

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

REPLY TO OPENING STATEMENT OF EVIDENCE AND ARGUMENTS

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GLOSSARY

FYG provides the following glossary of terms and citation conventions utilized in this Reply to WTA's Opening Statement of Evidence and Arguments:

People or entities

FYG – Respondents F.Y.G. Investments, Inc. and Treatco, Inc. FYG Investments is a holding company that owns the 27 acres of real estate abutting 25th Street adjacent to WTA's tracks in Wichita, Kansas. FYG leased part of this property to its sister company, TreatCo, for use as a dog food/pet treat processing plant.

WTA –Wichita Terminal Association, an unincorporated association originally formed in 1889 to provide switching operations in Wichita, Kansas for its owner railroads and its current co-owners BNSF Railway Co., and Union Pacific Railroad Co., each of which owns a 50% interest.

City – The City of Wichita, Kansas.

Judge Bribiesca – Sedgwick County, Kansas District Court Judge Joseph Bribiesca. Presided over hearings and made rulings reflected in the transcripts of February 20, 2007, November 21, 2011, and December 12, 2011, and entered the 2008 Permanent Injunction ordering the WTA to build a crossing at Emporia Court. These transcripts were attached to FYG's Reply and identified as Exhibits 5, 9, 10, and 6, respectively,.

Judge Henderson – Sedgwick County, Kansas District Court Judge Timothy Henderson. Presided over hearings and made rulings reflected in the transcripts of June 9, 2009, which were attached as Exhibit 7 to FYG's Reply.

State court pleadings, ordinances, transcripts, and other rulings

Verified Petition – WTA's Verified Petition, filed in the Sedgwick County, Kansas District Court on November 6, 2002. The Verified Petition, was previously attached to FYG's Reply as Exhibit 3.

2d Am. Verified Petition – WTA’s Second Amended Verified Petition, filed in the Sedgwick County, Kansas District Court on December 6, 2002. The 2d Am. Verified Petition was previously attached to FYG’s Reply as Exhibit 4.

February 2007 Hearing Tr. – Official transcript and ruling of bench trial held before Sedgwick County, Kansas District Court Judge Joseph Bribiesca on February 20, 2007. This transcript was previously attached to FYG’s Reply as Exhibit 5.

August 1, 2008 Journal Entry – Sedgwick County, Kansas District Court’s Journal Entry on Remand and Permanent Injunction, filed August 1, 2008. This Journal Entry was previously attached to FYG’s Reply as Exhibit 6.

June 2009 Hearing Tr. – Official transcript of evidentiary hearing held before Sedgwick County, Kansas District Court Judge Timothy Henderson on June 9, 2009. This transcript was previously attached to FYG’s Reply as Exhibit 7.

June 2009 Ruling Tr. – Official transcript of Sedgwick County, Kansas District Court Judge Timothy Henderson’s ruling following evidentiary hearing. This ruling was previously attached to FYG’s Reply as Exhibit 8. The date is incorrectly listed as June 8, 2009.

November 2011 Bench Trial Tr. – Official transcript of bench trial held before Sedgwick County, Kansas District Court Judge Joseph Bribiesca on November 21, 2011. This transcript was previously attached to FYG’s Reply as Exhibit 9.

December 2011 Ruling Tr. – Official transcript of oral ruling issued on December 12, 2011 by Sedgwick County, Kansas District Court Judge Joseph Bribiesca following the bench trial that was held on November 21, 2011. This transcript was previously attached to FYG’s Reply as Exhibit 10.

June 29, 1923 Agreement – June 29, 1923 Agreement concerning reformation of WTA. This Agreement was previously attached to FYG’s Reply as Exhibit 2. This Agreement was previously filed on October 10, 2003 in the Sedgwick County, Kansas District Court as Exhibit K to FYG’s Memorandum in Support of its Motion for Summary Judgment.

Ordinance 5436 – Wichita City Ordinance No. 5436 (1916). This Ordinance was previously attached to FYG’s Reply as Exhibit 1.

Ordinance 5390 – Wichita City Ordinance No. 5390 (1913), attached hereto as Exhibit 15.

FYG I – Wichita Terminal Ass’n v. F.Y.G. Invs., Inc., Case No. 92,132, 2005 WL 824042 (Kan. Ct. App. Apr. 8, 2005).

FYG II – Wichita Terminal Ass’n v. F.Y.G. Invs., Inc., Case No. 103,015, 2011 WL 588505 (Kan. Ct. App. Feb. 11, 2011).

FYG III – Wichita Terminal Ass’n v. F.Y.G. Invs., Inc., 305 P.3d 13 (Kan. Ct. App. 2013).

Regulatory terms and STB-related documents and pleadings

Exhibit G – Exhibit G attached to WTA’s Petition for Declaratory Order, filed with this Board on October 18, 2013.

MUTCD - Federal Highway Administration’s Manual on Uniform Traffic Control Devices.

En Banc Brief - En Banc Brief of *Amicus Curiae* Surface Transportation Board in *Franks Inv. Co. v. Union Pac. R. Co.*, 2009 WL 6297302 (Apr. 15, 2009).

WTA’s Petition – WTA’s Petition for Declaratory Order filed on or about October 3, 2013.

FYG’s Reply – FYG’s Reply to WTA’s Petition for Declaratory Order that was filed on or about December __, 2013.

IT - Approximately 1000 feet of WTA’s parallel east-west running “interchange tracks” located south of 25th Street and east of Broadway in Wichita, Kansas.

Order – The Decision of the Board’s Director, Office of Proceedings, served on May 20, 2014.

WTA’s Opening Statement – WTA’s Opening Statement of Evidence and Arguments filed on or about July 1, 2014 in response to the Board’s Order.

Verified Statement – The Verified Statement of Mr. Steve Sullivan of R.L. Banks & Associates, Inc., attached hereto as Exhibit 13.

Exhibits

Ex. 1 – Wichita City Ordinance No. 5436 (1916). (Attached to FYG’s Reply only.)

Ex. 2 – June 29, 1923 Agreement concerning reformation of WTA. This Agreement was previously filed on October 10, 2003 in the Sedgwick County, Kansas District Court as Exhibit K to FYG’s Memorandum in Support of its Motion for Summary Judgment. (Attached to FYG’s Reply only.)

Ex. 3 – WTA’s Verified Petition, filed November 6, 2002. (Attached to FYG’s Reply only.)

Ex. 4 – WTA’s Second Amended Verified Petition, filed December 6, 2002. (Attached to FYG’s Reply only.)

Ex. 5 – Official transcript and ruling of bench trial held before Sedgwick County, Kansas District Court Judge Joseph Bribiesca on February 20, 2007. (Attached to FYG’s Reply only.)

Ex. 6 – Sedgwick County, Kansas District Court’s Journal Entry on Remand and Permanent Injunction, filed August 1, 2008. (Attached to FYG’s Reply only.)

Ex. 7 – Official transcript of evidentiary hearing held before Sedgwick County, Kansas District Court Judge Timothy Henderson on June 9, 2009. (Attached to FYG’s Reply only.)

Ex. 8 – Official transcript of Sedgwick County, Kansas District Court Judge Timothy Henderson’s ruling following evidentiary hearing. The date is incorrectly listed as June 8, 2009. (Attached to FYG’s Reply only.)

Ex. 9 – Official transcript of bench trial held before Sedgwick County, Kansas District Court Judge Joseph Bribiesca on November 21, 2011. (Attached to FYG’s Reply only.)

Ex. 10 – Official transcript of oral ruling issued on December 12, 2001 by Sedgwick County, Kansas District Court Judge Joseph Bribiesca following the bench trial that was held on November 21, 2011. (Attached to FYG’s Reply only.)

Ex. 11 – June 6, 2013 Letter from FYG to WTA offering to sell right of way. (Attached to FYG’s Reply only.)

Ex. 12 – July 15, 2013 Letter from WTA to FYG declining offer to sell right of way. (Attached to FYG’s Reply only.)

Ex. 13 – Verified Statement of Steve Sullivan.

Ex. 14 – Excerpt of the testimony of WTA Superintendent Danny Miller offered at the February 2007 Bench Trial.

Ex. 15 – Wichita City Ordinance No. 5390 (1913).

Ex. 16 – Wichita City Ordinance 11-664 (1936).

INTRODUCTION

Kansas law provides FYG with a right to access 25th Street in Wichita, Kansas from its property. WTA does not and cannot contest this point.

WTA instead seeks to have the Board intervene, under the guise of regulatory concern for interstate commerce, so that WTA will not have to provide the crossing it is obligated and been ordered to construct. Neither the facts nor law support WTA's effort to take FYG's property right to this crossing. Accordingly, FYG asks the Board to conclude that the court-ordered Emporia Court crossing will not unreasonably interfere with interstate commerce so that FYG can finally obtain the crossing necessary to develop its landlocked property.

ISSUES FOR REVIEW

The Order defines the issues and evidence that frame and inform the Board's involvement in this Kansas property-law dispute between WTA and FYG. In its Order, the Board identified three issues it sought to resolve:

- (1) What impact will the Emporia Court crossing, with and without the removal and/or relocation of the north track, have upon interstate commerce?
- (2) How are the IT used by WTA, BNSF, and UP on a daily and weekly basis?
- (3) What is the current status and applicability of the 1916 Wichita Ordinance?

Order, p. 6. And, to aid this resolution, the Board identified seven categories of information it requested from the parties. *Id.* WTA provided some of the requested information in its Opening Statement.

In this Reply, FYG responds to the evidence submitted by WTA and addresses the three issues identified by the Board. FYG also supplies pertinent information in FYG's possession concerning the issues the Board identified. Finally, FYG does not re-state but incorporates by reference the arguments and authorities previously made in its Reply to WTA's Petition for Declaratory Order.

ARGUMENT AND AUTHORITIES

Kansas property law and Ordinance 5436 give FYG a right to access 25th Street from its property across the IT tracks. In 2008, a Kansas court – relying upon Kansas law and Ordinance 5436 – issued a final order directing that WTA construct this crossing. WTA did not appeal, but has refused to build this public crossing. Its plea to this Board is the latest effort to avoid providing the at-grade crossing it promised to build in exchange for permission to build these tracks.

I. The court-ordered Emporia Court crossing will have little impact upon interstate commerce along the minimally used IT track.

Kansas courts have repeatedly ruled that Kansas property law gives FYG the right to access 25th Street from its property. Moreover, these Kansas courts heard multiple days' worth of evidence concerning the proper location of this crossing, determining that the Emporia Court location – which the City approved as a dedicated street – was the

only viable option given the competing interests.¹ See *FYG III*, 305 P.3d at 22-23. WTA, however, contends the Emporia Court crossing will substantially interfere with its operations on the IT, which historically have largely entailed switching fewer than forty cars per day over these industry tracks in small “cuts” between tracks owned by its parent companies and local businesses in Wichita. Not surprisingly, WTA’s evidence fails to support its claim.

A. The evidence WTA submitted and a recent site visit to the IT confirm an Emporia Court crossing will have minimal impact upon WTA’s operations.

WTA’s Opening Statement contains a variety of evidence in support of its claim that the Emporia Court crossing would unreasonably interfere with WTA’s ability to engage in interstate commerce.² This evidence consists of (i) a description of WTA’s

¹ One of the issues this Board sought was “[d]ocumentation of the discussions between the City of Wichita and WTA regarding where a crossing should be constructed.” Order, p. 7, ¶ 7. Like WTA, FYG has no documentation of any discussion with the City of Wichita concerning where the crossing should be placed. But, as noted in FYG’s Reply to Petition and in the underlying Kansas appeals decision, FYG’s prior (but now deceased) counsel sought and received from the City of Wichita a declaration to construct a crossing at the already dedicated street known as Emporia Court. See FYG’s Reply, p. 9; *FYG III*, 305 P.3d at 1084-85; see also August 1, 2008 Order, p. 4. The only thing left is for WTA to construct the crossing.

² The only legal issue is whether the City-approved Emporia Court crossing unreasonably burdens interstate commerce. WTA seeks to distract this Board from that issue by suggesting (at p. 4) that FYG could create – at its own expense – a cost-prohibitive southern entrance to FYG’s property. That argument is a red

tracks, (ii) other tracks in Wichita that can be used to facilitate interchange operations, (iii) BNSF and UP rail facilities in the area, (iv) the nature of activities that WTA has or currently performs, and (v) a tally of daily interchange traffic along the IT. WTA relies on this evidence to make the not-too-surprising conclusion that the Emporia Court crossing would unreasonably interfere with its ability to facilitate interstate commerce. But, as summarized in this Reply and discussed in more detail in the attached Verified Statement of Steve Sullivan,³ Managing Director of R.L. Banks & Associates, Inc. (“RLBA”), analysis of the data and WTA’s factual assertions, supplemented by RLBA’s two-day site visit, refute WTA’s contention. To the contrary, the Emporia Court crossing will not unreasonably interfere with WTA’s operations and may actually provide additional efficiency.

herring: FYG has an inalienable property right to access 25th Street from its property and the Kansas courts have repeatedly held that Emporia Court is where the crossing must be placed. *FYG III*, 305 P.3d 22-23 (substantial evidence supports the Emporia Court crossing); *FYG I*, at *3-4 (recognizing FYG is entitled to ingress and egress to 25th Street based upon both state law and Ordinance 5436); *see also Sebree v. Board of County Comm’rs of Shawnee*, 840 P.2d 1125, 1129 & Syl. 5 (Kan. 1992) (right of access to and from an existing public street or highway, which does not depend upon necessity, is one of the incidents of land ownership that cannot be deprived without full compensation and due process of law).

³ Mr. Sullivan has over 35 years of railroad operating and executive management experience, including the position of Vice President and Executive Director of the American Short Line and Regional Railroad Association, where he served for 12 years. *See* Verified Statement, p. 2.

1. The Emporia Court crossing will not prohibit movement of trains across the IT.

The Emporia Crossing itself will not impact the ability to move complete trains between BNSF and UP across the IT, which WTA states happens occasionally during harvest seasons. The Emporia Court crossing will be at grade and 32 feet wide, the speed limit on the IT is 10 miles per hour, and the testimony offered by WTA suggests that the cuts of rail cars traversing the IT rarely exceed 40 cars, with all of these larger cuts passing directly through – without stopping on – the IT. Given these variables, it is hardly surprising that WTA offers no contention that the physical presence of the Emporia Court crossing will inhibit the passage of trains between BNSF and UP along the IT.

2. The daily volume of cars WTA interchanges on the IT is quite low.

Given the vigor WTA has employed to resist FYG's right to access its property, one may reasonably suspect the Emporia Court crossing is akin to a dam across the Mississippi River. Not so. The volume of rail cars that traverse the IT on a daily basis is both consistent and small. The data provided by WTA confirms that the average number of cars interchanged along the IT is less than 40 cars/day, with 35.65 cars/day in 2012, 35.37 cars/day in 2013, and 23.86 cars/day so far this year. *See Verified Statement*, pp. 4-5. This is consistent with the testimony previously offered by WTA in the Kansas courts, where WTA confirmed that there are usually "30 to 40 cars per day" and, even during peak use, fewer than 100 cars per day. FYG's Reply, p. 32 (citing prior trial

testimony). In short, FYG is being denied its state property right to a crossing so WTA – when it wishes – can either park or interchange fewer than 40 rail cars per day on two industrial tracks that block FYG’s access to a public road.

3. WTA’s primary practice of interchanging small “cuts” of cars will be unaffected by the Emporia Court crossing.

Not only is the daily volume of cars WTA interchanges on the IT small, most of the traffic interchanged along the IT line is done in piecemeal fashion involving only small “cuts” of cars. A recent two-day observation of the IT confirms what the WTA evidence suggest: most “cuts” interchanged on the IT are small, averaging six or fewer cars per movement, and many involve locomotives with no cars being moved. *See Verified Statement, p. 5 & Attachments 1 and 2.* The Emporia Court crossing will not inhibit WTA’s ability to temporarily store or interchange the average cut on the IT.

Review of the data submitted by WTA reveals that the smaller cuts are attributable to the local customer base that WTA serves, not any space limitation on the IT. The WTA-provided maps demonstrate and the RBLA on-scene evaluation confirms that most local customers of the WTA lack sufficient track storage capacity to handle more than a few cars at a time. *See Verified Statement, pp. 5-6.* In other words, the presence of the Emporia Crossing should have little impact on the WTA’s daily operations since the typical movements are small enough to be performed on the IT track. Thus, the storage capacity of the IT, even with the Emporia Court crossing, is more than sufficient to enable the WTA to serve the majority of its local customers.

4. WTA's claims that the Emporia Court crossing will substantially reduce the functionality of the IT are undermined by WTA's evidence and existing practice.

WTA's chief complaint (at p. 20) is that it will no longer be able to park 30 cars upon the IT because the Emporia Court crossing will reduce track storage capacity to no more than 12 cars. The supporting data WTA provided, however, confirms this concern is both exaggerated and, in the limited situations when it arises, easily addressed.

a. The loss of storage capacity will not be nearly as great as WTA suggests.

WTA's calculation of lost storage capacity relies upon its self-imposed 250-foot buffer that WTA claims should be allowed on both sides of a crossing. *See* WTA's Opening Statement, pp. 20-21 & Ex. A, p. 5. But this buffer distance WTA selected has no basis in Kansas law. Indeed, WTA's self-imposed buffer is 75 feet longer than the federal guideline that is applicable to tracks that have a speed limit twice as fast as that of the IT. *See* Verified Statement, p. 8-9. In fact, the applicable Wichita Ordinance requires only a 30 foot buffer on each side of a crossing. *See* Wichita City Code 12.04.090 ("Whenever the tracks of a railroad cross a street or highway at a grade, it is unlawful to leave any railroad car or engine standing within *thirty feet* of the roadway unless the crossing is protected by a flagman." (emphasis added)). As a result, the Emporia Court crossing, if the City of Wichita Ordinance is followed, would cause WTA to lose only 92 feet of storage space, which is barely three rail cars per track. In other words, the Emporia Court crossing will not cause a loss of storage capacity nearly as significant as WTA wants this Board to believe.

b. For full trains and larger cuts, WTA coordinates with UP or BNSF to avoid any standing time along the IT.

WTA's evidence demonstrates that it occasionally handles larger cuts of cars, primarily during harvest. The post-harvest wheat shipping results in a brief spike of large cuts of covered hopper cars that can, at times, include unit trains of wheat exceeding 100 cars. *See* Verified Statement, p. 10 (describing how some cuts exceed the 100-car mark but that the seasonal average is roughly 60 cars). Given the size of these seasonal cuts, the IT track – regardless of whether there is an Emporia Court crossing or not – is too short to permit WTA to store these cuts on the IT without impeding onto other, necessary tracks. *See* Verified Statement, p. 10. Thus, as explained below, these larger cuts and complete trains traverse the IT without stopping, making them largely irrelevant to the question of whether the presence of the Emporia Court crossing would unreasonably interfere with interstate commerce.

WTA's handling of these larger cuts demonstrates how easily WTA will be able to overcome any reduced storage capacity WTA believes the Emporia Court crossing will cause. In particular, WTA's then-Superintendent Danny Miller testified in 2007 that the railroads electronically notified each other of pending or delivered cuts that will exceed the IT storage capacity. In those situations, "BNSF will bring a 110-car grain train in, [WTA will] go to the west end of the interchange, get the cars and drag all 110 back, so those cars are never actually stopped on the interchange. They'll go right through the tracks." *See* February 2007 Trial Tr., 27:15-19.

The coordination demonstrated on these atypically large cuts undermines WTA's concern that the Emporia Court crossing would fundamentally alter its operations. Whether the IT is able to store 12, 20, or 40 cars, WTA has – for at least seven years – been coordinating the delivery of cuts that exceed storage capacity of the IT so that the cars, whatever the size of the cut, are “never actually stopped on the interchange,” but are instead pulled “right through the tracks.” (If the BNSF and UP Yards have sufficient space for these large trains, it is difficult to imagine there is insufficient space for a three-car cut.) This practice confirms that coordination of occasional complete trains and larger cuts has been and can be accomplished without parking cars on the IT, is unlikely to consume significant additional resources, and will likely lead to the increased productivity by avoiding the need to deliver, disconnect, and reassemble the cuts so that they can be stored on the two IT tracks. *See Verified Statement, p. 10.*

c. WTA's current use of existing facilities and the availability of other, nearby options address all concerns WTA has with the Emporia Court crossing.

WTA states (at p. 11) that the IT is the only available place WTA is able to store rail cars because it “does not have a yard for switching and railcar storage” so it “relies heavily on the IT for railcar switching and interchange of its customers' freight.” The diagrams provided by WTA and the site inspection by RBLA, however, establish that, while WTA does not own yard tracks, it currently utilizes nearby yard space of its owner companies and has many other ready options that will allow its operations to proceed uninterrupted once the Emporia Court crossing is built.

For example, WTA currently uses existing BNSF track, located immediately west of the IT, to store and switch rail cars. As shown in Diagram 4 of WTA's Opening Statement (at p. 13), BNSF owns a curved segment of single track connecting the IT to the BNSF Arkansas City Subdivision mainline. WTA is currently using this portion of the track to interchange rail cars. *See Verified Statement*, p. 6-7. The single track segment is approximately 600 feet in length, which WTA asserts is sufficient to store ten cars. *See id.* That length, of course, will be expanded once the Emporia Court crossing is constructed and the temporary crossing is removed, adding capacity for perhaps another two or three rail cars. *See id.* Additional modifications, such as reconfiguration, extension, or construction of a second parallel track along this line would only increase this capacity and enhance operational flexibility. *See id.*

The maps further confirm that WTA's owners, BNSF and UP, own three nearby rail yards that are or can be connected to the IT. As Diagram 3 of WTA's Opening Statement (at p. 12) confirms, the BNSF Yard is northwest of the IT and the UP Yard is to the northeast. The RLBA site visit confirmed what the images WTA provided: there is ample storage track space in both the local BNSF and UP yards to hold cars to be switched by WTA. *See Verified Statement*, p. 9. Approximately 70% of BNSF's Yard was unoccupied and available for the fewer than 40 cars the IT touches on an ordinary day. *See id.* In addition, RLBA observed WTA delivering cars into BNSF's Yard, where they remained for over 36 hours, indicating sufficient flexibility and wide margins on delivery times for traffic originating or terminating on the IT. *See id.*

While lamenting (at p. 11) that it does not currently own a rail yard, WTA recognizes – as it must – that BNSF owns a rail yard that it has effectively abandoned. This yard, known as the “Frisco Yard,” is allegedly “out of service because of track conditions.” WTA’s Opening Statement, Ex. A, p. 3. But, all or most of WTA’s storage capacity and “railroad gymnastics” concerns could likely be resolved if WTA were to procure or lease (from its co-owner) and maintain this nearby rail yard. This is a far better option than depriving FYG of its property right of ingress from and egress to 25th Street.

B. WTA is in control of determining whether to abandon or relocate the northern track.

Almost a year after the Kansas court issued a final order directing WTA to construct the Emporia Court crossing, WTA argued – in response to FYG’s contempt motion – that the crossing was impractical given its newly-minted, feigned concern that the MUTCD’s requirement of a warning signal could not be constructed at the Emporia Court location.⁴ Now, WTA wants this Board to believe it is FYG that seeks replacement of the northern track, claiming (at pp. 23-24) that “the relocation is both illegal and infeasible.” WTA’s arguments are inconsistent with the procedural history of this case and Kansas law.

⁴ The procedural history has already been provided. *See* FYG’s Reply, pp. 6-12 & Exs. 5-8.

1. No Kansas court or local law requires WTA to remove and/or replace the northern track.

The historical premise of WTA's relocation argument is wrong. WTA asserts (at p. 23) that "FYG attempted to remedy these track-removal difficulties by proposing a southern relocation of the north IT." Not so.

The notion of WTA relocating the northern IT line was offered, *sua sponte*, by the Kansas District Court at the June 2009 hearing. In the August 2, 2008 Journal Entry, the District Court entered an injunction that required WTA to "construct and install" the Emporia Court crossing within 90 days after FYG provided sealed engineering drawings. Aug. 1, 2008 Journal Entry, p. 4. As noted, WTA did not appeal from that Journal Entry and it became a final order of the district court. *FYG III*, 305 P.3d at 17. FYG filed a motion for contempt when, following submission of those drawings, WTA did not comply with the final order of the district court. *See id.*

At the June 2009 hearing, WTA asserted that it was impractical to construct the Emporia Court crossing because of the MUTCD signage issue. The District Court, *sua sponte*, raised the possibility of WTA choosing to relocate the northern track to the south to address WTA's late-arriving MUTCD concern. In modifying the August 1, 2008 obligation, the Court ruled that WTA "shall remove the north track of this crossing *if that is the only means to construct the crossing* without impeding upon 25th Street." June 2009 Ruling Tr., 7:18 – 8-5 (emphasis added). FYG did not advocate that relocation (or abandonment) of the northern track was necessary or preferable; constructing the

crossing at Emporia Court is and has been FYG's sole concern. WTA, not FYG, is in the best position to determine whether relocating or removing the northern track is prudent or necessary in order to construct the Emporia Court crossing.

2. If WTA chooses to replace the northern track, it has the legal power to do so.

If relocation of the track is the choice WTA ultimately makes, WTA is not as helpless as it portrays. Specifically, WTA again complains (at p. 23) that "FYG, not the WTA, owns the property" south of the existing IT. But, as FYG has previously demonstrated (i) if the IT were somehow deemed to be common carrier lines of rail, WTA's owners would have the legal authority under Kansas law to "condemn the FYG property necessary to relocate WTA's northern track further south" and (ii) "FYG has already offered (and remains willing) to sell WTA the land necessary to relocate its tracks" if that is what WTA chooses to do. FYG's Reply, p. 34. In other words, WTA – should it choose relocation as the best method to implement the court-ordered crossing – can procure the land necessary to meet its obligation under Kansas law.

WTA nonetheless argues (at pp. 23-24) that neither the district court nor this Board can require condemnation. This argument mixes apples and oranges. FYG is unaware of any effort by the Kansas courts or this Board to initiate condemnation proceedings on WTA's behalf. WTA has a standing offer to purchase the necessary land from FYG to undertake the relocation or its owners might attempt, under Kansas law, to initiate an eminent domain proceeding on their own accord. WTA and its owners,

however, remain solely in control of which of these options they believe is most appropriate in this situation. FYG simply expects WTA to provide the crossing at Emporia Court as the Kansas courts have repeatedly ordered.

II. Ordinance 5436, which remains in effect, is not preempted.

WTA does not contest the continuing vitality of Ordinance 5436. Instead, unable to avoid its previous concession that this private crossing dispute is not preempted, WTA now asserts – and, for the first time in the 12-year history of this dispute – that Ordinance 5436 is expressly preempted. WTA, again, is wrong.

A. Ordinance 5436, as the Kansas District Court recognized, remains in effect.

This Board sought a “description of the circumstances under which Wichita Ordinance 5436 was passed” and “any changes, amendments, or modifications to the ordinance since 1916.” Order, p. 7, ¶ 3. In addition to the 1917 alteration of Section 4 that WTA notes in its Opening Statement, FYG is unaware of any subsequent alteration. As the District Court recognized, Ordinance 5436 “was put in place back on September 12, 1916,” but it is “[s]till in the books.” FYG’s Reply, p. 7 (quoting February 2007 Hearing Tr., 59:4-60-3).

Before Ordinance 5436 was enacted, WTA held a similar right to construct the IT along 25th Street that presumably lapsed. On or about June 15, 1913, the City of Wichita enacted Ordinance No. 5390, which granted WTA “the right to construct, operate and maintain industrial tracks on and noroo [sic] what is ordinarily known and called 25th Street, in the City of Wichita, Kansas.” Ordinance 5390 (attached hereto as Exhibit 15)

(imposing a similar requirement of providing access across the tracks throughout its run). That Ordinance declared that WTA “shall accept this ordinance and the provisions thereof in writing to be filed with the City Clerk within forty days after the publication of this ordinance and the tracks described in Section 1 hereof must be built complete on or before Sept. 1st, 1931, otherwise this ordinance is null and void.” Ordinance 5390, Sec. 4. Presumably due to this provision, Ordinance 5390 was formally repealed by City Ordinance 11-664. *See* City Ordinance 11-664 (attached hereto as Exhibit 16).

In sum, the City of Wichita gave WTA permission to construct industrial tracks along 25th Street on two different occasions. Both times, it conditioned this permission upon an agreement to provide a crossing at any point along WTA’s industrial tracks. WTA accepted this offer the second time, built those industrial tracks, and continues to conduct switching operations over those industrial tracks – subject to the express condition of a crossing – pursuant to this grant of authority.⁵

B. Ordinance 5436 is not preempted.

WTA’s preemption argument fails in many respects. One is that the argument is procedurally improper because the Board’s Order neither invites nor permits this belated

⁵ As noted previously, WTA cannot avoid the agreement it voluntarily struck under the guise of regulatory concern. *See* FYG’s Reply, pp. 22-23 (citing this Board’s conclusion in *Town of Woodbridge* that a railroad’s voluntary agreement reflects the carrier’s own determination and admission that the agreement would not unreasonably interfere with the railroad’s operations).

contention. Another is that, even if Ordinance 5436 were no longer in effect for any reason, FYG's right to access 25th Street remains because it is guaranteed by Kansas property law. In addition, the preemption argument is based upon the doctrine of express preemption, which has no application to a generally applicable state law that is consistent with traditional police powers. The final reason is that, at best, the as-applied preemption test applies and WTA's evidence confirms that there is no unreasonable burden on interstate commerce. WTA's preemption argument must therefore be rejected.

1. WTA's preemption argument is procedurally barred.

WTA's express preemption is procedurally barred because it has already conceded that express preemption does not apply and, in any event, this Board's Order does not permit such an argument. The Kansas Court of Appeals recognized that WTA admitted this crossing dispute was not expressly preempted: WTA "assert[ed] that the ICCTA expressly preempts state law regarding the removal and reconstruction of railroad tracks, [but] it *conceded* that federal law does not expressly preempt the resolution of railroad crossing disputes by state courts." *FYG III*, 305 P.3d at 19 (emphasis added). As FYG previously observed, this concession is legally sound. *See* FYG's Reply, p. 17 n.6. WTA is estopped from arguing express preemption applies to this crossing dispute, whether arising under Ordinance 5436 or state law.

Even if WTA had not conceded that express preemption does not apply, the Board's Order does not permit WTA to make that argument now, twelve years into the litigation. The Order identified three questions it could not resolve without additional

information and identified the seven areas of information it sought. Order at p. 6. One of the areas of information the Board sought was “the current status and applicability of the 1916 Wichita Ordinance,” including “a description of the circumstances under which Wichita Ordinance 5436 was passed; how or why WTA became operator of the tracks discussed in the ordinance; and any changes, amendments, or modifications to the ordinance since 1916.” Order, at p. 7. But this request for information did not invite or suggest that it sought an argument concerning express preemption. To the contrary, the Order pointedly directed the parties *not* to further discuss the nature of the track or the Board’s jurisdiction over it. *See* Order, at p. 6 n.42. FYG respectfully suggests that the Board should reject this portion of WTA’s Opening Statement as having been conceded, untimely, and not responsive to the Order.

2. Federal law does not “plainly and expressly” preempt Ordinance 5436.

WTA desperately endeavors to avoid plain language of the agreement it struck with the City of Wichita in 1916. It argues (at p. 25) that “ICCTA plainly and expressly preempts” Ordinance 5436 because “any rail property related to the movements of passengers or goods on tracks is ‘transportation’ within the exclusive jurisdiction of the STB.”⁶ WTA’s position is demonstrably wrong in several important respects.

⁶ WTA’s preemption arguments are also flawed because they are based on the faulty premises that it is a common carrier railroad and the IT are common carrier lines

a. FYG’s right to the Emporia Court crossing is compelled by Ordinance 5436 and Kansas property law.

WTA focuses its effort to avoid the obligation to a crossing over the IT upon the assertion that Ordinance 5436 is preempted. Although incorrect, the argument is irrelevant because FYG’s right to the Emporia Court crossing is, even without Ordinance 5436, guaranteed by Kansas property law. *See FYG I*, at *3-4 (recognizing FYG is entitled to ingress and egress based upon both state law and Ordinance 5436); *see also Sebree v. Board of County Comm’rs of Shawnee*, 840 P.2d 1125, 1129 & Syl. 5 (Kan. 1992) (right of access to and from an existing public street or highway, which does not depend upon necessity, is one of the incidents of land ownership that cannot be deprived without full compensation and due process of law). As a result, WTA’s untimely speculation as to attributes of Ordinance 5436 is purely academic.

b. Express preemption has no application in this crossing dispute.

Express preemption does not apply to this dispute over a private rail crossing.⁷

Disputes involving the right to private rail crossings that arise pursuant to state law are

of rail, both of which assertions FYG vigorously disputes. *See* FYG’s Reply, pp. 18-28.

⁷ The Emporia Court crossing is “private” in the sense that it will not be owned by the WTA. But, it is not for the sole benefit of FYG, either. Instead, the City of Wichita approved its placement for public access to a public road that will promote interstate commerce on FYG’s property.

not amenable to express preemption analysis because these property rights result from traditional exercise of the state's retained sovereign policy power that applies generally and is not designed to regulate or manage rail transportation. *See generally Franks Inv. Co. v. Union Pac. R.R. Co.*, 593 F.3d 410, 413 (5th Cir. 2008) (relying upon decisions from the Third, Fourth, Sixth, and Eleventh Circuits). This "presumption against preemption applies with full force to this generally applicable state property law, even if applied to permit a private, at-grade railroad crossing." *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 334 (5th Cir. 2009); *see also Franks*, 593 F.3d at 407.

WTA's broad view of express preemption (and the power WTA seeks to exercise) under ICCTA – to borrow a phrase from this Board – would lead to absurd results. WTA is advancing the rule adopted by a panel of the Fifth Circuit in *Franks Inv. Co. v. Union Pac. R.R. Co.*, 534 F.3d 443, 445-46 (5th Cir. 2008): any state law relating to the ownership or entitlement to crossings is expressly preempted. The Fifth Circuit, sitting *en banc*, rejected this notion. *Franks Inv. Co. v. Union Pac. R.R. Co.*, 593 F.3d 404, 413 (5th Cir. 2010) (*en banc*) And, as this Board advised the *en banc* Fifth Circuit, WTA's position is both "over broad and inconsistent with precedent and Congress' intent because, notwithstanding the longstanding role that states have played in determining the needs of the public and of landowners for safe and adequate nonexclusive railroad/highway crossings, railroads could permanently close or relocate any private railroad crossing at will." *En Banc Brief*, at *12 (footnotes omitted) (relying upon *Island Park, LLC v. CSX Transp., Inc.*, 559 F.3d 96, 102 (2d Cir. 2009), and *Emerson v. Kansas*

City Ry., 503 F.3d 1126, 1132 (10th Cir. 2007)); *see also Franks Inv. Co. v. Union Pac. R.R. Co.*, 593 F.3d at 410 (recognizing it makes no difference whether a landowner is using state law to keep a crossing open or to close the crossing). That hypothetical is precisely what WTA seeks to do here – to unilaterally foreclose FYG’s recognized property right (in violation of the agreement it struck in Ordinance 5436) of access to 25th Street.

Ordinance 5436 does no more than mimic the property right that has always existed in favor of Kansas landowners. It does not and has never sought to regulate rail or switching operations of WTA. As a result, WTA’s reliance on *City of Seattle v. Burlington N. R. Co.*, 41 P.2d 1169 (Wash. 2002), *City of Auburn v. United States*, 154 F.2d 1025 (9th Cir. 1998) and similar cases is misplaced. In those cases, as WTA readily concedes (at pp. 25-26), the local ordinance or law sought to regulate the actual commercial operations of the common carrier railroad, as opposed to merely requiring a road crossing. In *City of Seattle*, for instance, the ordinance sought to regulate the times and places where the railroad could conduct switching operations, among other restrictions. Ordinance 5436, which exchanges permission to build the tracks upon an agreement to permit a crossing, imposes no similar restrictions for switching or interchange operations. Unlike the ordinance in *City of Seattle*, WTA’s obligation to permit a crossing set out in Ordinance 5436 is merely consistent with “a generally applicable [Kansas] property law that does not specifically apply to railroad crossings.”

Barrois, 533 F.3d at 336 (rejecting an as-applied challenge to a Louisiana statute that permitted ingress and egress to a public road).

3. **Even if WTA had argued Ordinance 5436 was prohibited under an as-applied preemption analysis, WTA’s evidence confirms the Emporia Court crossing does not unreasonably interfere with interstate commerce.**

To the extent any preemption doctrine applies to the Board’s exercise of its jurisdiction over the crossing of industrial tracks under 49 U.S.C. § 10906 operated by a local switching entity, the only doctrine that could apply in this case is the as-applied implied preemption argument. *See generally En Banc Brief*, at *11 & n.17. This as-applied preemption only overcomes the presumption against preemption in the rare case when the railroad demonstrates that the law has “the effect of unreasonably burdening or interfering with rail transportation.” *Franks*, 593 F.3d at 414 (adopting the Board’s analysis and noting its adoption by the Second, Third, Fourth, Sixth, and Tenth Circuits). But WTA – by focusing on the *per se* rule of unreasonable interference applicable to express preemption situations – does not attempt and cannot establish an *unreasonable* burden or interference with rail transportation. *See Part I.A., supra*.

WTA’s refusal to address the as-applied standard is undoubtedly in recognition of the fact that it cannot satisfy its burden of demonstrating an *unreasonable interference* with railroad operations or interstate commerce. First, there will be a single, crossing on the 850 foot run of WTA’s industrial track. By comparison, in *Barrios*, the Fifth Circuit ruled that 270 private crossings along a 24 mile stretch of a line of railroad (or, one

crossing every 470 feet) to permit ingress and egress from enclosed property to a public road did not create an unreasonable burden upon the railroad's short-line rail operations. *See Barrois*, 533 F.3d at 326 n.2, 335-36. It is difficult to imagine, in light of *Barrois*, how a single, at-grade crossing that will not inhibit any through-traffic can be considered too burdensome.

Second, Ordinance 5436's obligation to permit FYG, the abutting landowner, the right to ingress to and egress from its enclosed property is consistent with Kansas property law. In similar circumstances, courts and this Board have recognized that broad, generally applicable property laws give state courts – as here – the right to determine the appropriate location of the crossing given the unique situation confronted by the railroads. *Cf. Barrois*, 533 F.3d at 336. This litigation is a perfect example: after multiple hearings involving the sworn testimony of WTA witnesses describing the nature of the property, the inability of FYG to access the public road (25th Street), the alleged impact a crossing would have upon the rail operations, the competing locations offered by the parties for the proposed crossing, the topographical and geological features of the land at issue, and WTA's use of the tracks, the Kansas court determined that the Emporia Court location was the best place for the crossing. *See FYG III*, 305 P.3d at 22-23 (finding substantial evidence confirming this decision).

Third, the most compelling weakness in WTA's argument is that the options for WTA to minimize or reduce the burden on WTA's desire to park cars are almost limitless and wholly within WTA's control. *See generally* Part I.A., *supra*. To contextualize this

dispute, WTA's records and testimony confirm that an average of 36 cars per day pass over the IT, and the Emporia Court crossing will have no impact upon WTA's ability to move rail cars between UP's and BNSF's respective yards. And, for the handful of cars that WTA needs to "cut" for local delivery or movement to the respective UP or BNSF Yards, WTA (i) will continue to have storage capacity on the IT, perhaps losing only three car lengths; (ii) can continue to rely upon (or develop additional usable space near) the curved rail west of the IT near where the temporary crossing is located; (iii) schedule all cuts (not just ones that will not fit on the IT for parking purposes) for delivery into either the BNSF or UP Yards; and/or (iv) procure from BNSF the nearby Frisco Yard, which no railroad is using, so that WTA can discontinue using the IT as its delivery dock.

These options are undoubtedly less attractive to WTA than simply depriving FYG of its property right to access 25th Street. And, it may even be considered, in the colloquial sense, a "burden" to construct the crossings that Ordinance 5436, Kansas property law, and a court order require. But, importantly, the burden on WTA and/or interstate commerce would not be unreasonable. It would be no more unreasonable than any other market participant must bear: manufacturers are required to pay for the electricity used to power their plants, oil companies must own the mineral interests before they take oil or gas from the ground, and farmers cannot reap crops off land they neither own nor lease. WTA lacks the legal authority to deprive FYG of the right FYG owns and cannot hide behind the guise of STB preemption to do so.

CONCLUSION

Kansas property law, which is derived from the state's traditional police powers, and Ordinance 5436 give FYG a right to access 25th Street from its property. The evidence WTA relies upon not only fails to support the assertion that the court-ordered Emporia Court crossing unreasonably interferes with interstate commerce, it confirms the opposite is true. As a result, FYG asks this Board to affirm WTA's obligation to construct the Emporia Court crossing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on this 25th day of August, 2014, I served a copy of the foregoing Reply to the Opening Statement of Evidence and Arguments by hand-delivery upon counsel for Petitioner BNSF Railway Company at the following address:

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INDEX OF EXHIBITS

Ex. 13 – Verified Statement of Steve Sullivan.

Ex. 14 – Excerpt of the testimony of Superintendent Danny Miller offered at the February 2007 Bench Trial.

Ex. 15 – Wichita City Ordinance No. 5390 (1913).

Ex. 16 – Wichita City Ordinance 11-664 (1936).

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket FD 35765

Exhibit 13

F.Y.G. Investments, Inc. and Treatco, Inc.'s
Reply To Opening Statement Of Evidence And Arguments

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket FD 35765

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

VERIFIED STATEMENT OF STEVE SULLIVAN

Verified Statement of Steve Sullivan
Exhibit 13 to FYG's Reply to WTA's Opening Statement of Evidence and Argument

My name is Steve Sullivan. I have been a transportation professional for my entire adult life, with 35 years of railroad operating and executive management experience. I am currently employed as the Managing Director at R.L. Banks & Associates (RLBA), a consulting firm based in Arlington, VA specializing in railroad economics, engineering, service planning and litigation support. Prior to joining RLBA last year, I served as the Vice President and Executive Director of The American Short Line and Regional Railroad Association (ASLRRA) for twelve years. In that capacity I represented over 550 Class II and Class III railroads on a number of topics that included interchange issues, operating compliance, customer service disputes and industry car movement standards/performance. I started my railroad career as a brakeman and have held various managerial positions with Conrail, a major ("Class One") railroad, which included Trainmaster, Manager of Rules and Operating Practices, District Superintendent, Manager of Commercial Planning, Manager of Capital Planning, Director of Strategic Planning and Director of Corporate Strategy. Through these positions I have become well acquainted with the railroad interchange process, as well as terminal railroad operations.

I've been retained by Foulston Siefkin, LLP to provide expert testimony in this proceeding concerning the grievance of F.Y.G. Investments, Inc. and Treatco, Inc. towards the Wichita Terminal Association (WTA) and its owners, BNSF Railway (BNSF) and Union Pacific Railroad Company (UP), blocking for more than a decade, the installation of a permanent grade crossing across WTA tracks adjacent to 25th Street in Wichita, KS (identified as the Emporia Court Crossing location in filings in this case) to access a potential industrial development site. Specifically, I was asked to comment on the use of the railroad tracks at the Emporia Court Crossing location (identified as the IT Track in filings in this case), as well as the effect the

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Emporia Court Crossing would have on railroad operations at that location if installed. In preparation of this statement, I have reviewed the previously filed documents and evidence pertaining to this case. Particular attention was paid to the testimonies of WTA Superintendents, Danny Miller and Ronald Dame, as well as WTA self-reported historical waybill and interchange volume data. In addition, an associate of mine, working in the same office as I at RLBA, conducted a two day, on-site investigation of applicable railroad operations in the vicinity of the Emporia Court Crossing location under my direction. The results of his investigation are incorporated into my verified statement.

The Use of the IT Track

After reviewing both the findings from RLBA's on-site investigation, along with the evidence provided by WTA, it is in my opinion that the two tangent track segments and adjoining connection to the BNSF Wichita Yard comprising the IT Track is a switching or industry track used for active interchange between the WTA and BNSF.

A distinction must be made between storing unassigned cars indefinitely between loads and cars temporarily standing while waiting pick up at an interchange point like the IT Track. The flexible method of scheduling combined with varying volume levels found on freight railroads today means that interchange is conducted in windows, rather than specific times, not unlike how a parcel service might provide a range of service delivery times. RLBA observed that at times when switching crews of both BNSF and WTA are on duty, particularly in the mid-morning and early afternoon, freight cars did not sit on the IT Track for more than several hours; a short amount of time compared to many interchange operations. Situations may exist where

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some cars stay on the interchange track for a longer period of time when there are not overlapping crews on duty of both railroads (particularly in the late afternoon, early morning, or weekends), but even under those circumstances, cars on the IT Track appeared to still be in transit to a defined destination, and therefore are standing between movements on the IT Track, not being stored until needed. As such, it is my opinion that interstate commerce is being conducted on the IT Track.

Operations on the IT Track

While on site, RLBA observed an average of 33.5 cars interchanged between WTA and BNSF on the IT Track daily. RLBA observed, and Superintendent Dame's testimony corroborates that WTA relies on BNSF and UP rail yards to accomplish interim car storage and to compensate for a lack of storage capacity on the WTA itself – not an unusual or unexpected situation given the relationship between the railroads. As a jointly owned terminal operation, WTA's primary purpose is to switch and deliver cars to local customers on behalf of BNSF and UP, thus relieving those companies of costly and redundant operations and track. At the same time, a terminal railway generally leaves responsibility for the storage, shipment and delivery of said cars outside of the railroad's operating area to the larger, interstate railroad companies.

Cars bound to customers switched by the WTA are delivered by a BNSF "local" train serving various customers along the Arkansas City Subdivision. Cars are held in BNSF's yard adjacent to the IT Track until BNSF crews are ready to deliver them to the IT Track for collection by the WTA. In turn, outbound cars are stored in BNSF's yard until the aforementioned local arrives to collect these cars and forward them for shipment across the

national rail network. RLBA observed that WTA cars were delivered and picked up approximately once a day, with certain cars interchanged from WTA stored in BNSF's yard for up to 36 hours. Historical interchange volumes provided by the WTA report daily interchange averages of 35.65 cars a day in 2012, 35.37 cars a day in 2013 and 23.86 cars a day in 2014. Bearing in mind that the height of the grain shipment season this year has not yet occurred (probably explaining the depressed average year-to-date thus far), it is my opinion that RLBA observed normal interchange volumes while its staff was on-site.

The daily average of 33.5 daily cars observed by RLBA was brought to the IT Track by both WTA and BNSF crews in a piecemeal fashion throughout the day in small „cuts“ of cars, averaging just six cars per cut (*See Attachment 1, “Typical WTA delivery to IT Track observed by RLBA, 23JUL14” and Attachment 2, “Typical car cut size and placement observed on IT Track by RLBA, 23JUL14”*). Of the eleven cuts interchanged between the two railroads on the IT Track, only one exceeded twelve cars (the maximum of amount cars, according to WTA, which could be stored temporarily on the IT Track after the construction of the Emporia Court crossing). Again, historical data provided by WTA supports, with the exception of bulk wheat shipments, that this piecemeal fashion is standard operating procedure on the IT Track; between January 2012 and May 2014 the average interchange cut was 5.7 cars in length.

In my opinion, cars are interchanged in multiple smaller cuts rather than a limited number of large cuts not because of capacity limitations at the IT Track, but largely because of customer capacity constraints. With the exception of several large grain elevators which only use rail shipments seasonally, the majority of WTA customers appear to have limited storage capacity,

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and therefore presumably only can receive switches of several cars at a time. After reviewing the data provided by the WTA, it is clear that interchange levels on the IT Track have remained consistent since at least 2012. Additionally, WTA has not provided any testimony or evidence to suggest a significant change in its operations in the future. With these factors in mind, I see no reason to expect the levels of interchange, or methods in which interchange is performed to change significantly in the foreseeable future of the IT Track.

Effects of the Emporia Court Crossing on IT Track Operations

The primary concerns expressed by WTA over the installation of the Emporia Court Crossing are a loss of holding capacity and to lesser extent, an increase in man-hours associated with more switching moves. Because operations on the IT Track can be typified accurately as small cuts of cars, exchanged multiple times throughout the day, it is my opinion that a large proportion of operations on the IT Track would be unaffected by the installation of the Emporia Court Crossing and, similarly, the vast majority of operations could continue to be conducted with minimal impact upon the construction and use of the crossing.

In addition to the two tracks adjacent to 25th street, RLBA observed interchange being conducted on the curved segment of single track connecting the IT Track to the BNSF Arkansas City Subdivision mainline. Between the current, in-place, temporary crossing on 25th Street and the junction with the Arkansas City Subdivision, the single track segment provides approximately 600 feet of unobstructed track. This is roughly long enough to hold ten railcars assuming WTA's suggested average length of 60 feet per car. If the current temporary crossing were removed, as would be expected upon the installation of the permanent Emporia Court

Crossing, that capacity could be increased to eleven or twelve cars. Further modifications, such as the reconfiguration, extension or construction of a second track could continue to increase this capacity even more, allowing greater operational flexibility. Given this, a WTA or BNSF crew which arrives or departs "lite" to receive or deliver ten cars or less (with the historical average being 5.7 cars), would be unaffected by Emporia Court Crossing. Lite power refers to a train comprised solely of locomotives, without any cars to pick up or drop off and therefore not needing a second track to hold cars awaiting movement in the opposite direction. Of the eleven car cuts RLBA observed interchanged, eight times the crew arrived or departed lite. Furthermore, eight of the observed cuts were of ten cars or less, including one cut of seven cars which was delivered to the single track segment in the manner I just described (*See Attachments 3 and 4, "Cut of cars delivered to single track by WTA, 23JUL14"*).

Based on the historical data provided by the WTA, it is impossible to definitely comment as to if this ratio of lite movements holds true over a larger sample size, but given the close correlation between other key metrics, I believe it is a fair assumption to make. This assumption is further supported by RLBA's observation of the BNSF morning crew performing the majority of BNSF work at the IT Track. The morning crew exclusively switched the BNSF rail yard directly northwest of the IT Track, making many back and forth switching moves while sorting cars. The IT Track connects directly to the track used by the crew to bring cuts of cars out of the BNSF yard to sort. It is virtually no hindrance or delay at all on the morning crew to access the IT Track and, as such, RLBA only observed one instance in which the crew did not arrive lite at the IT Track.

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Interchange moves in which cars are being both delivered and received (and therefore require a second track) would be affected by Emporia Court Crossing but these effects would be minimal on most such moves. Assuming BNSF's stated 250 foot minimal sight line clearance reference, I believe each of the two IT Tracks can accommodate seven or eight cars, more than both the RLBA-observed and historical average interchange cut length of six and 5.7, respectively. However, there is no requirement for a minimum 250 foot sight clearance. The 250 foot sight clearance is not a Federal or State-mandated regulation but rather, merely guidance from the rail industry. The only Federal instruction on sight lines is provided in the *USDOT Railroad-Highway Grade Crossing Handbook, Revised Second Edition August 2007*, which requires 250 foot sight lines in connection with trains operating between 25-30 MPH, significantly faster than the restricted 10 MPH operations observed on the WTA. What's more, even BNSF's own safety instructions do not require 250 foot sight lines as evidenced in *BNSF Maintenance of Way Operating Rule No 6.32.4*, adopted from the *General Code of Operating Rules Sixth Edition*;

"Leave cars, engines, or equipment clear of road crossings and crossing signal circuits. ***When practical***, avoid leaving cars, engines, or equipment standing closer than 250 feet from the road crossing when there is an adjacent track (<25' track centers)."

The language found in *Rule No 6.32.4* includes no accompanying guidelines defining "when practical," leaving interpretation to the discretion of railroad crews and management. Given the slow speed and the status of the IT Track as switching tracks, it is my opinion that requiring 250 foot sight lines at this location would be excessive and should be reviewed. If the

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sight line distance was reduced to 175 feet, as required in the *USDOT Railroad-Highway Grade Crossing Handbook* for trains operating at 20 MPH (still twice the approximate speed of trains observed on the IT Track and WTA as a whole), capacity would increase by twelve total cars, six on each side of the crossing.

Effects of the installation of Emporia Court Crossing on BNSF and WTA man-hours and wages also would be minimal. Based on my experience and observation of railroad operations, it only takes roughly one minute to make the required adjustments and inspections before and after disconnecting one or more cars from a train, and perhaps another minute to reposition the train to complete the next switching action. Even if one were to assume that every interchange move between BNSF and WTA would require two additional switching actions at five minutes apiece, at the observed and historical average of six interchange moves a day, crews would have to dedicate an additional hour a day, significantly less than the three hours estimated by Superintendent Miller. The actual time loss likely would be significantly less, given the nature of the BNSF's morning crew workload (as previously described) and given that most movements on the IT Track are lite. Concerns raised by Superintendent Dame about possible ripple effect delays on other rail yards and crews connected to Wichita also would be insignificant; RLBA observed ample open storage track space in both the local BNSF and UP yards used to host WTA storage, with approximately 70% of BNSF's yard unoccupied and available for car storage (*See Attachment 5, "BNSF Wichita Yard, 24JUL14"*). Cars received from the WTA were observed standing in BNSF's yard for over 36 hours before pick-up, indicating flexibility and wide margins on delivery times for traffic originating or terminating on the WTA.

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While lite movements and small cuts of cars make up the clear majority of switch moves on the IT Track, data submitted by WTA indicates the balance is made up of occasional large cuts of covered hopper cars used to ship wheat seasonally in a brief window during mid-summer and, to a lesser extent, late autumn. While RLBA did not observe any such movements while on site, WTA historical data shows that many of those cuts are significantly larger than the existing 44 car capacity of the IT Track, with a small number of cuts over the 100-car mark, and the majority averaging approximately 60 cars in length. However, these movements should have little effect on the construction and use of the Emporia Court crossing because, according to Superintendent Miller's testimony, BNSF or WTA coordinate operations to allow those long cuts to move directly from the BNSF to WTA tracks and vice versa without any standing time on the IT Track.

WTA historical data does indicate that some cuts of seasonal wheat movements are short enough to currently fit on the IT Track, and can fill the two tracks to near capacity. Regardless of the capacity loss absorbed by the installation of the Emporia Court Crossing, I see no reason why these shorter cuts could not be handled in the same manner as the previously mentioned longer ones. While the added level of coordination requires additional resource commitments on the part of both railroads, these movements occur so infrequently and relatively predictably, that they would have minimal added impact and offer ample time for preparation. In 2012 and 2013 combined, there were only six trains over 100 cars in length, with all but one occurring during the height of wheat shipping season between June and August. In fact, if done correctly, coordination could even lead to increased productivity by eliminating the need to disconnect and reassemble these car cuts that currently are separated between the two tracks.

Verified Statement of Steve Sullivan
Exhibit 13 to FYG's Reply to WTA's Opening Statement of Evidence and Argument

Conclusion and Findings

While it is apparent that WTA switching operations would be affected by the installation of Emporia Crossing, it is my opinion that WTA's complaints are extreme in this situation, and that the crossing would not unreasonably interfere with WTA's use of the IT Track. It is further my opinion that, opposition of WTA and its owners UP and BNSF, is driven more by a policy against the installation of new grade crossings, in particular private crossings. A BNSF produced public relations piece entitled *Grade Crossing Safety Brochure 2013* sums up the company's perspective;

"BNSF's grade crossing safety program includes an aggressive initiative to close public and private at-grade crossings, working closely with communities and property owners... Since 2000, BNSF has closed more than 5,600 at-grade crossings."

The same document goes on to say;

"BNSF is working to reduce the number of private grade crossings, especially those that are rarely used or redundant, and closely scrutinizes all requests for new private crossings. During 2012, there were 146 requests for new private crossing permits. Only 34 new crossings were installed – and 25 of those were temporary for construction purposes."

It is my professional opinion that with minimal adjustments to operating procedures on the part of BNSF and WTA as to the switching of the infrequent longer trains discussed above, the interchange and switching operations on the IT Track can continue unimpeded. In fact, as discussed in the testimony of Superintendent Dame, the interconnected nature of the track owned by BNSF and WTA in the vicinity of the Emporia Court Crossing, with minor adjustments to

Verified Statement of Steve Sullivan
Exhibit 13 to FYG's Reply to WTA's Opening Statement of Evidence and Argument

trackage rights and access agreements, could allow interchange to be conducted virtually as it is done today at several alternate locations. The volumes of traffic, frequency of interchange and nature of the work conducted by WTA and BNSF crews allows a great amount of flexibility in the way in which interchange is and can be conducted on the IT Track.

Verification

I, Steve Sullivan, verify under penalty of perjury that I have prepared and read this Verified Statement to be filed on behalf of FYG in the aforementioned dispute before the Surface Transportation Board, that I know the contents thereof, and that the same is true and correct. Further, I certify that I am qualified and authorized to file this statement

Executed on August 15, 2014



Steve Sullivan

Attachments

Attachment 1



Typical WTA delivery to IT Track observed by RLBA, 23JUL14

Attachment 2



Typical car cut size and placement observed on IT Track by RLBA, 23JUL14

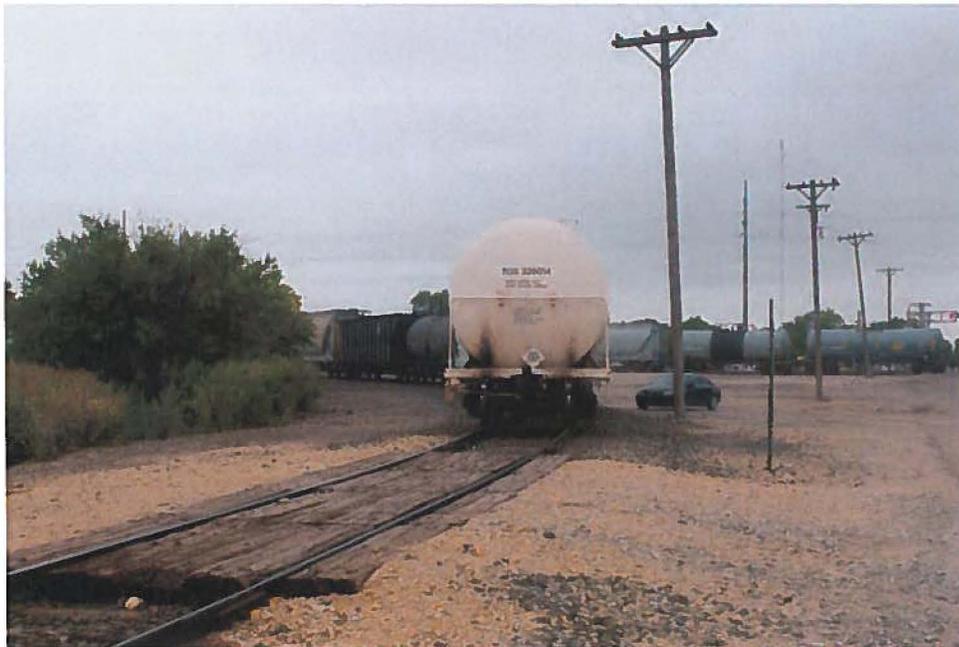
Verified Statement of Steve Sullivan
Exhibit 13 to FYG's Reply to WTA's Opening Statement of Evidence and Argument

Attachment 3



Car cut delivered to single track on IT Track by WTA, 23JUL14

Attachment 4



Car cut delivered to single track on IT Track by WTA, 23JUL14

Verified Statement of Steve Sullivan
Exhibit 13 to FYG's Reply to WTA's Opening Statement of Evidence and Argument

Attachment 5



BNSF Wichita Yard, 24JUL14

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket FD 35765

Exhibit 14

F.Y.G. Investments, Inc. and Treatco, Inc.'s
Reply To Opening Statement Of Evidence And Arguments

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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 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 February 20, 2007.

APPEARANCES:

The Plaintiffs, Wichita Terminal Association,
Burlington Northern & Santa Fe Railway Company and Union
Pacific Railroad Company, appeared by and through its
attorney, Mr. Glenn D. Young, Jr., of Young, Bogle,
McCausland, Wells & Blanchard, 106 W. Douglas, Suite 923,
Wichita, Kansas 67202-3392.

The Defendants, FYG Investments, Inc. and
Treatco, Inc., appeared by and through its attorneys, Mr.

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

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket FD 35765

Exhibit 15

F.Y.G. Investments, Inc. and Treatco, Inc.'s
Reply To Opening Statement Of Evidence And Arguments

190

ORDINANCE No. 5390

STATE OF KANSAS
SEDWICK COUNTY
CITY OF WICHITA

I HEREBY CERTIFY THAT THE ABOVE ORDINANCE NO. 5390 was passed at a regular meeting of the Commissioners held June 15th, 1918; was not published and is recorded on page 177 of Journal 2 of the Commissioners Proceedings.

REPEALED
ORD. NO. 11066
DATE 1-21-20

Repealed

ORDINANCE NO. 5390

AN ORDINANCE RELATING TO THE WICHITA TERMINAL ASSOCIATION, COMPOSED OF THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, and Jacob M. Dickinson, its receiver; the Missouri Pacific Railway Company and H. F. Bush, its receiver, and the St. Louis & San Francisco Railroad Co. and J. W. Lusk and W. C. Mixer, its receivers, the right to construct, operate and maintain industrial tracks on and across what is ordinarily known and called 25th Street, in the City of Wichita, Kansas.

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF WICHITA.

SECTION 1. That permission is hereby granted to The Wichita Terminal Association, hereinafter called "Association" composed of The Atchison, Topeka & Santa Fe Railway Company, The Chicago, Rock Island & Pacific Railway Company, and Jacob M. Dickinson its Receiver, The Missouri, Pacific Railway Company and H. F. Bush, its receiver, and The St. Louis & San Francisco Railroad Company and J. W. Lusk and W. C. Mixer, its Receivers, to construct, operate and maintain industrial tracks and switches along and across what is known and called 25th Street, from a point sixty feet east of the east line of Section 4, in Tp. 37 N of R 1 east of the 6th P.M., to the west line of Washington Avenue, in the City of Wichita, Kansas, as follows: The center line of the south track, being 31 1/2 feet south of the north line of the SW 1/4 of said Sec. 4, with the right to cross said 25th Street for industrial tracks and switching tracks, also a second track 12 feet from center to center north of the above described track but extending only from near Topoka Avenue on the west to near Lead Avenue as platted in Illinois Add. to the City of Wichita, on the east.

SECTION 2. This permission is hereby made subject to the following conditions, terms and stipulations: Said Association shall construct said tracks under the direction and supervision of the City Engineer of the City of Wichita as to lines, grades, crossings and methods of crossing on the construction work in so far as public use of streets is concerned. Said Association shall at all times keep and maintain said tracks on grade not by the City Engineer, and should the grade be changed at any time said Association shall immediately change said tracks to conform to such grade at its own expense. The said Association shall construct and maintain in good order such sidewalks crossed and railway crossings and do such filling as may be deemed best and proper by the Board of Commissioners of said City, and shall keep said tracks in good repair and in such condition that teams and vehicles can safely pass over, across and along the entire length thereof. The said Association when duly ordered to do so shall pay the cost of paving its right of way as provided by law, and the work shall

ORDINANCE No. 101

be done in accordance with the plans and specifications furnished by the City Engineer. Said Association shall hold the City of Wichita forever harmless for damages, costs or charges that may result by reason of the construction, maintenance and operation of said tracks, including all damages, if any, to adjacent property.

SECTION 3. That this grant is hereby made subject to all laws governing cities of the first class now in force or that may hereafter be enacted, and all ordinances and parts of ordinances of Wichita, Kansas, in relation thereto. The violation by said Association its successors and assigns, of any of the terms of this ordinance, or any amendments of the same, shall be a cause for the forfeiture thereof. The said City may compel the rigid observance of the conditions, terms and stipulations at any time that said City may elect.

SECTION 4. That said association shall accept this ordinance and the provisions thereof in writing to be filed with the City Clerk within forty days after the publication of this ordinance and the tracks described in Section 1 hereof must be built complete on or before Sept. 1st, 1913, otherwise this ordinance is null and void.

SECTION 5. This ordinance shall take effect and be in force from and after its publication once in the official city paper.

Approved this 19th day of June, A.D., 1910.

Attest:-

[Signature]
 City Clerk

[Signature]
 Mayor.

SOUTH OF KANSAS
 SEDWICK COUNTY
 CITY OF WICHITA

I HEREBY CERTIFY THAT THE ABOVE ORDINANCE NO. 5300 was passed at a regular meeting of the Commissioners held June 19, 1913; was published in the Daily Beacon June 21, 1913 and is recorded on page of Journal K of the Commissioners Proceedings. Page 224.

[Signature]
 City Clerk

X ORDINANCE NO. 5301 *cut*

AN ORDINANCE MAKING A SPECIAL ASSESSMENT TO PAY FOR THE COST OF CUTTING WEEDS. BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF WICHITA.

SECTION 1. That the sums set opposite the following lots, pieces and parcels of land or ground herein specified, be and the same are hereby levied to pay for the cost of cutting weeds on said property herein described.

Lot	Street	Addition	
134	Market	Original Town	.03
150			.03
132			.03
136			.03
300	Main	Hyde & Ferrulle	.03
309			.03
141	Main	Original Town	.03
143			.03
142			.03
62			.03
70			.03
55			.03
57			.03

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket FD 35765

Exhibit 16

F.Y.G. Investments, Inc. and Treatco, Inc.'s
Reply To Opening Statement Of Evidence And Arguments

5870

ORDINANCE NO. 11-664

ORDINANCE NO. 11-664.

AN ORDINANCE REPEALING ORDINANCES No. 9, 14, 46, 47, 93, 100, 103, 105,

- 111, 115, 114, 117, 119, 146, 159, 210, 249, 265, 270, 273, 290, 304, 335,
- 336, 337, 351, 360, 365, 394, 396, 405, 432, 433, 438, 439, 465, 473, 486,
- 547, 548, 552, 566, 565, 596, 605, 607, 635, 636, 637, 647, 650, 656, 667,
- 698, 703, 706, 722, 750, 751, 770, 775, 777, 823, 865, 870, 904, 912, 971,
- 989, 1052, 1109, 1132, 1134, 1139, 1153, 1165, 1169, 1187, 1190, 1195, 1201,
- 1246, 1270, 1292, 1294, 1298, 1313, 1315, 1316, 1329, 1349, 1355, 1362, 1405,
- 1412, 1415, 1426, 1431, 1445, 1450, 1456, 1474, 1476, 1507, 1508, 1511, 1527,
- 1528, 1562, 1566, 1570, 1603, 1604, 1627, 1631, 1637, 1659, 1660, 1671, 1673,
- 1674, 1677, 1678, 1679, 1689, 1691, 1694, 1695, 1728, 1774, 1784, 1788, 1792,
- 1794, 1803, 1804, 1819, 1832, 1833, 1865, 1896, 1897, 1938, 1950, 1974, 2015,
- 2017, 2021, 2025, 2035, 2054, 2066, 2075, 2077, 2080, 2097, 2199, 2213, 2217,
- 2265, 2266, 2267, 2395, 2397, 2401, 2419, 2420, 2436, 2455, 2461, 2470, 2494,
- 2506, 2510, 2511, 2543, 2544, 2547, 2571, 2597, 2627, 2670, 2674, 2680, 2691,
- 2725, 2740, 2744, 2762, 2782, 2787, 2812, 2813, 2814, 2815, 2816, 2817,
- 2816, 2850, 2851, 2862, 2891, 2893, 2897, 2908, 2912, 2924, 2932, 2938, 2973,
- 2974, 2976, 2947, 3040, 3069, 3081, 3147, 3148, 3151, 3163, 3182, 3185, 3205,
- 3206, 3241, 3242, 3243, 3272, 3299, 3309, 3426, 3497, 3521, 3525, 3566, 3652,
- 3667, 3685, 3686, 3720, 3766, 3770, 3852, 3855, 3961, 3986, 4055, 4060, 4083,
- 4086, 4102, 4109, 4204, 4276, 4296, 4301, 4313, 4379, 4394, 4414, 4450, 4453,
- 4468, 4469, 4480, 4523, 4577, 4620, 4624, 4633, 4676, 4690, 4694, 4756, 4777,
- 4789, 4795, 4796, 4805, 4833, 4869, 4886, 4941, 4974, 4982, 5007, 5021, 5024,
- 5044, 5055, 5047, 5048, 5071, 5079, 5106, 5115, 5123, 5129, 5131, 5132, 5156,
- 5157, 5166, 5169, 5224, 5214, 5220, 5227, 5228, 5229, 5230, 5231, 5233, 5242,
- 5251, 5260, 5276, 5304, 5303, 5340, 5342, 5365, 5390, 5397, 5426, 5569, 5575,
- 5599, 5600, 5601, 5615, 5616, 5618, 5619, 5623, 5629, 5633, 5640, 5610, 5653,
- 5662, 5680, 5696, 5702, 5709, 5714, 5724, 5726, 5729, 5731, 5759, 5760, 5791,
- 5811, 5749, 5807, 5809, 5830, 5819, 5936, 5964, 5978, 6018, 6047, 6070, 6117,
- 6237, 6249, 6266, 6285, 6346, 6416, 6426, 6463, 6710, 6730, 6744, 6825, 6843,
- 6945, 7103, 7174, 7357, 7177, 7176, 7179, 7140, 7213, 7236, 7242, 7303, 7326,
- 7427, 7515, 7605, 7404, 7689, 7903, 7385, 8167, 8330, 8463, 8485, 8600, 8665,
- 9041, 9113, 9117, 9166, 9170, 9214, 9281, 9304, 9444, 9520, 9596, 9619, 9600,
- 9601, 9743, 9744, 9946, 9976, 10-004, 10-017, 10-020, 10-152, 10-173, 10-194,
- 10-197, 10-201, 10-370, 10-371, 10-372, 10-639, 10-640, 10-641, 10-701, 10-710,
- 10-745, 10-809, 10-994, 11-062, 11-030, 11-352, 11-252, 11-367, 11-379, 11-366,
- 11-371, 11-466, 11-498, and 11-519.

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF
MICHOTA, KANSAS: *That ordinances 9, 14, 46, 47, 93, 100, 105*

0000715

ORDINANCE NO. 11-664

5871

111, 115, 114, 117, 119, 148, 159, 210, 249, 266, 270, 273, 290, 304, 335,
 336, 337, 351, 360, 365, 394, 396, 403, 432, 433, 438, 439, 445, 473, 488,
 547, 548, 558, 566, 585, 596, 605, 607, 635, 636, 637, 642, 650, 656, 687,
 438, 703, 706, 722, 750, 751, 770, 775, 777, 823, 865, 872, 904, 912, 971,
 989, 1052, 1109, 1132, 1134, 1139, 1153, 1166, 1169, 1187, 1190, 1195, 1201,
 1246, 1272, 1272, 1292, 1292, 1313, 1315, 1315, 1329, 1349, 1355, 1362, 1405,
 1412, 1415, 1426, 1431, 1445, 1450, 1456, 1474, 1476, 1507, 1508, 1511, 1527,
 1528, 1562, 1588, 1602, 1603, 1604, 1627, 1631, 1637, 1659, 1660, 1671, 1673,
 1674, 1677, 1678, 1679, 1680, 1691, 1694, 1695, 1724, 1778, 1764, 1784, 1792,
 1796, 1803, 1806, 1819, 1832, 1833, 1845, 1890, 1893, 1934, 1950, 1974, 2015,
 2017, 2021, 2025, 2035, 2054, 2066, 2075, 2077, 2090, 2097, 2199, 2213, 2217,
 2265, 2266, 2267, 2395, 2397, 2401, 2419, 2420, 2435, 2455, 2461, 2470, 2494,
 2508, 2510, 2511, 2543, 2548, 2567, 2571, 2597, 2627, 2670, 2674, 2680, 2691,
 2725, 2740, 2744, 2747, 2742, 2792, 2797, 2812, 2813, 2814, 2814, 2816, 2817,
 2818, 2850, 2851, 2882, 2891, 2893, 2897, 2904, 2912, 2924, 2932, 2936, 2973,
 2974, 2974, 2987, 3040, 3049, 3081, 3147, 3148, 3151, 3163, 3162, 3185, 3205,
 3206, 3241, 3242, 3243, 3276, 3299, 3365, 3496, 3497, 3521, 3525, 3565, 3652,
 3657, 3685, 3686, 3715, 3728, 3795, 3853, 3855, 3961, 3966, 4055, 4060, 4083,
 4088, 4102, 4109, 4204, 4276, 4294, 4301, 4313, 4379, 4394, 4414, 4450, 4453,
 4462, 4453, 4480, 4523, 4597, 4600, 4624, 4633, 4676, 4690, 4694, 4766, 4777,
 4789, 4795, 4794, 4844, 4833, 4860, 4846, 4941, 4974, 4982, 5007, 5021, 5024,
 5048, 5055, 4057, 5058, 5071, 5090, 5108, 5115, 5123, 5129, 5131, 5132, 5156,
 5157, 5156, 5157, 5204, 5214, 5220, 5227, 5228, 5229, 5230, 5231, 5243, 5246,
 5261, 5264, 5296, 5306, 5309, 5340, 5342, 5366, 5390, 5397, 5426, 5569, 5575,
 5599, 5601, 5601, 5615, 5616, 5619, 5623, 5629, 5633, 5640, 5616, 5010, 5663,
 5664, 5660, 5696, 5704, 5709, 5716, 5724, 5726, 5729, 5732, 5759, 5760, 5799,
 5811, 5769, 5847, 5849, 5890, 5919, 5938, 5954, 5976, 6014, 6047, 6072, 6117,
 6237, 6249, 6286, 6525, 6566, 6616, 6626, 6625, 6710, 6734, 6746, 6826, 6943,
 6945, 7103, 7176, 7177, 7178, 7179, 7180, 7213, 7236, 7252, 7303, 7326, 7357,
 7427, 7515, 7605, 7805, 7862, 7903, 7925, 8167, 8330, 8463, 8985, 8800, 8865,
 9041, 9113, 9117, 9164, 9170, 9212, 9241, 9302, 9425, 9544, 9596, 9599, 9600,
 9601, 9743, 9764, 9768, 9778, 10-003, 10-019, 10-090, 10-192, 10-193, 10-194,
 10-197, 10-201, 10-370, 10-371, 10-372, 10-639, 10-640, 10-641, 10-721, 10-732,
 10-745, 10-823, 10-995, 11-062, 11-230, 11-352, 11-252, 11-367, 11-379, 11-386,
 11-431, 11-444, 11-492, and 11-515 be and the same are hereby repealed.

SECTION 2. This ordinance shall take effect and be in force from
 and after its passage and publication once in the official city paper.

ADOPTED AT Wichita, Kansas, on this 24th day of August, 1936.

T. Walker Denver
 President of Board of Commissioners.

Attest:

[Signature]

City Clerk