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January 10, 2014

VIA E-FILING

235282

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
January 10, 2014
Part of
Public Record

Re: Petition of the Wichita Terminal Association, BNSF Railway Company and Union Pacific Railroad Company (the "WTA") for Declaratory Order Finance Docket No. 35765

Dear Ms. Brown:

On behalf of the WTA, I am enclosing the following documents for filing in the above-captioned proceeding:

1. Petition of the WTA for Leave to File a Reply to a Reply; and
2. Reply to Reply of F.Y.G. Investments, Inc. and Treatco, Inc. Regarding Petition for Declaratory Order.

Thank you for your attention to this matter.

Very truly yours,

Lathrop & Gage LLP

By: s/ K. Paul Day
K. Paul Day

Enclosures

cc: Karl Morell
Counsel for Respondents

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35765

**PETITION OF WICHITA TERMINAL ASSOCIATION, BNSF RAILWAY COMPANY,
and UNION PACIFIC RAILROAD COMPANY FOR DECLARATORY ORDER**

**PETITION OF THE WTA
FOR LEAVE TO FILE A REPLY TO A REPLY**

Dated: January 10, 2014

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35765

**PETITION OF WICHITA TERMINAL ASSOCIATION, BNSF RAILWAY COMPANY,
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**PETITION OF THE WTA
FOR LEAVE TO FILE A REPLY TO A REPLY**

Pursuant to 49 C.F.R. § 1117.1, Petitioners Wichita Terminal Association, BNSF Railway Company, and Union Pacific Railroad Company (collectively the “WTA”) hereby file this Petition for Leave to File a Reply to the Reply filed by F.Y.G. Investments, Inc. and Treatco, Inc. (collectively “FYG”).

Although the Board’s rules do not permit the submission of a reply to a reply (49 C.F.R. 1104.13(c)) as a matter of right, the Board grants leave to file a reply to a reply “[w]hen good cause is shown, or when additional information is necessary to develop a more complete record...” *Waterloo Ry. Co. – Adverse Abandonment – Lines of Bangor & Aroostook R.R. Co.*, Docket No. AB—124 (Sub-No. 2), slip op. at 3 (STB served May 6, 2003); *See also City of Alexandria, VA*. Petition for Declaratory Order, FD 35157 (Board allowing reply to reply “[i]n interest of compiling a full record” where petitioner alleged reply was misleading). Here, good cause exists for the Board to grant the WTA leave to file its reply because FYG’s Reply distorts the facts and evidence of record. Indeed, FYG’s Reply contains a number of misleading statements of fact and law.

The WTA is compelled to respond to those assertions in order to correct the record and clarify the proper scope of this proceeding. For example, FYG’s Reply ignores that the Kansas

Court of Appeals held that “it is within the exclusive jurisdiction of the STB to determine” the relocation of the north track, and if the construction of the proposed permanent crossing “would unreasonably burden inter-state commerce – even with the relocation of north tracks...” FYG attempts to limit the Board’s authority in its Reply, stating that the Kansas Court of Appeals directed the Board to determine whether it has jurisdiction, and if so, for the Board to either relinquish its jurisdiction to the District Court or approve the track relocation portion of the District Court’s order. This assertion is a gross misrepresentation of the appellate court’s decision which expressed no limitation on what remedy the STB could order. The Court of Appeals held that the only way to enforce the District Court’s order was for the STB to either relinquish its jurisdiction or approve of the District Court’s remedy of installing a permanent railroad crossing at the Emporia Court location. FYG’s Reply asserts that the STB only has these two options. Such an assertion is a misrepresentation of the decision from the Kansas Court of Appeals.

Furthermore, FYG claims that it is landlocked. This is completely false. The record, including WTA’s exhibits, proves not only that FYG has access to the property through the use of the temporary crossing, but that FYG has also improved the property to access the temporary crossing. Moreover, FYG has access to its property through use of an entrance and another railroad crossing southwest of the proposed Emporia Crossing. As such, FYG is not landlocked as it has no less than two points of ingress and egress for the property.

The WTA’s reply does not raise any new legal issues, and does not make arguments that could have been included in its Petition for Declaratory Order. Permitting the WTA to submit a reply will not prejudice any party because the Board has not yet issued any decision in this proceeding. Allowing the WTA to reply will, however, assist the Board in resolving this matter

by correcting the record and clarifying the issues properly before the Board.

WHEREFORE, and in view of all of the foregoing, the WTA respectfully requests that this Board grant the WTA's Petition for Leave to File a Reply to the Reply filed by FYG to the Petition for Declaratory Order.

Dated: January 10, 2014

Respectfully submitted,

s/ K. Paul Day

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*Counsel for Petitioner BNSF Railway
Company*

ATTESTATION AND VERIFICATION

I, K. Paul Day, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this Petition for Leave to File a Reply to a Reply.

Executed on January 10, 2014.

s/ K. Paul Day

K. Paul Day

STATEMENT REGARDING SERVICE

I hereby certify that on this 10th day of January, 2014, I have served Respondents in this proceeding with this Petition for Leave to File a Reply to a Reply, via First-Class mail, postage pre-paid, upon the following counsel of record:

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s/ K. Paul Day

K. Paul Day

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35765

**PETITION OF WICHITA TERMINAL ASSOCIATION, BNSF RAILWAY COMPANY,
and UNION PACIFIC RAILROAD COMPANY FOR DECLARATORY ORDER**

**REPLY TO REPLY OF F.Y.G. INVESTMENTS, INC. and TREATCO, INC.
REGARDING PETITION FOR DECLARATORY ORDER**

Dated: January 10, 2014

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*Counsel for Petitioners Wichita Terminal
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Union Pacific Railroad Company*

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35765

**PETITION OF WICHITA TERMINAL ASSOCIATION, BNSF RAILWAY COMPANY,
and UNION PACIFIC RAILROAD COMPANY FOR DECLARATORY ORDER**

**REPLY TO REPLY OF F.Y.G. INVESTMENTS, INC. and TREATCO, INC. TO
PETITION FOR DECLARATORY ORDER**

Petitioners Wichita Terminal Association, BNSF Railway Company, and Union Pacific Railroad Company (collectively the “WTA”) hereby reply to the Reply filed by F.Y.G. Investments, Inc. and Treatco, Inc. (collectively “FYG”) on December 9, 2013 in response to the WTA’s Petition for Declaratory Order (the “WTA’s Petition”). The WTA has filed a Petition for Leave to File a Reply to a Reply, and is tendering this Reply in anticipation of a favorable ruling on that Petition for Leave.

In the WTA’s Petition it seeks the Board’s determination of a clear legal question: whether the WTA’s interstate commerce operations in Wichita, Kansas will be unreasonably burdened if a crossing is installed in the center of its dual main-line interchange tracks (referred to as the “IT” in the WTA’s Petition). While Kansas district and appellate courts have expressed a multitude of opinions regarding the IT for over a decade, the WTA sought the Board’s determination after the Kansas Court of Appeals entered its July 2013 opinion, which held 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 instate commerce...”

Unreasonable burden on interstate commerce is *the* issue, and there can be no dispute that hundreds, if not thousands of railroad cars use the IT in a given month. In fact, FYG does not dispute that numerous shippers rely on the IT's operations in a given day to ship various products to destinations outside of Kansas. *See* WTA's Petition at 3.

Rather than address this issue, FYG paints a misleading picture for the Board. FYG begins by claiming this is not about a crossing (in complete contradiction to the Kansas Court of Appeals' decision), but that this is *only* a property dispute because FYG's property is land-locked and it has a right of ingress and egress. FYG Reply at 1. FYG is incorrect. The record and the WTA's exhibits clearly show that FYG not only has ingress and egress to its property through the use of the temporary crossing, but that it has improved its land to access the temporary crossing. In fact, FYG does not dispute that FYG has improved its property to access the temporary crossing. *See* WTA Petition at 25. And, as addressed in Sec. II, Part B below, FYG has access to its property through use of another, already established crossing located southwest from the proposed Emporia Crossing.

ARGUMENT

I. **FYG Makes Several Erroneous Arguments Regarding this Board's Authority and ICCTA Preemption**

- A. Contrary to FYG's Reply, this Board is Not Limited by the Kansas Court of Appeals' Decision.

FYG incorrectly states that "the decisions from the Kansas courts are final decisions resolving the parties' rights arising under state law that cannot and should not be re-opened." FYG Reply at 1. FYG is wrong. The Kansas Court of Appeals "conclud[ed] *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 new track south of the existing tracks." (emphasis

added). Therefore, the Kansas District Court’s rulings regarding relocation of the WTA’s tracks are moot; the “rights of the parties” are clearly not yet resolved.

Then, in attempt to limit the authority of this Board, FYG states that based on the Kansas Court of Appeals’ decision, the Board must only determine whether it has jurisdiction, and if so, the Board must determine whether it should either relinquish it to the District Court or approve the track relocation portion of the District Court’s order. FYG Reply at 13. FYG essentially argues that the Board has only two options: relinquish its jurisdiction or approve of the District Court’s track relocation ruling. The Court of Appeals **did not** limit this Board’s authority. Instead, the appellate court simply held that if the Board were to enforce the District Court’s order, the Board had to either relinquish its jurisdiction or approve of the District Court’s order.

The Kansas Court of Appeals further held that the Board has “exclusive jurisdiction” to resolve this dispute and in no way did that decision limit the remedy this Board can order. FYG wholly omits the Court of Appeals’ conclusion 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.” FYG fails to acknowledge that the Kansas Court of Appeals concluded that the STB not only has “exclusive jurisdiction” to determine track relocation, but also has “exclusive jurisdiction” to determine the construction of a crossing so as to minimize any burden on interstate commerce. Authority to decide these remaining issues rests with the Board.

B. FYG’s Misapplied the Applicable Federal Statutory Law.

Contrary to FYG’s contentions, the IT are not industrial or switching tracks. However, even if the IT were industrial or switching tracks, the Board *still* has “exclusive” jurisdiction over

the IT pursuant to 49 U.S.C. § 10501 (b)(2) because the IT are used for interstate commerce. *See* 49 U.S.C. § 10501 (b)(2) (Board has exclusive jurisdiction over “the construction...[or] operation of spur, industrial...switching, or side tracks...”). FYG grasps at straws by relying on 49 U.S.C. § 10906, which is inapplicable to this matter. FYG argues the Board’s authority is not applicable pursuant to § 10906 because “[t]he Board lacks authority ‘over construction, acquisition, operation, abandonment or discontinuance of spur, industrial, team, switching or side tracks.’” FYG fails to recognize that Section 10906 applies only to licensing authority. FYG Reply at 20-21, citing 49 U.S.C. § 10906. The issue here is Board jurisdiction, not licensing authority. Moreover, FYG’s continued reference to the WTA’s Verified Petition that refers to the IT as “interchange or transfer” tracks has no bearing on the Board’s jurisdiction.¹ The Board has exclusive jurisdiction over rail transportation which includes interchange. *See* 49 U.S.C. § 10501(b)(1).

II. FYG Is Not Landlocked

FYG also improperly contends it is landlocked, and that the WTA has taken its property without compensation. FYG Reply at 33, 36. FYG misleads the Board by failing to acknowledge that it has access to its property through the temporary crossing. *See* WTA Petition, Exhibits E, J, K, and M. Indeed, FYG does not allege that it cannot access its property by using the temporary crossing. Moreover, FYG fails to admit that it has access to another crossing located southwest from the proposed Emporia Court crossing. (Exhibit N, attached to this Reply). Therefore, FYG is not landlocked. Any argument to the contrary is specious.²

¹ Similarly, FYG’s attempt to rely on a 1916 Wichita City Ordinance to define the IT as industrial tracks is irrelevant to the question of the Board’s jurisdiction. *See, e.g.*, FYG Reply at 4.

² Although the WTA’s Reply does not address every misleading contention made in FYG’s Reply, the WTA does take issue with FYG’s repeated reference to the WTA’s Exhibit G, a June 2004 Google Maps Image, to propose that the IT is used as a “parking lot.” An aerial

CONCLUSION

For the foregoing reasons, Petitioners Wichita Terminal Association, BNSF Railway Company, and Union Pacific Railroad Company respectfully request the Board to grant their Petition for Declaratory Order.

Dated: January 10, 2014

Respectfully submitted,

s/ K. Paul Day

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Counsel for Petitioner BNSF Railway Company

photo taken at a single moment in time does not establish that the IT is exclusively used for car storage. Such an assertion belies logic and contradicts the record.

ATTESTATION AND VERIFICATION

I, K. Paul Day, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this Reply to Reply.

Executed on January 10, 2014.

s/ K. Paul Day
K. Paul Day

STATEMENT REGARDING SERVICE

I hereby certify that on this 10th day of January, 2014, I have served Respondents in this proceeding with this Reply to Reply, via First-Class mail, postage pre-paid, upon the following counsel of record:

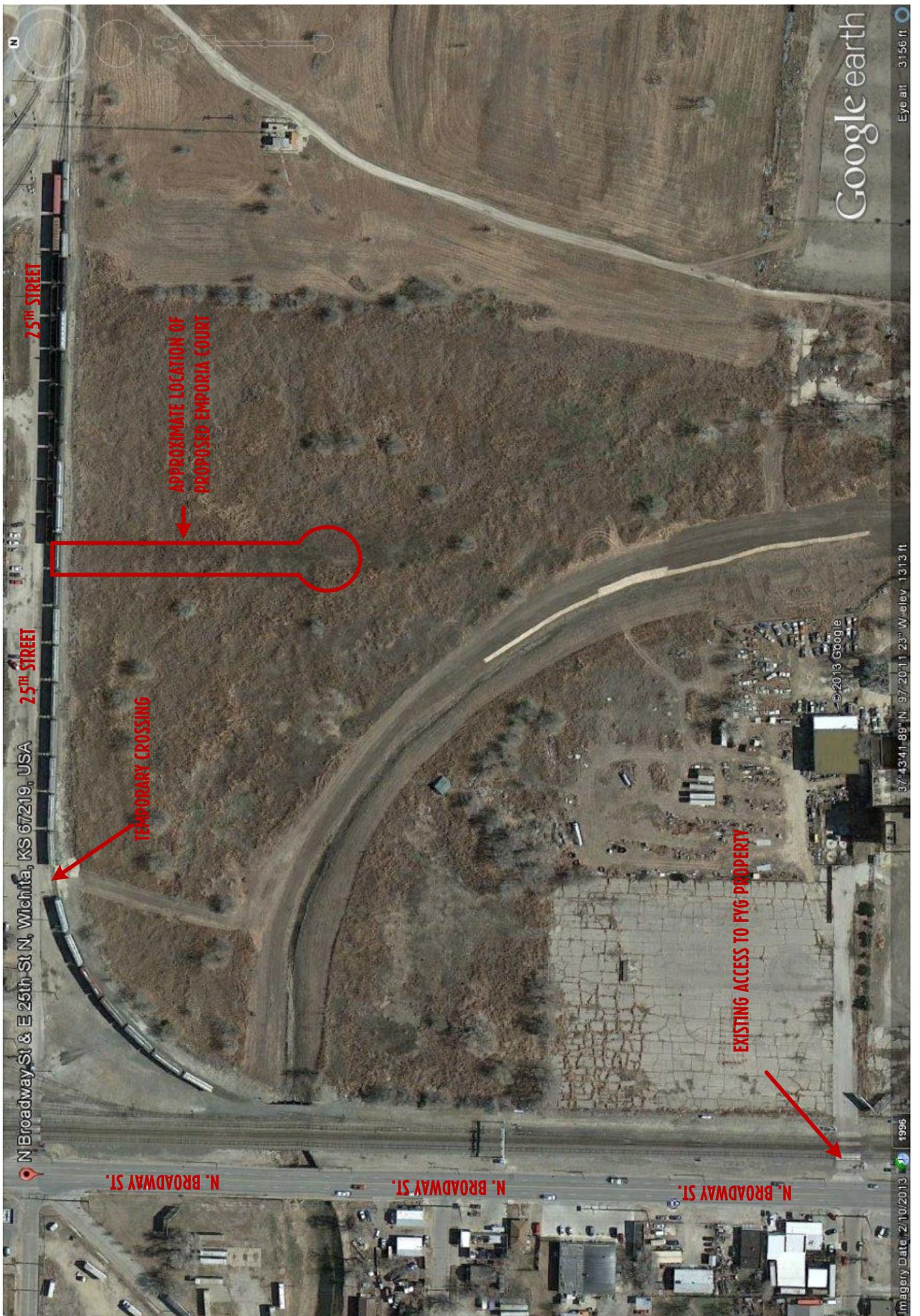
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s/ K. Paul Day
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EXHIBIT N



Google earth

Eye alt 3156 ft

© 2013 Google
37°43'41.88"N 97°20'11.23"W elev 1313 ft

Imagery Date: 2/10/2013 1996

EXHIBIT N