 3 years after the initial installation of the W10-5 sign (see Section 2A.13).

Guidance:

Auxiliary plaques such as **AHEAD**, **NEXT CROSSING**, or **USE NEXT CROSSING** (with appropriate arrows), or a supplemental distance plaque should be placed below the W10-5 sign at the nearest intersecting highway where a vehicle can detour or at a point on the highway wide enough to permit a U-turn.

If engineering judgment of roadway geometric and operating conditions confirms that vehicle speeds across the railroad tracks should be below the posted speed limit, a W13-1 advisory speed plaque should be posted.

Figure 8B-5. Warning Signs



Note: The W10-11 sign is a W10-3 sign modified for geometrics. Other signs can be oriented or revised as needed to satisfy the geometrics of the roadways and the railroad tracks.

Option:

If the highway-rail grade crossing is rough, word message signs such as **BUMP**, **DIP**, or **ROUGH CROSSING** may be installed. A W13-1 advisory speed plaque may be installed below the word message sign in advance of rough crossings.

Support:

Information on railroad ground clearance requirements is also available in the "American Railway Engineering and Maintenance-of-Way Association's Engineering Manual," or the American Association of State Highway and Transportation Officials' "Policy on Geometric Design of Highways and Streets" (see Section 1A.11).

Section 8B.18 Storage Space Signs (W10-11, W10-11a, W10-11b)

Guidance:

A Storage Space (W10-11) sign supplemented by a word message storage distance (W10-11a) sign (see Figure 8B-5) should be used where there is a highway intersection in close proximity to the highway-rail grade crossing and an engineering study determines that adequate space is not available to store a design vehicle(s) between the highway intersection and the train dynamic envelope.

The Storage Space (W10-11 and W10-11a) signs should be mounted in advance of the highway-rail grade crossing at an appropriate location to advise drivers of the space available for vehicle storage between the highway intersection and the highway-rail grade crossing.

Option:

A Storage Space (W10-11b) sign (see Figure 8B-5) may be mounted beyond the highway-rail grade crossing at the highway intersection under the STOP or YIELD sign or just prior to the signalized intersection to remind drivers of the storage space between the tracks and the highway intersection.

Section 8B.19 Skewed Crossing Sign (W10-12)**Option:**

The Skewed Crossing (W10-12) sign (see Figure 8B-5) may be used at a skewed highway-rail grade crossing to warn drivers that the railroad tracks are not perpendicular to the highway.

Guidance:

If the Skewed Crossing sign is used, the symbol should show the direction of the crossing (near left to far right as shown in Figure 8B-5, or the mirror image if the track goes from far left to near right). If the Skewed Crossing sign is used where the angle of the crossing is significantly different than 45 degrees, the symbol should show the approximate angle of the crossing.

Standard:

The Skewed Crossing sign shall not be used as a replacement for the required Advance Warning (W10-1) sign. If used, the Skewed Crossing sign shall supplement the W10-1 sign and shall be mounted on a separate post.

Section 8B.20 Pavement Markings**Standard:**

All highway-rail grade crossing pavement markings shall be retroreflectorized white. All other markings shall be in accordance with Part 3.

Pavement markings in advance of a highway-rail grade crossing shall consist of an X, the letters RR, a no-passing marking (two-lane highways where centerline markings are used), and certain transverse lines as shown in Figures 8B-6 and 8B-7.

Identical markings shall be placed in each approach lane on all paved approaches to highway-rail grade crossings where signals or automatic gates are located, and at all other highway-rail grade crossings where the posted or statutory highway speed is 60 km/h (40 mph) or greater.

Pavement markings shall not be required at highway-rail grade crossings where the posted or statutory highway speed is less than 60 km/h (40 mph), or in urban areas, if an engineering study indicates that other installed devices provide suitable warning and control.

Guidance:

When pavement markings are used, a portion of the X symbol should be directly opposite the Advance Warning sign. The X symbol and letters should be elongated to allow for the low angle at which they will be viewed.

Option:

When justified by engineering judgment, supplemental pavement marking symbol(s) may be placed between the Advance Warning sign and the highway-rail grade crossing.

Section 8B.21 Stop Lines**Guidance:**

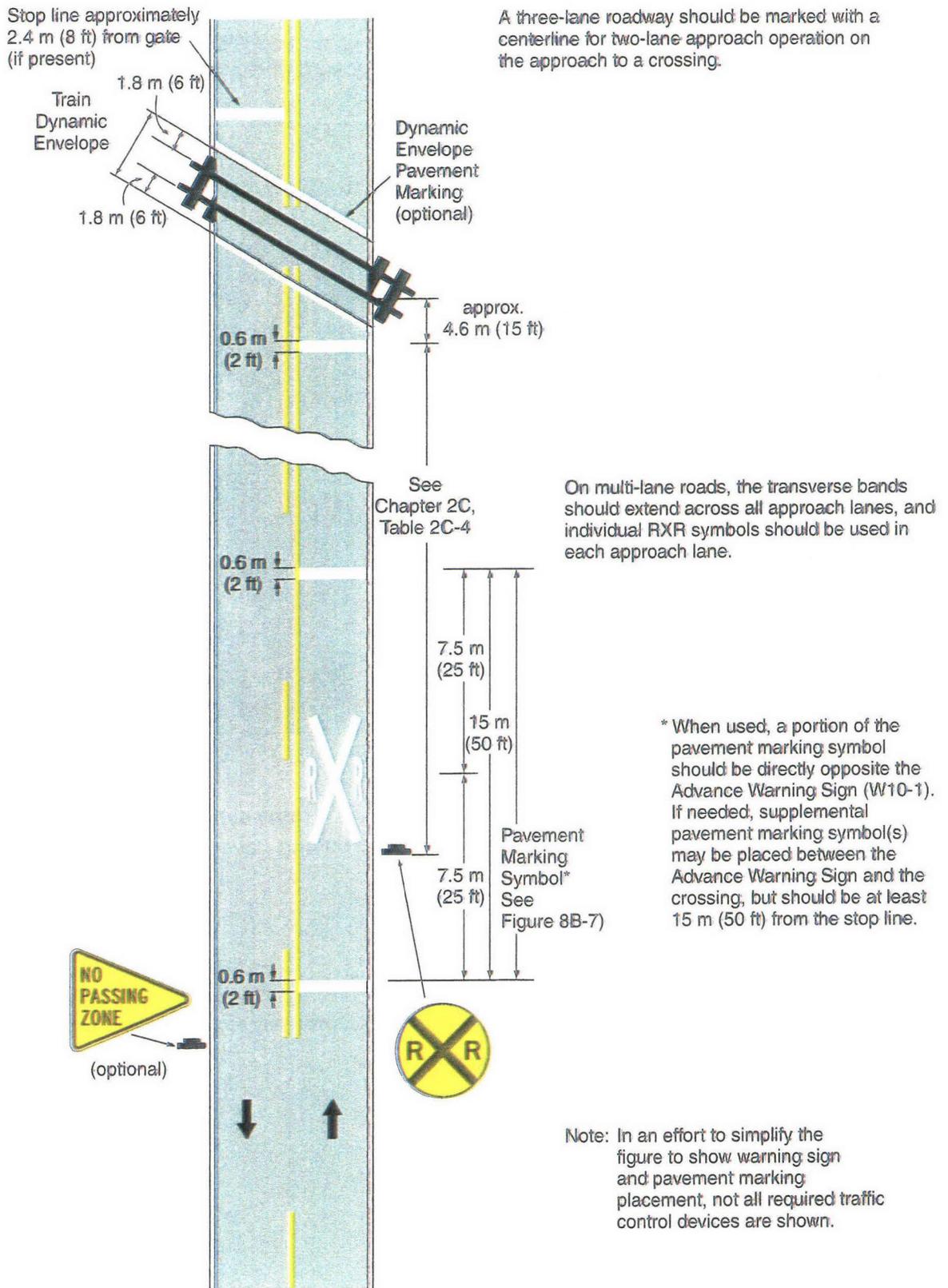
The stop line should be a transverse line at a right angle to the traveled way at a point where a vehicle is to stop or as near to that point as possible. The stop line should be placed approximately 2.4 m (8 ft) from the gate (if present), but no closer than 4.6 m (15 ft) from the nearest rail.

Section 8B.22 Dynamic Envelope Markings**Option:**

Dynamic envelope markings may be used to mark the edges of the dynamic envelope where there is a highway intersection in close proximity to the highway-rail grade crossing and an engineering study determines that vehicles might stop within the dynamic envelope area.

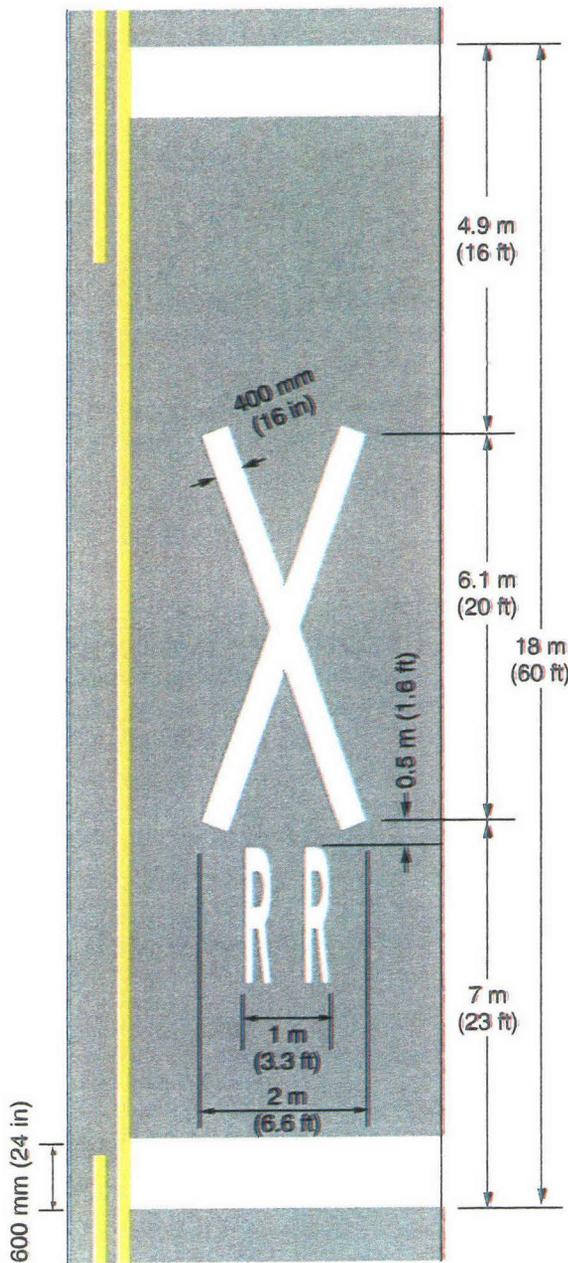
Dynamic envelope markings may be installed at all highway-rail grade crossings, unless a Four-Quadrant Gate system (see Section 8D.05) is used.

Figure 8B-6. Example of Placement of Warning Signs and Pavement Markings at Highway-Rail Grade Crossings



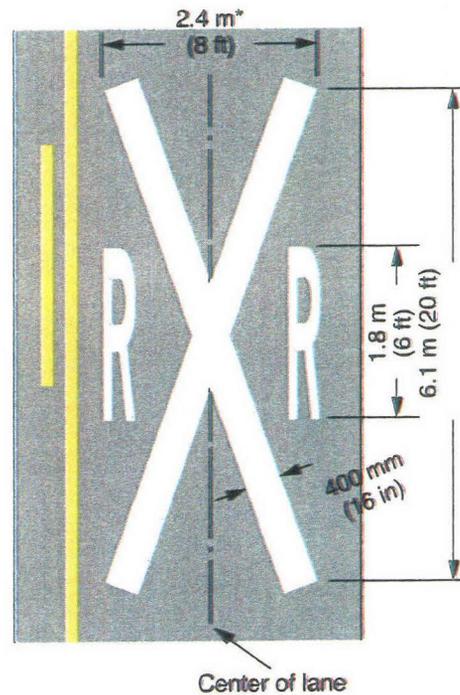
Legend
 → Direction of travel

Figure 8B-7. Examples of Highway-Rail Grade Crossing Pavement Markings



Highway-rail grade crossing alternative (narrow) pavement markings

Note: Refer to Figure 8B-6 for placement



Highway-rail grade crossing pavement markings

*Width may vary according to lane width

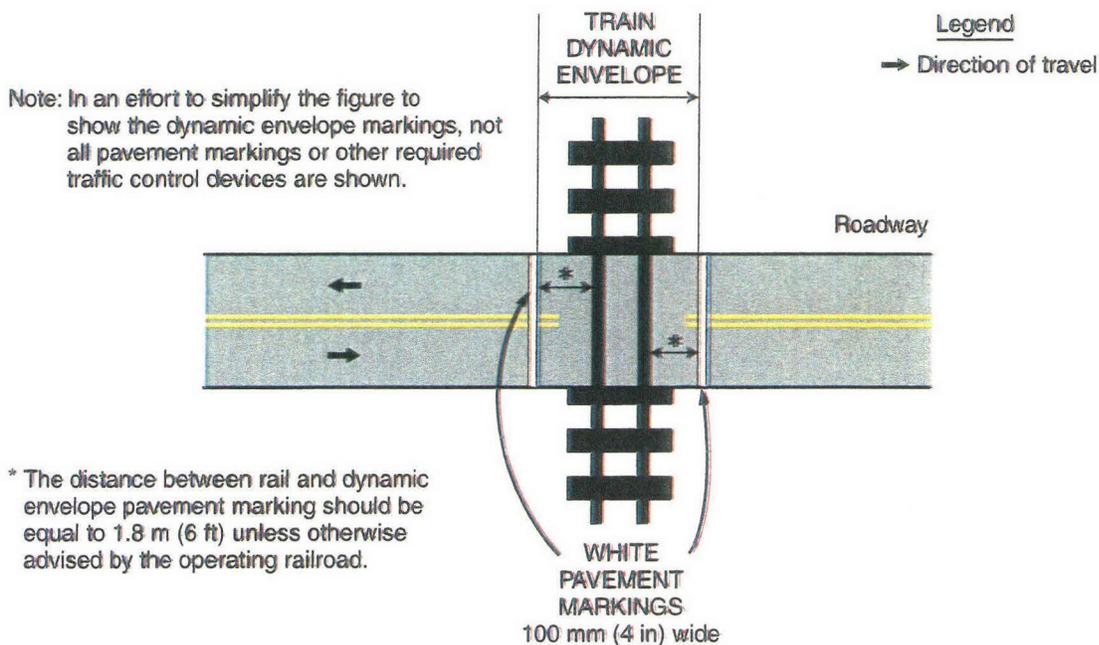
Standard:

If used, pavement markings for indicating the dynamic envelope shall conform to Part 3 and shall be a 100 mm (4 in) normal solid white line or contrasting pavement color and/or contrasting pavement texture.

Guidance:

If used, dynamic envelope pavement markings should be placed on the highway 1.8 m (6 ft) from the nearest rail, installed parallel to the tracks, unless the operating railroad company advises otherwise. The pavement markings should extend across the roadway as shown in Figure 8B-8.

Figure 8B-8. Typical Train Dynamic Envelope Pavement Markings



CHAPTER 8C. ILLUMINATION**Section 8C.01 Illumination at Highway-Rail Grade Crossings****Option:**

Illumination may be installed at or adjacent to a highway-rail grade crossing.

Guidance:

If an engineering study is conducted and if the engineering study determines that better nighttime visibility of the train and the highway-rail grade crossing is needed (for example, where a substantial amount of railroad operation is conducted at night, where train speeds are low and highway-rail grade crossings are blocked for long periods, or crash history indicates that drivers experience difficulty in seeing trains or traffic control devices during hours of darkness), then illumination should be installed at and adjacent to the highway-rail grade crossing.

Support:

Types and location of luminaires for highway-rail grade crossing illumination are contained in the American National Standards Institute's (ANSI) "Practice for Roadway Lighting RP-8" available from the Illuminating Engineering Society (see Section 1A.11).

CHAPTER 8D. FLASHING-LIGHT SIGNALS, GATES, AND TRAFFIC CONTROL SIGNALS

Section 8D.01 Introduction

Support:

Active traffic control systems inform motorists, bicyclists, and pedestrians of the approach or presence of trains, locomotives, or other railroad equipment at highway-rail grade crossings.

A composite drawing (see Figure 8D-1) shows a post-mounted flashing-light signal (two light units mounted in a horizontal line), a flashing-light signal mounted on an overhead structure, and an automatic gate assembly.

Option:

Post-mounted and overhead-mounted flashing-light signals may be used separately or in combination with each other as determined by an engineering study. Also, flashing-light signals may be used without automatic gate assemblies, as determined by an engineering study.

Standard:

The meaning of flashing-light signals and gates shall be as stated in the "Uniform Vehicle Code" (see Sections 11-701 and 11-703 of the "UVC"), which is available from the National Committee on Uniform Traffic Laws and Ordinances (see Page i for the address).

Location and clearance dimensions for flashing-light signals and gates shall be as shown in Figure 8D-1.

When there is a curb, a horizontal clearance of at least 0.6 m (2 ft) shall be provided from the face of the vertical curb to the closest part of the signal or gate arm in its upright position. When a cantilevered-arm flashing-light signal is used, the vertical clearance shall be at least 5.2 m (17 ft) above the crown of the highway to the lowest point of the signal unit.

Where there is a shoulder, but no curb, a horizontal clearance of at least 0.6 m (2 ft) from the edge of a paved or surfaced shoulder shall be provided, with a clearance of at least 1.8 m (6 ft) from the edge of the traveled way.

Where there is no curb or shoulder, the minimum horizontal clearance shall be 1.8 m (6 ft) from the edge of the traveled way.

Guidance:

Equipment housings (controller cabinets) should have a lateral clearance of at least 9 m (30 ft) from the edge of the highway, and where railroad property and conditions allow, at least 7.6 m (25 ft) from the nearest rail.

If a pedestrian route is provided, sufficient clearance from supports, posts, and gate mechanisms should be maintained for pedestrian travel.

When determined by an engineering study, a lateral escape route to the right of the highway in advance of the highway-rail grade crossing traffic control devices should be kept free of guardrail or other ground obstructions. Where guardrail is not deemed necessary or appropriate, barriers should not be used for protecting signal supports.

The same lateral clearance and roadside safety features should apply to flashing-light signal and automatic gate locations on both the right and left sides of the roadway.

Option:

In industrial or other areas involving only low-speed highway traffic or where signals are vulnerable to damage by turning truck traffic, guardrail may be installed to provide protection for the signal assembly.

Section 8D.02 Flashing-Light Signals, Post-Mounted

Standard:

The flashing-light signal assembly (shown in Figure 8D-1) on the side of the highway shall include a standard Crossback (R15-1) sign, and where there is more than one track, a supplemental Number of Tracks (R15-2) sign, all of which indicate to motorists, bicyclists, and pedestrians the location of a highway-rail grade crossing.

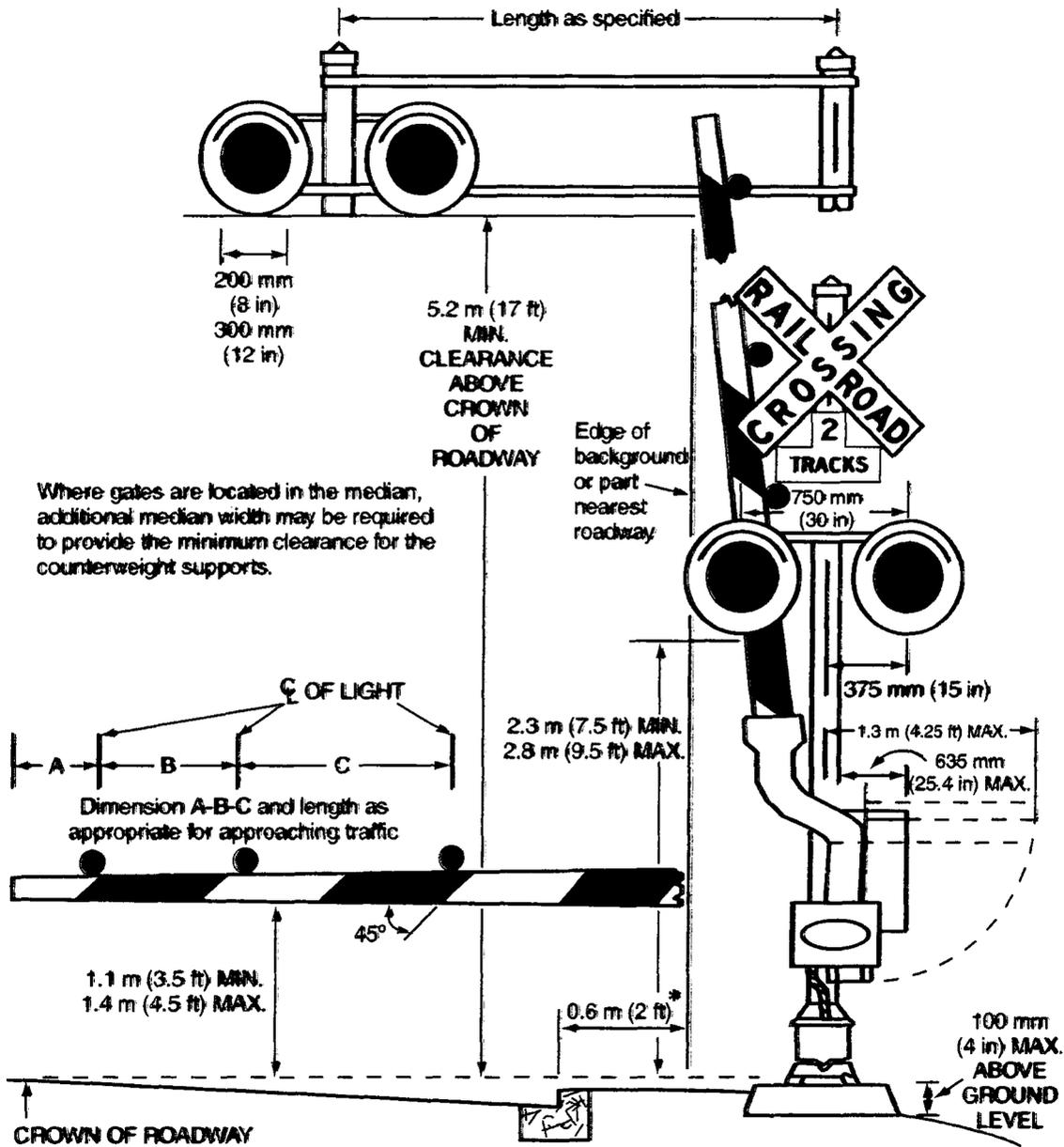
Option:

Bells or other audible warning devices may be included in the assembly and may be operated in conjunction with the flashing lights to provide additional warning for pedestrians and bicyclists.

Standard:

When indicating the approach or presence of a train, the flashing-light signal shall display toward approaching highway traffic two red lights mounted in a horizontal line flashing alternately.

Figure 8D-1. Composite Drawing of Active Traffic Control Devices for Highway-Rail Grade Crossings Showing Clearances



* For locating this reference line at other than curb section installation, see Section 8D.01.

Flashing-light signals shall be placed to the right of approaching highway traffic on all highway approaches to a highway-rail grade crossing. They shall be located laterally with respect to the highway in conformance with Figure 8D-1 except where such location would adversely affect signal visibility.

At highway-rail grade crossings with highway traffic in both directions, back-to-back pairs of lights shall be placed on each side of the tracks. On multi-lane one-way streets and divided highways, flashing light signals shall be placed on the approach side of the highway-rail grade crossing on both sides of the roadway or shall be placed above the highway.

Each red signal unit in the flashing-light signal shall flash alternately. The number of flashes per minute for each lamp shall be 35 minimum and 65 maximum. Each lamp shall be illuminated approximately the same length of time. Total time of illumination of each pair of lamps shall be the entire operating time. Flashing-light units shall use either 200 mm (8 in) or 300 mm (12 in) nominal diameter lenses.

Guidance:

In choosing between the 200 mm (8 in) or 300 mm (12 in) nominal diameter lenses for use in highway-rail grade crossing flashing-light signals, consideration should be given to the principles stated in Section 4D.15.

Standard:

Highway-rail grade crossing flashing-light signals shall operate at a low voltage using storage batteries either as a primary or stand-by source of electrical energy. Provision shall be made to provide a source of energy for charging batteries.

Option:

Additional pairs of flashing-light units may be mounted on the same supporting post and directed toward vehicular traffic approaching the highway-rail grade crossing from other than the principal highway route, such as where there are approaching routes on highways closely adjacent to and parallel to the railroad.

Section 8D.03 Flashing-Light Signals, Overhead Structures

Option:

Flashing-light signals may be installed on overhead structures or cantilevered supports as shown in Figure 8D-1 where needed for additional emphasis, or for better visibility to approaching traffic, particularly on multi-lane approaches or highways with profile restrictions.

If it is determined by an engineering study that one set of flashing lights on the cantilever arm is not sufficiently visible to road users, one or more additional sets of flashing lights may be mounted on the supporting post and/or on the cantilever arm.

Standard:

Breakaway or frangible bases shall not be used for overhead structures or cantilevered supports.

Section 8D.04 Automatic Gates

Support:

An automatic gate is a traffic control device used as an adjunct to flashing-light signals.

Standard:

The automatic gate (see Figure 8D-1) shall consist of a drive mechanism and a fully retroreflectorized red- and white-striped gate arm with lights. When in the down position, the gate arm shall extend across the approaching lanes of highway traffic.

In the normal sequence of operation, unless constant warning time or other advanced system requires otherwise, the flashing-light signals and the lights on the gate arm (in its normal upright position) shall be activated immediately upon detection of the approaching train. The gate arm shall start its downward motion not less than 3 seconds after the flashing-light signals start to operate, shall reach its horizontal position at least 5 seconds before the arrival of the train, and shall remain in the down position as long as the train occupies the highway-rail grade crossing.

When the train clears the highway-rail grade crossing, and if no other train is detected, the gate arm shall ascend to its upright position, following which the flashing lights and the lights on the gate arm shall cease operation.

Gate arms shall be fully retroreflectorized on both sides, have 45-degree diagonal stripes alternately red and white at 400 mm (16 in) intervals measured horizontally, and shall have at least three red lights as indicated in Figure 8D-1.

When activated, the gate arm light nearest the tip shall be illuminated continuously and the other lights shall flash alternately in unison with the flashing-light signals.

The entrance gate arm mechanism shall be designed to fail safe in the down position.

Guidance:

The gate arm should ascend to its upright position in not more than 12 seconds.

In its normal upright position, when no train is approaching or occupying the highway-rail grade crossing, the gate arm should be either vertical or nearly so (see Figure 8D-1).

In the design of individual installations, consideration should be given to timing the operation of the gate arm to accommodate large and/or slow-moving vehicles.

The gates should cover the approaching highway to block all motor vehicles from being driven around the gate without crossing the centerline.

Option:

Automatic gate installations may include median islands between opposing lanes on an approach to a highway-rail grade crossing.

Where gates are located in the median, additional median width may be required to provide the minimum clearance for the counterweight supports.

Section 8D.05 Four-Quadrant Gate Systems

Option:

Four-Quadrant Gate systems may be installed to improve safety at highway-rail grade crossings based on an engineering study when less restrictive measures, such as automatic gates and median islands, are not effective.

Standard:

A Four-Quadrant Gate system shall consist of a series of automatic gates used as an adjunct to flashing-light signals to control traffic on all lanes entering and exiting the highway-rail grade crossing.

The Four-Quadrant Gate system shall consist of a drive mechanism and fully retroreflectorized red- and white-striped gate arms with lights, and when in the down position the gate arms extend individually across the entrance and exit lanes of highway traffic as shown in Figure 8D-2. Standards contained in Sections 8D.01 through 8D.03 for flashing-light signals shall be followed for signal specifications, location, and clearance distances.

In the normal sequence of operation, unless constant warning time or other advanced system requires otherwise, the flashing-light signals and the lights on the gate arms (in their normal upright positions) shall be activated immediately upon detection of the approaching train. The gate arms for the entrance lanes of traffic shall start their downward motion not less than 3 seconds after the flashing-light signals start to operate and shall reach their horizontal position at least 5 seconds before the arrival of the train. Exit gate arm activation and downward motion shall be based on detection or timing requirements established by an engineering study of the individual site. The gate arms shall remain in the down position as long as the train occupies the highway-rail grade crossing.

When the train clears the highway-rail grade crossing, and if no other train is detected, the gate arms shall ascend to their upright positions, following which the flashing lights and the lights on the gate arms shall cease operation.

Gate arm design, colors, and lighting requirements shall be in accordance with the Standards contained in Section 8D.04.

Except as noted in the Option below, the exit gate arm mechanism shall be designed to fail-safe in the up position.

At locations where gate arms are offset a sufficient distance for vehicles to drive between the entrance and exit gate arms, median islands shall be installed in accordance with the needs established by an engineering study.

Guidance:

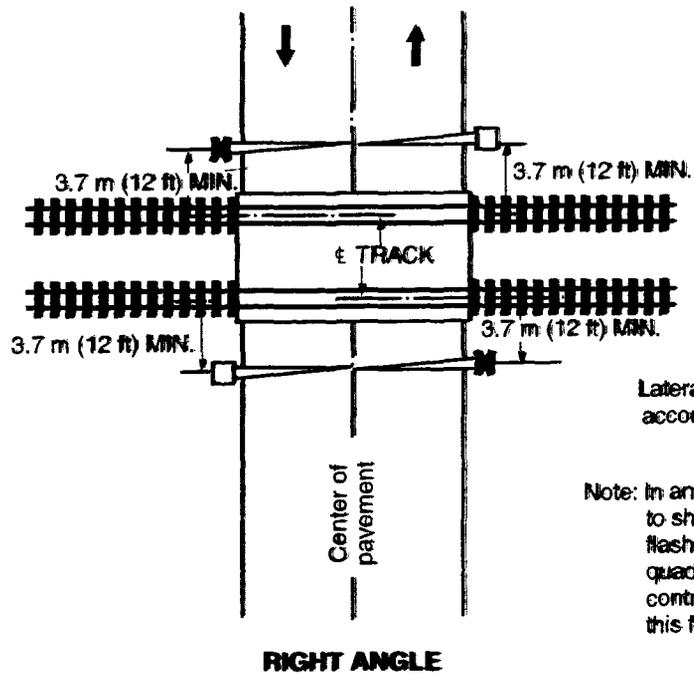
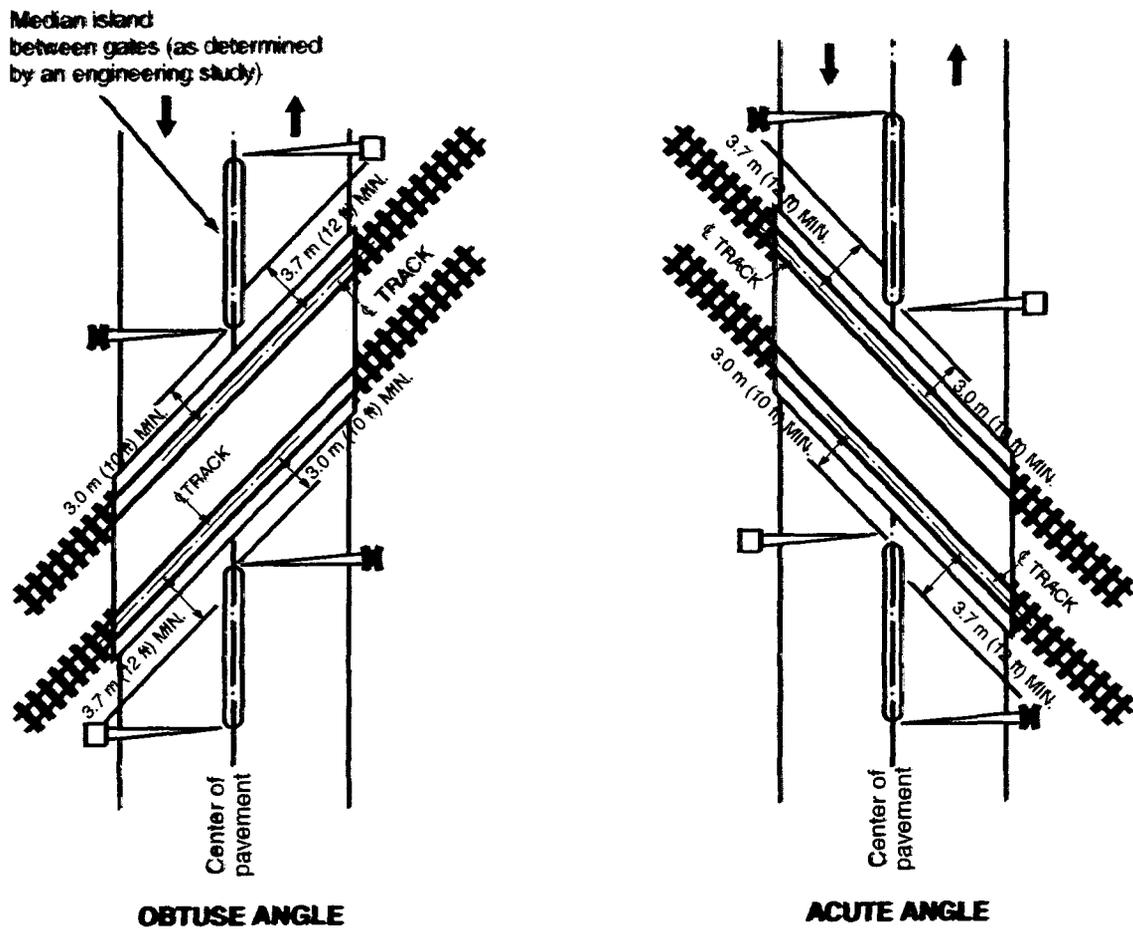
The gate arm should ascend to its upright position in not more than 12 seconds.

Four-Quadrant Gate systems should only be used in locations with constant-warning-time train detection.

The operating mode of the exit gates should be determined based upon an engineering study, with input from the affected railroad company.

If the Timed Exit Gate Operating Mode is used, the engineering study, with input from the affected railroad company, should also determine the Exit Gate Clearance Time (see Section 8A.01).

Figure 8D-2. Example of Location Plan for Flashing-Light Signals and Four-Quadrant Gates



Legend
 → Direction of travel

Lateral clearances shall be in accordance with Figure 8D-1 and Chapter 8D.

Note: In an effort to simplify the figure to show typical location plans for flashing-light signals and four-quadrant gates, not all traffic control devices are shown on this figure.

If the Dynamic Exit Gate Operating Mode is used, vehicle intrusion detection devices should be installed to control exit gate operation based on vehicle presence within the minimum track clearance distance.

Regardless of which exit gate operating mode is used, the Exit Gate Clearance Time should be considered when determining additional time requirements for the Minimum Warning Time.

If a Four-Quadrant Gate system is used at a location that is adjacent to an intersection that could cause vehicles to queue within the minimum track clearance distance, the Dynamic Exit Gate Operating Mode should be used unless an engineering study indicates otherwise.

If a Four-Quadrant Gate system is interconnected with a highway traffic signal, backup or standby power should be considered for the highway traffic signal. Also, cunctry should be installed to prevent the highway traffic signal from leaving the track clearance green interval until all of the gates are lowered.

At locations where sufficient space is available, exit gates should be set back from the track a distance that provides a safety zone long enough to accommodate at least one design vehicle between the exit gate and the nearest rail.

Four-Quadrant Gate systems should include remote health (status) monitoring capable of automatically notifying railroad signal maintenance personnel when anomalies have occurred within the system.

Option:

Exit gate arms may fail in the down position if the highway-rail grade crossing is equipped with remote health (status) monitoring.

Four-Quadrant Gate installations may include median islands between opposing lanes on an approach to a highway-rail grade crossing.

Guidance:

Where sufficient space is available, median islands should be at least 18 m (60 ft) in length.

Section 8D.06 Train Detection

Standard:

The devices employed in active traffic control systems shall be actuated by some form of train detection.

Train detection circuits, insofar as practical, shall be designed on the fail-safe principle.

Flashing-light signals shall operate for at least 20 seconds before the arrival of any train, except as noted in the Option below.

Option:

On tracks where all trains operate at less than 30 km/h (20 mph) and where flagging is performed by an employee on the ground, a shorter signal operating time for the flashing-light signals may be used.

Additional warning time may be provided when determined by an engineering study.

Guidance:

Where the speeds of different trains on a given track vary considerably under normal operation, special devices or circuits should be installed to provide reasonably uniform notice in advance of all train movements over the highway-rail grade crossing. Special control features should be used to eliminate the effects of station stops and switching operations within approach control circuits to prevent excessive activation of the traffic control devices while trains are stopped on or switching upon the approach track control circuits.

Section 8D.07 Traffic Control Signals at or Near Highway-Rail Grade Crossings

Option:

Traffic control signals may be used instead of flashing-light signals to control road users at industrial highway-rail grade crossings and other places where train movements are very slow, such as in switching operations.

Standard:

The appropriate provisions of Part 4 relating to traffic control signal design, installation, and operation shall be applicable where traffic control signals are used to control road users instead of flashing-light signals at highway-rail grade crossings.

Traffic control signals shall not be used instead of flashing-light signals to control road users at a

mainline highway-rail grade crossing.**Guidance:**

The highway agency with jurisdiction, the regulatory agency with statutory authority, if applicable, and the railroad company should jointly determine the preemption operation at highway-rail grade crossings adjacent to signalized highway intersections.

If a highway-rail grade crossing is equipped with a flashing-light signal system and is located within 60 m (200 ft) of an intersection or midblock location controlled by a traffic control signal, the traffic control signal should be provided with preemption in accordance with Section 4D.13.

Coordination with the flashing-light signal system, queue detection, or other alternatives should be considered for traffic control signals located farther than 60 m (200 ft) from the highway-rail grade crossing. Factors to be considered should include traffic volumes, vehicle mix, vehicle and train approach speeds, frequency of trains, and queue lengths.

Standard:

If preemption is provided, the normal sequence of traffic control signal indications shall be preempted upon the approach of trains to avoid entrapment of vehicles on the highway-rail grade crossing by conflicting aspects of the traffic control signals and the highway-rail grade crossing flashing-light signals.

This preemption feature shall have an electrical circuit of the closed-circuit principle, or a supervised communication circuit between the control circuits of the highway-rail grade crossing warning system and the traffic control signal controller. The traffic control signal controller preemptor shall be activated via the supervised communication circuit or the electrical circuit that is normally energized by the control circuits of the highway-rail grade crossing warning system. The approach of a train to a highway-rail grade crossing shall de-energize the electrical circuit or activate the supervised communication circuit, which in turn shall activate the traffic control signal controller preemptor. This shall establish and maintain the preemption condition during the time the highway-rail grade crossing warning system is activated, except that when crossing gates exist, the preemption condition shall be maintained until the crossing gates are energized to start their upward movement. When multiple or successive preemptions occur, train activation shall receive first priority.

Guidance:

If a highway-rail grade crossing is located within 15 m (50 ft) (or within 23 m (75 ft) for a highway that is regularly used by multi-unit vehicles) of an intersection controlled by a traffic control signal, the use of pre-signals to control traffic approaching the grade crossing should be considered.

Standard:

If used, the pre-signals shall display a red signal indication during the track clearance portion of a signal preemption sequence to prohibit additional vehicles from crossing the railroad track.

Guidance:

Consideration should be given to using visibility-limited signal faces (see Section 4A.02) at the intersection for the downstream signal faces that control the approach that is equipped with pre-signals.

Option:

The pre-signal phase sequencing may be timed with an offset from the signalized intersection such that the railroad track area and the area between the railroad track and the downstream signalized intersection is generally kept clear of stopped vehicles.

Standard:

If a pre-signal is installed at an interconnected highway-rail grade crossing near a signalized intersection, a STOP HERE ON RED (R10-6) sign shall be installed near the pre-signal or at the stop line if used. If there is a nearby signalized intersection with insufficient clear storage distance for a design vehicle, or the highway-rail grade crossing does not have gates, a NO TURN ON RED (R10-11) sign shall be installed for the approach that crosses the railroad track.

Option:

At locations where a highway-rail grade crossing is located more than 15 m (50 ft) (or more than 23 m (75 ft) for a highway regularly used by multi-unit vehicles) from an intersection controlled by a traffic control signal, a pre-signal may be used if an engineering study determines a need.

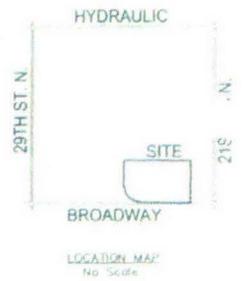
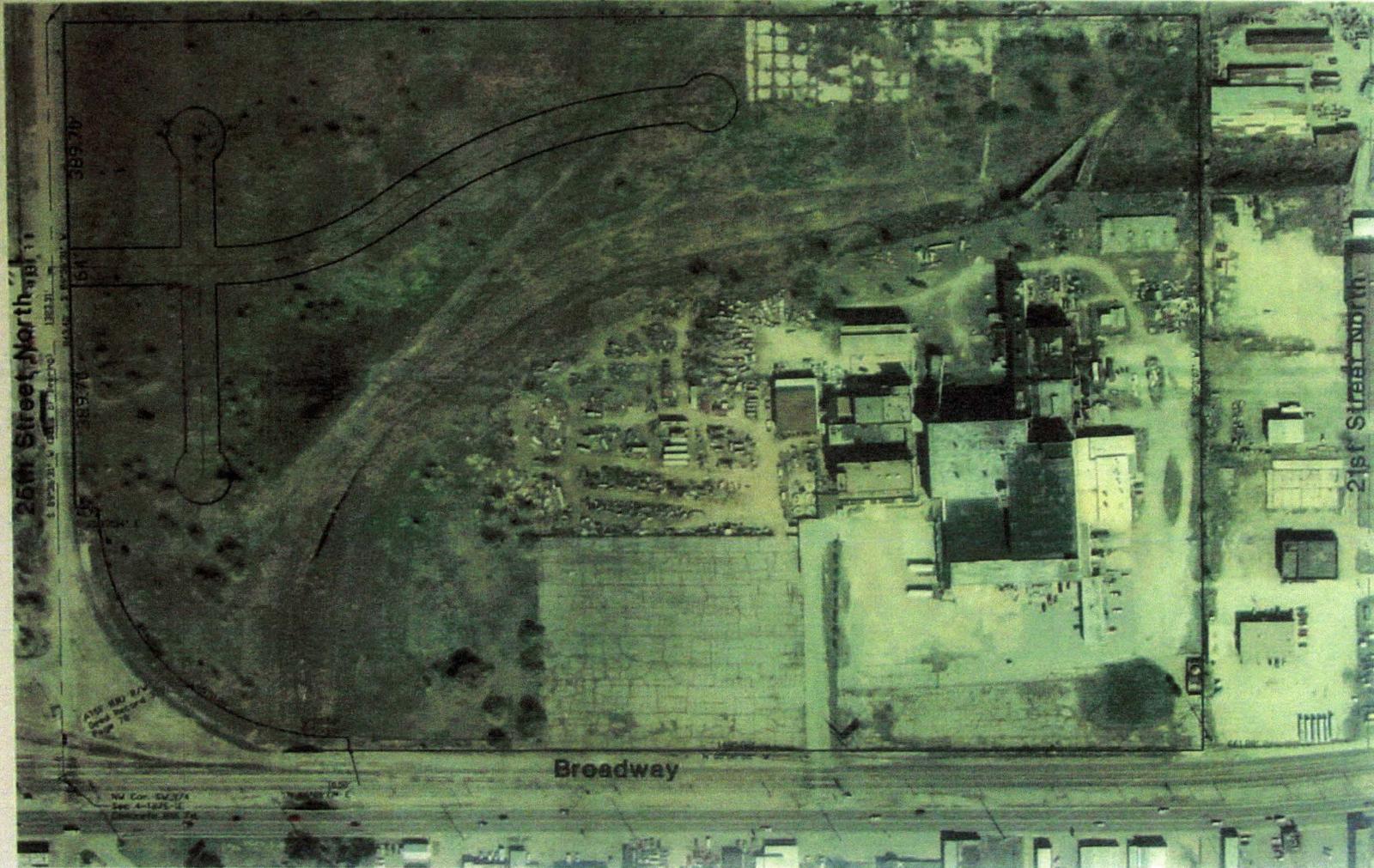
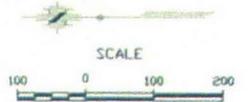
If highway traffic signals must be located within close proximity to the flashing-light signal system, the highway traffic signals may be mounted on the same overhead structure as the flashing-light signals.

Support:

Section 4D.13 describes additional considerations regarding preemption of traffic control signals at or near highway-rail grade crossings.

EXHIBIT
3

SKETCH PLAT OF TREATCO INDUSTRIAL ADDITION TO THE CITY OF WICHITA, SEDGWICK COUNTY, KANSAS S.W. 1/4, SEC. 4-T21S-R1E



SKETCH #3



POE & ASSOCIATES, INC.
CONSULTING ENGINEERS
1940 E. Central, Suite 200 • Wichita, KS 67208-4142
Phone 316/685-4114 • FAX 316/685-4444





EXISTING TEMPORARY
CROSSING

EMPORIA COURT

APPROXIMATE PROPOSED DEVELOPMENT



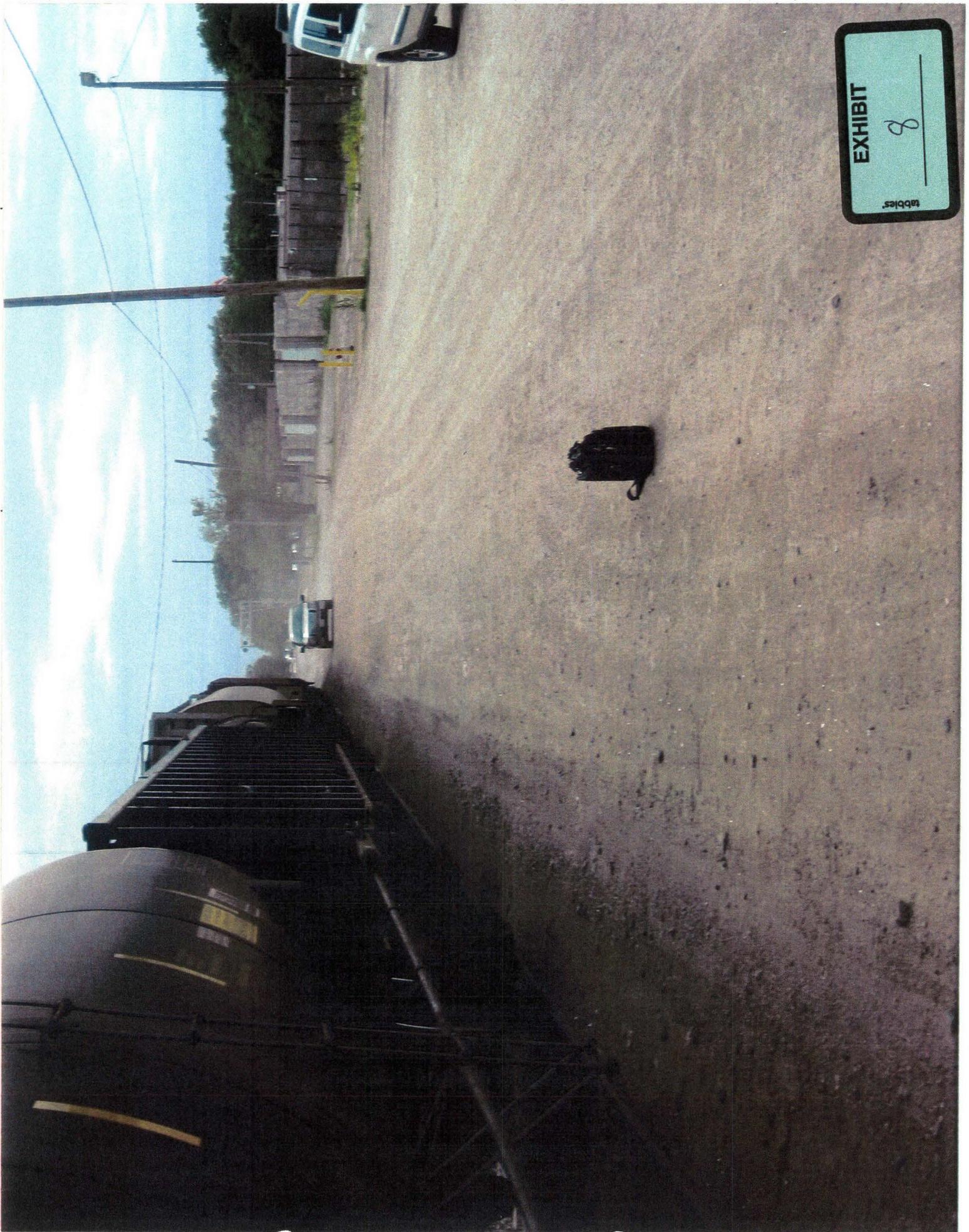
Emporia St

15000 S 150th St

150th St



EXHIBIT
7
tabbles



tabbles®
EXHIBIT 8



tabbles®
EXHIBIT
9

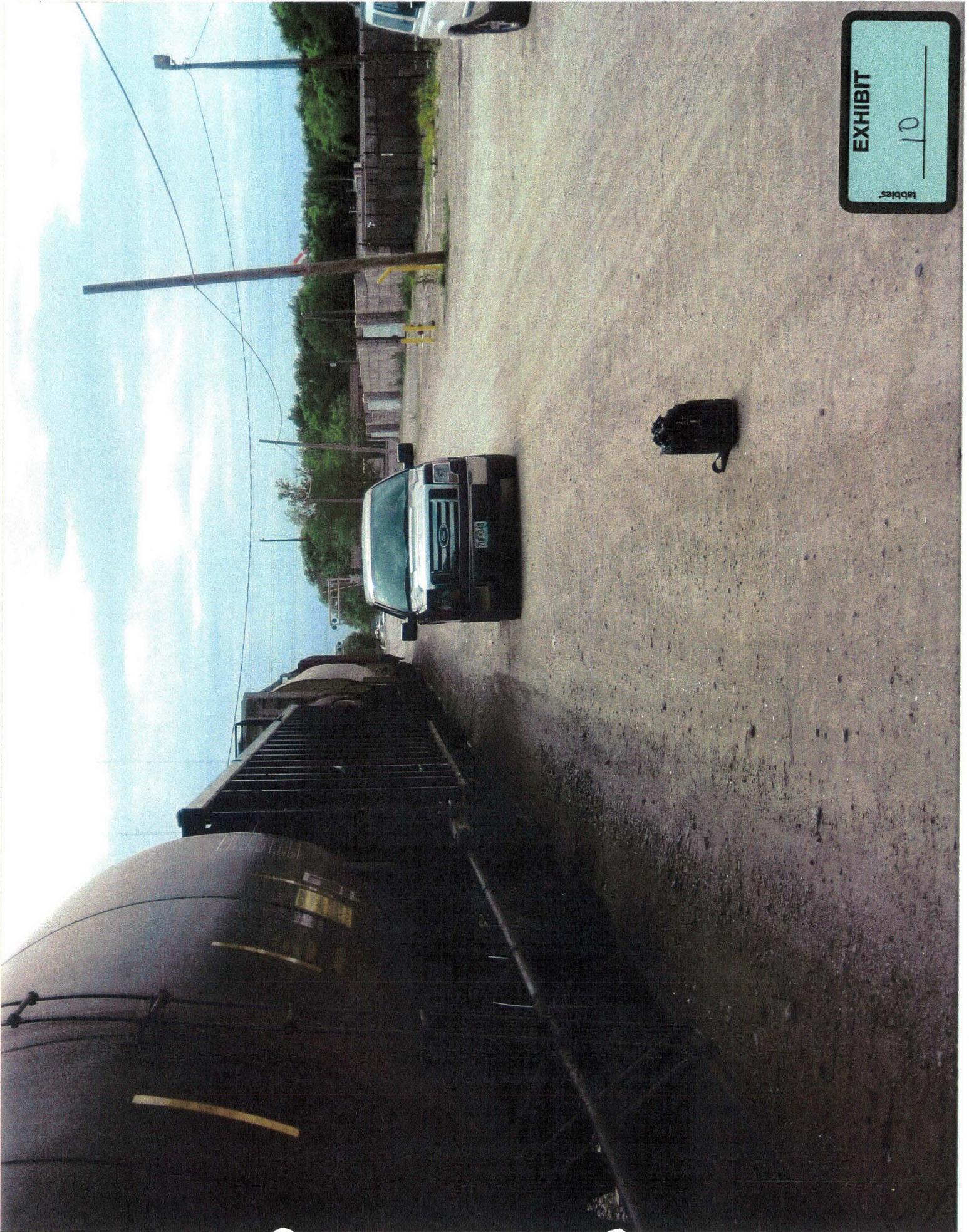


EXHIBIT
10
tabbles



EXHIBIT

11

tabbles

EXHIBIT
12





EXHIBIT

13

tabbles



EXHIBIT
14
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tabbles
EXHIBIT
15



EXHIBIT
16
tabbles

25th St.

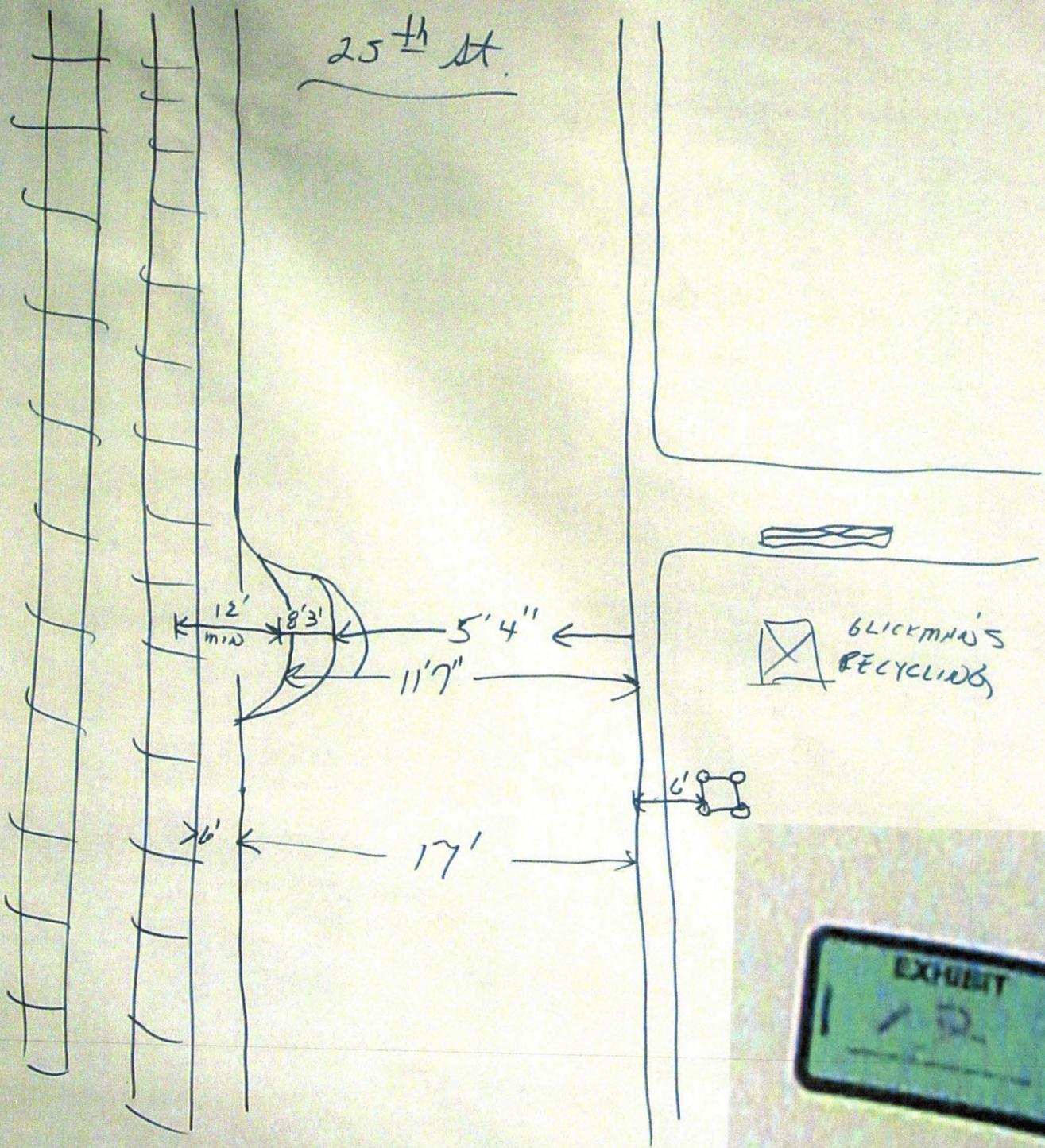


EXHIBIT
1 / 2