

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Docket FD 35765**

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235370  
ENTERED  
Office of Proceedings  
January 28, 2014  
Part of  
Public Record

**WICHITA TERMINAL ASSOCIATION, BNSF RAILWAY CO. and UNION  
PACIFIC RAILROAD CO. – PETITION FOR DECLARATORY ORDER**

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**OBJECTION TO WTA's PETITION FOR LEAVE  
TO FILE A REPLY TO A REPLY**

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## INTRODUCTION

This dispute concerns WTA's<sup>1</sup> state law obligation to install a rail crossing from 25th Street to the northern end of FYG's<sup>2</sup> property. But WTA's impermissible reply to a reply seeks to describe access to the southern end of FYG's property, across the creek, and to tell this Board – once again – what it believes the law requires. Why? WTA neither explains its rationale nor satisfies the standard that must be met to upend the rule that “replies to replies are not permitted.” Accordingly, FYG asks this Board to deny WTA's Petition and exclude WTA's proffered reply to a reply from the record.

## ARGUMENT AND AUTHORITIES

**1. WTA's late-filed, unsupported request to submit an impermissible reply to a reply should be denied.** There are at least two substantive reasons to deny WTA's leave to submit a reply to a reply. One is that it is inexcusably untimely. While permissible replies must be submitted within twenty days, *see* 49 C.F.R. §1104.13(a), WTA did not file its request for an impermissible reply to reply until thirty-one days after FYG submitted its Reply. Moreover, WTA has failed to offer any excuse or reason for this unnecessary delay. This, standing alone, is reason to summarily deny the filings.

The other reason is that WTA fails to satisfy this Board's heavy burden justifying the extraordinary relief being sought. *See Waterloo Ry. Co. – Adverse Abandonment –*

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<sup>1</sup> Wichita Terminal Association, BNSF Railway Company, and Union Pacific Railroad Company.

<sup>2</sup> F.Y.G. Investments, Inc. and Treatco, Inc.

*Lines of Bangor and Aroostood Railroad*, 2003 WL 21009328, at \*2 (STB served May 6, 2013) (“the pleading process ends with the reply, and replies to replies are not permitted”). WTA’s alleged “good cause” is nothing more than a re-statement of what it believes the Kansas Court of Appeals held or what ICCTA requires. *See* WTA’s Petition, pp. 2-3; WTA’s Proposed Reply to Reply, pp. 2-4. FYG has no doubt this Board, armed with both parties’ pleadings, the prior judicial decisions, and its regulatory expertise, can and will properly resolve these legal issues without further explanation from WTA. And, the “additional information” WTA wants this Board to acknowledge – that “FYG is not landlocked,” WTA’s Petition, p. 3; WTA’s Proposed Sur-Reply, pp. 4-5 – is both false and legally irrelevant. Accordingly, FYG urges the Board to enforce 49 C.F.R. §1104.13(c)’s prohibition on filing a reply to a reply. *See Peter Pan Bus Lines, Inc.- Pooling—Greyhound Lines, Inc.*, 2011 WL 1496366, at \*2 (STB Served Apr. 20, 2011) (denying sur-reply allegedly necessitated by mis-statements contained in the reply); *Pennsylvania R.R. Co. – Merger – N.Y. Cent. R.R. Co.*, 2011 WL 64041, at \*6 (STB served Jan. 10, 2011) (denying sur-reply that “simply reiterates facts and arguments that are already of record” and did not “purport to submit new evidence or evidence of changed circumstances”).

**2. WTA’s contention that FYG’s property is not landlocked is both false and immaterial.** FYG’s Reply brief noted – once – that the 27 acre tract at issue in this case is land-locked: “Kansas courts have repeatedly held that Kansas law gives FYG a right of ingress to and egress from its land-locked property over the two industrial tracks

separating FYG's property from a public street in Wichita, Kansas." FYG's Reply, p. 1. But WTA's request to file a reply to FYG's Reply treats this description as if it were the crux of the case, suggesting – on the strength of a Google aerial photograph, Exhibit N – that there is a crossing on the south side of the intersecting Chisholm Creek that FYG could use (to access Broadway, not 25th Street) instead of making WTA honor its legal obligations to construct a crossing on the northern border of the property so that FYG can access 25th Street. *See* WTA's Proposed Reply to Reply, p. 4.

New Exhibit N does nothing more than confirm two facts established by previously-submitted Exhibit G. First, it depicts Chisholm Creek, a creek that is at least 9 feet deep with a flood plain of over 150 feet wide, at the southern and western border of the 27-acre northern tract at issue in this litigation. Indeed, this is the very waterway the Kansas District Court referred to when it described the western portion of the property where the temporary crossing sits as “an area that is a low point and a virtual swamp with a creek running through it,” making that location impractical for a crossing given the “grade and swampy nature of the land at that location.” FYG's Reply, p. 12 (quoting Ex. 10, December 2011 Ruling Tr., 2:11 – 3:4); *see also Frank Bryan, Inc. v. CSX Transp., Inc.*, Case No. 13-363, 2013 WL 1624886, at \*1 (W.D. Pa. Apr. 15, 2013) (describing property hemmed in by CSX tracks and a river as landlocked); *Cathcart v. Wachovia Mortgage*, Case No. 04-1236, 2005 WL 756208, at \*1 (S.D. Ind. Feb. 22, 2005) (“The landlocked portion is separated from the remaining three acres by a body of water alternatively described as a pond or lake.”).

Second, Exhibit N's depiction of rail cars parked on the industrial tracks reinforces both the testimony WTA offered in the state court trials and a judicial finding that WTA uses its industrial tracks as a parking lot, not a bustling thoroughfare of rail traffic. *See generally* FYG's Reply, pp. 9-10 & n. 4; *see also* FYG's Reply, pp. 32-33.

The Kansas courts' and parties' focus on the 25th Street access to the property (and inattention to the southern or western property features) is hardly surprising. The entire litigation has been focused upon whether FYG has a right under Kansas law to access its land from the north, along 25th Street. As noted, WTA obtained rights to build its industrial tracks along 25th Street upon the express condition that it would construct them so that vehicles "can safely pass over such tracks at any point on said street." City Ordinance 5436, §2. And the Kansas courts repeatedly ruled (and WTA did not appeal) that Kansas law gives FYG a right to access its property from the northern boundary, along 25th Street. FYG therefore wonders why – and WTA's proposed Reply to Reply does not explain the intended significance of – the property characteristics of the Chisholm Creek border to the south would be of any concern to this Board. Kansas law provides FYG with a right to access its property from 25th Street and imposes upon WTA the duty to construct and maintain such a crossing.

## **CONCLUSION**

This dispute has dragged on for over a decade. FYG respectfully asks this Board to bring an end to WTA's efforts to continue the merry-go-round ride. FYG has a state law right to ingress and egress to 25th Street across the industrial tracks at the Emporia

Court location. This Board should not act as an excuse for WTA to avoid its legal obligations.

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## CERTIFICATE OF SERVICE

I do hereby certify that on this 28th day of January, 2014, I served a copy of the foregoing by hand-delivery upon counsel for Petitioner BNSF Railway Company at the following address:

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