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Before the
SURFACE TRANSPORTATION BOARD

TRI-CITY RAILROAD COMPANY, LLC, a Washington limited liability
company,

Petitioner,

vs.

THE CITY OF KENNEWICK, of the State of Washington, located in
Benton County, Washington; THE CITY OF RICHLAND, of the State of
Washington, located in Benton County, Washington,

Respondents.

**TCRY'S SUR-REBUTTAL BRIEF RE: PETITION FOR
DECLARATORY ORDER**

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TABLE OF CONTENTS

I. SCOPE OF SUR REBUTTAL..... 1

II. PROCEDURAL HISTORY 1

III. “STANDARD OF REVIEW” / BURDEN OF PROOF 4

**IV. THE FEDERAL RAILROAD ADMINISTRATION AND THE GENERAL CODE OF
OPERATING RULES 10**

V. MISCELLANEOUS POINTS 13

VI. CONCLUSION 17

I. SCOPE OF SUR REBUTTAL

Given the volume of evidence already submitted, Tri City Railroad LLC (“TCRY”) will respond to the new matters raised in the Sur Reply of the City of Kennewick and the City of Richland (“Cities”).

As described by the Board in its August 31 Decision:

On June 30, 2015, the Cities filed a letter requesting leave to file a reply to TCRY’s rebuttal. The Cities state that TCRY’s rebuttal introduced verified statements from three new witnesses.⁷ The Cities contend that these witnesses introduced new facts and material to which the Cities did not have the opportunity to respond.⁸ The Cities request the opportunity to address these new facts.⁹

The three witnesses the Cities were referencing are Foster Peterson, a railroad operations expert; Lisa Anderson, TCRY’s corporate secretary; and Randolph Peterson, an owner of TCRY. Despite their request, the Cities’ September 15, 2015, Sur Reply does not include substantive testimony from any new witnesses. Instead, the Cities largely repeat testimony and argument already submitted and have their experts in traffic engineering and road/crossing design offer opinions as to railroad operations and the General Code of Operating Rules. In evaluating TCRY’s Petition for Declaratory Order to determine whether the Cities’ pending state-law condemnation of an at-grade crossing unreasonably interferes with current or planned railroad operations, the Board should take notice of the Cities having been given multiple opportunities to offer competent expert testimony on the railroad operations issues presented, and of the Cities having not done so.

II. PROCEDURAL HISTORY

To put TCRY’s Sur Rebuttal in context, the following is a synopsis of the procedural history of this case while it has been before the Surface Transportation Board (“Board”).

- On March 19, 2015, TCRY filed a Petition for a Declaratory Order and served it upon the Cities' attorneys;
- On March 20, 2015, the Cities' attorneys filed a notice of appearance but chose not to respond to the Petition;
- On April 2, 2015, TCRY received at its P.O. Box in Richland via certified mail notification that the Richland City Council and Kennewick City Council would be considering condemnation ordinances to condemn a right-of-way across TCRY's leased tracks;
- On April 6, 2015, TCRY's counsel filed with the Board a Supplemental Affidavit of Counsel RE: Notice of Condemnation Proceedings and served the Cities' attorneys with this filing. The material filed with the Board was what TCRY received on April 2, 2015;
- On April 13, 2015, TCRY sent a letter to each Councilmember of the City of Kennewick advising that the Petition was pending before the Board and requested that the City Council hold the eminent domain resolution in abeyance until the Board issued a ruling;
- On April 15, 2015, TCRY sent a letter to each Councilmember of the City of Richland and to the Mayor advising that the Petition was pending before the Board and requested that the City Council hold the eminent domain resolution in abeyance until the Board issued a ruling;
- On April 18, 2015, the City of Kennewick passed an ordinance to condemn a right-of-way across tracks leased by TCRY;

- On April 21, 2015, the City of Richland passed an ordinance to condemn a right-of-way across tracks leased by TCRY;
- On May 7, 2015, TCRY was served with a Summons and Complaint from a condemnation action initiated by the Cities of Kennewick and Richland in the State of Washington, County of Benton, under Superior Court Cause No. 15-2-01039-2. These pleadings are signed by the same attorneys representing the Cities in the instant matter before the Board. The condemnation pleadings do not mention the pendency of TCRY's Petition, though the condemnation pleadings were filed and served nearly two months after TCRY filed its Petition. The condemnation pleadings, by their terms, request expedited consideration pursuant to certain Washington State statutes;
- May 21, 2015, the Board issued a Decision initiating a proceeding under modified procedure;
- On May 29, 2015, the Cities requested additional time to file its Reply;
- On June 15, 2015, the Cities filed their Reply;
- On June 24, 2015, TCRY filed its Rebuttal;
- On June 30, 2015, the Cities filed a letter requesting leave to file a Response to TCRY's Rebuttal;
- On July 1, 2015, TCRY filed a letter responding to the Cities' June 30, 2015 letter;
- On August 31, 2015, the Board issued a Decision permitting a sur reply and a sur rebuttal as quoted above.

(See **Exhibits 1-11** to the June 24, 2015 Supplemental Verified Statement of Counsel)

III. “STANDARD OF REVIEW” / BURDEN OF PROOF

TCRY requested that the Board initiate proceedings and grant its Petition, finding that the condemnation under state law of the proposed at-grade crossing over TCYR’s parallel main and 1900 foot passing tracks would unreasonably interfere with TCYR’s current or planned railroad operations.

As provided in the Board’s May 21, 2015, Decision, “[t]he Cities did not file a reply to the petition for declaratory order[.]” The Board then ruled that it “has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to eliminate a controversy or remove uncertainty.” “Here,” the Decision continued, “a controversy exists as to whether the proposed condemnation action to construct an at-grade crossing is preempted under § 10501(b), and the record is incomplete.”

It is ordered:

1. A declaratory order proceeding is instituted. This proceeding will be handled under the modified procedure on the basis of written statements submitted by the parties. All parties must comply with the Rules of Practice, including 49 C.F.R. parts 1112 and 1114.

Id.

49 C.F.R. part 1112 concerns Modified Proceedings, and part 1114 concerns Discovery and Evidence. 49 C.F.R. § 1114.1 provides:

Any evidence which is sufficiently reliable and probative to support a decision under the provisions of the Administrative Procedure Act, or which would be admissible under the general statutes of the United States, or under the rules of evidence governing proceedings in matters not involving trial by jury in the courts of the United States, will be admissible in hearings before the Board. The rules of evidence will be applied in any proceeding to the end that necessary and proper evidence will be conveniently, inexpensively, and speedily produced, while preserving the substantial rights of the parties.

TCRY submitted testimony from two witnesses presently actively engaged in railroading, and testimony from a nationally-recognized railroad operations expert. The Cities, on the other hand, have not produced testimony from any witness with qualifications, experience, or training in railroad operations or the General Code of Operating Rules. As described below, and consistent with 49 C.F.R § 1114.1, the Cities have failed to rebut TCRY's submissions with competent admissible evidence.

Railroad litigation often takes place in state or federal courts, rather than in administrative proceedings. Federal case law therefore provides a well-developed body of law concerning the qualifications and admissibility of expert testimony on railroad operations.

In federal court, Fed. R. Evid. 702, which governs the use of expert testimony, states that a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of opinion or otherwise provided that “(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.”

To admit expert testimony under this rule, the court must determine that (1) the witness is qualified; (2) the expert’s methodology is reliable; and (3) the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. *Myers v. Ill. Cent. R.R. Co.*, 629 F.3d 639, 644 (7th Cir. 2010).

The Rule requires trial courts to assume a “gatekeeping role,” ensuring that the methodology underlying an expert's testimony is valid and the expert’s conclusions are based on “good grounds.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590-97 (1993). However,

“[t]here is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself.” *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005).

“[The Tribunal] must ensure that expert opinion testimony is in fact expert opinion, not merely opinion given by an expert.” *United States v. Lundy*, 809 F.2d 392, 396 (7th Cir. 1987).

Relevant here, the Cities argue in their Sur Reply: “TCRY’s purported ‘operations’ expert rebuttal testimony provided does not support a finding of unreasonable interference, but rather asserts extraneous facts and issues, ignores dispositive facts, and misconstrues the plain language of rules and regulations.” (Cities’ Sur Reply p. 16)

As TCRY previously noted in its Reply Brief, none of the Cities’ expert witnesses have any disclosed expertise, training, or education in railroad operations. As the specific question before the Board is whether the proposed at-grade crossing unreasonably interferes with planned or future railroad operations, expert testimony is only helpful to the Board if the expert is both qualified in that field and offering pertinent opinions.

In contrast to the qualifications and motor vehicle related opinions of the Cities’ witnesses, TCRY has offered testimony of witnesses experienced in railroad operations, trained in GCOR, and presently working in the field. By way of specific example, Foster Peterson’s qualifications as a testifying expert in railroad operations were discussed in *BNSF Railway Co. v. LaFarge Southwest, Inc.*, 2009 WL 4279768, No. 06-1076 MCA/LFG (D.N.M. 2-15-2009), an at-grade crossing accident case. Finding Mr. Peterson qualified under Fed.R.Evid. 702 and *Daubert* as an expert in railroad operations, the *LaFarge* court explained:

Foster Peterson is currently a partner in Full Service Railroad Consulting, Inc., in Tucker, Georgia, as well as the Chief Operating Officer and Supervisor of Engineers with the Hiwassee River Railroad Company in Copperhill, Tennessee. Mr. Peterson also currently serves as the Manager of Training Rules and Safety; Supervisor of Locomotive Engineers; and a

Locomotive Engineer with the Tennessee Valley Railroad in Chattanooga, Tennessee.

With Full Service Railroad Consulting, Mr. Peterson conducts operational and safety audits; provides services as a consulting or testifying expert in railroad mechanical, operating, and engineering disciplines; and provides railroad technical and engineering support for accident/incident responses, case analysis, and preparation of reports. He utilizes train dynamics simulation models in accident investigation and analysis. He also deals with event recorders and their interpretation.

In 1995, Mr. Peterson graduated from the Georgia Institute of Technology with a Bachelor's Degree in Mechanical Engineering. From 1986 through 1993 he was in railroad operations as a brakeman and fireman in train service and also learned maintenance practices for cars and locomotives. He then became a certified locomotive engineer qualified to operate on the Tennessee Valley Railroad and Norfolk Southern (Class I) trackage rights in Tennessee, also operating on mainline Norfolk Southern (Class I) trackage. He was also responsible for maintenance and servicing of locomotives and cars during that period. From 1993 to 1995 he was a locomotive engineer for New Georgia Railroad, operating on CSX (Division 1) tracks and mainline operations on CSX and Norfolk Southern tracks.

From 1995 to 2001, Mr. Peterson performed railroad consulting work for Rail Sciences, Inc. While with Rail Sciences, he performed numerous accident and derailment investigations; railroad operational safety studies; vehicle dynamic studies; mechanical inspections; physical testing; and railroad training. Mr. Peterson has specialized training and experience with event recorders and their interpretation, and has published and presented on that topic. Mr. Peterson also has performed numerous field investigations where event recorder data was critical, and has extensive experience with simulation tools such as the train operations simulator.

Mr. Peterson is a member of the International Association of Railway Operating Officers; the Air Brake Association; the American Association of Railroad Superintendents; the American Railway Engineering and Maintenance of Way Association; and the American Society of mechanical Engineers. In addition to publishing and presenting on the topic of event recorders, Mr. Peterson has published and presented on such topics as locomotive brakes; modern locomotive technology; and the investigation of derailments.

On the basis of these credentials, the Court concludes that Mr. Peterson qualifies by education, training, and experience as an expert in the field of railroad operations.

Id. at * (internal citations omitted).¹

On the other hand, an expert lacking experience, training, or education in railroad practices and operations is not qualified as an expert to offer testimony as to those subjects. In *M.B. v. CSX Transp.*, 2015 WL 5315961, -- F.Supp.3d --, No. 1:12-CV-0825 (N.D.N.Y. 9-11-2015), a minor was injured when he was struck by a train while trying to cross the railroad tracks on foot. *Id.* at *1. Upon motion of the railroad, the district court excluded the proposed testimony of plaintiff's liability expert, and granted summary judgment. *Id.*

The *M.B.* plaintiff's expert, Nicholas Bellizzi, a professional engineer, testified that he was an accident reconstructionist, though "he has not received accreditation or any other form of certification in the area of accident reconstruction." *Id.* at 2.² Bellizzi offered opinions as to the train's speed, the reaction time of the train crew, and the train's braking time and distance. *Id.*

The railroad sought exclusion of the *M.B.* plaintiff's expert's testimony. The *M.B.* court, describing Fed.R.Evid. 702 and the *Daubert* standard, noted that it "must... consider the fact that 'experience in conjunction with other knowledge, skill, training or education... [may] provide a sufficient foundation for expert testimony,' and '[i]n certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.'" *Id.* at *5 (quoting Fed. R. Evid. 702 Advisory Committee's Note). Applying the Fed.R.Evid. 702 and *Daubert* standard, the *M.B.* court excluded the opinions of the *M.B.* plaintiff's expert:

Perhaps most importantly, Mr. Bellizzi's report states that the PRT is based upon his "prior experience in numerous similar train accident cases." "[W]hile experience can provide the basis to qualify a witness as an expert, the experience must be demonstrated and have direct relevance to the issues in the case." *Dreyer v. Ryder Auto. Carrier Grp., Inc.*, 98-

¹ See also *BNSF v. ABC-NACO*, 389 Ill. App.3d 691, 706, 906 N.E.2d 83 (2009) ("Therefore, the expert testimony of [Foster] Peterson... on [his] opinion of the cause of the train derailment was properly admitted.").

² CSX's expert in *M.B.* was also Foster Peterson. See *M.B.* at at **2-3.

CV-0082, 2005 WL 1074320, at *1 (W.D. N.Y. Feb. 9, 2005) (*citing Wilson v. Woods*, 163 F.3d 935, 938 [5th Cir. 1999]). Moreover, “nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.” *Glen. Elec. Co.*, 522 U.S. at 146. Here, Mr. Bellizzi testified that he has never worked as a train engineer or conductor or in any similar position. Therefore, without any studies or practical experience operating a locomotive to support Mr. Bellizzi’s proposed PRT, the Court finds that this opinion is arbitrary, impermissibly speculative, and unreliable.

...
Similarly, here, Mr. Bellizzi’s curriculum vitae is devoid of any indication that he has received any training, education, or experience in an area such as human factors analysis that would allow him to determine the minimum time required for M.B. to clear the train’s path. *See also Lappe v. Am. Honda Motor Co., Inc.*, 857 F.Supp. 222, 227 (N.D. N.Y. 1994) (holding that “[a]n expert must, however, stay within the reasonable confines of his subject area, and cannot render expert opinion on an entirely different field or discipline.”) (*citing Wheeler v. John Deere Co.*, 935 F.2d 1090, 1100 [10th Cir. 1991]).... The Court agrees with Defendant and finds that Mr. Bellizzi is not qualified to render such an opinion nor is his opinion, as presented, sufficiently reliable to be deemed admissible.

Id. at **7-11 (footnotes omitted) (record citations omitted).

Here, the Cities’ expert witnesses are professional engineers. Their disclosed expertise all pertains to traffic and road design. As in *M.B.*, “without any... experience operating a locomotive... this opinion is arbitrary, impermissibly speculative, and unreliable.” The Cities’ experts’ curriculum vitae are “devoid of any indication that [they have] received any training, education, or experience” in railroad operations or the General Code of Operating Rules.

TCRY has presented evidence from Foster Peterson, a recognized expert in railroad operations and GCOR. The Cities requested, and were granted, an opportunity to present testimony in order to rebut Mr. Peterson. Rather than presenting testimony from a railroad operations expert, the Cities resubmitted the testimony of their traffic engineers, posed as railroad operations opinions.

The Cities Sur Reply draws the Board's attention to the burden of proof. TCRY met its initial burden, and this proceeding was initiated. The Cities have been afforded two opportunities since the Board's May 21, 2015, Decision to present relevant evidence on the issue of whether the proposed crossing unreasonably interferes with planned and future railroad operations, yet they have not presented testimony from an expert qualified in railroad operations.

IV. THE FEDERAL RAILROAD ADMINISTRATION AND THE GENERAL CODE OF OPERATING RULES

"Railroads are among the most heavily regulated American industries." *Zimmerman v. Norfolk Southern Corp.*, 706 F.3d 170, 174 (3rd Cir. 2013). "[E]ach railroad is required to instruct its employees in operating practices." 49 C.F.R. § 217.1. Every railroad must adopt operating rules which comply with the regulations promulgated by the FRA, and may adopt additional or more stringent requirements. 49 C.F.R. § 218.1. *See also* 49 C.F.R. § 217.7 (railroad must keep copy of operating rules available at all times, and provide copy to FRA).

Railroad employees must be trained and tested on a railroad's operating rules, as well as on any additional or more stringent requirements adopted by the railroad. 49 C.F.R. § 218.11; 49 C.F.R. § 217.9; 49 C.F.R. § 217.11. *See also Carter v. Nat. Railroad Passenger Corp.*, 63 F.Supp.3d 1118, 1156 n. 28, n. 29, n. 30 (N.D.Cal. 2014).

Violations by the railroad of the FRA's requirements to adopt, train employees, and enforce operating rules subjects the railroad to civil penalties of as much as \$25,000 per violation. 49 C.F.R. § 218.9; 49 C.F.R. § 217.5.

The General Code of Operating Rules (GCOR) is a set of operating rules for railroads in the United States. GCOR is used by Class I railroads west of Chicago, most of the Class II railroads, and many short-line railroads. The Federal Railroad Administration's "Compliance with

Railroad Operating Rules and Corporate Culture Influences”, located at <https://www.fra.dot.gov/Elib/Document/2775>, describes:

By the 1850s, railroad operating rules, often printed as pamphlets or on the back of a time card, had evolved to near universal application. On April 14, 1887, representatives of 48 railroads voted for the adoption of what is now known as the Standard Code of Operating Rules (SCOR), published by the Association of American Railroads (AAR). Thus, all railroad rule books in North America today have as their foundation the SCOR in both development and application. The SCOR, however, was never intended to be used as a working rulebook. Rather, its primary intention was to standardize operating practices to the extent practicable while still preserving the flexibility of individual railroads to either modify or omit rules at their discretion. Even rulebooks with identical phraseology could be interpreted and applied differently on different railroads. Although used as a reference book, the SCOR was primarily a matrix document, from which the industry could establish standard verbiage and a common numbering system. Until recently, in fact, railroads rarely deviated from the original numbering system. At present, most Class I railroads in the U.S. use one of two “standard” rulebooks: the Northeast Operating Rules Advisory Committee (NORAC) rulebook and the General Code of Operating Rules (GCOR). Conrail, Amtrak, and several commuter and short line railroads in the northeastern United States use the NORAC rulebook. The GCOR is used by every Class I railroad west of the Mississippi River, most of the Class II railroads, and numerous shortline railroads. A few railroads, including CSX, Norfolk Southern, Illinois Central, and Florida East Coast, have adopted their own rulebooks.

(Internal references omitted).

The Sixth Edition of the General Code of Operating Rules became effective April 7, 2010, and the Seventh Edition on April 1, 2015. The cover of each rulebook states:

The rules herein govern the operations of the railroads listed and must be complied with by all employees regardless of gender whose duties are in any way affected thereby. They supersede all previous rules and instructions inconsistent therewith.

See also Carter, 63 F.Supp.3d at 1125 (“The cover page of GCOR states that “[t]he rules herein govern the operations of the railroads listed and must be complied with by all employees[.]”)

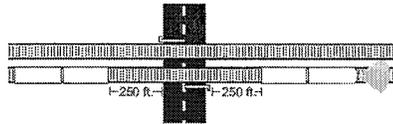
Relevant here are GCOR 6.32.4 and 6.32.6:

6-18 GCOR—Seventh Edition—April 1, 2015

6.32.4 Clear of Crossings and Signal Circuits

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.



[Diagram A.]

6.32.5 Actuating Automatic Warning Devices Unnecessarily

Avoid actuating automatic warning devices unnecessarily by leaving switches open or permitting equipment to stand within the controlling circuit. If this cannot be avoided and if the signals are equipped for manual operation, a crew member must manually operate the signal for movement of traffic. A crew member must restore signals to automatic operation before a train or engine occupies the crossing or before it leaves the crossing.

6.32.6 Blocking Public Crossings

When practical, a standing train or switching movement must avoid blocking a public crossing longer than 10 minutes.

Without citation to any authority, and without support from any witness with disclosed experience or training in the General Code of Operating Rules, the Cities argue that the above rules are “permissive”. It appears that by “permissive”, the Cities mean that railroad employees may disregard the above rules at their option. In effect, the Cities ask the Board to strike rules adopted by hundreds of railroads, which have been followed for decades.³

As Foster Peterson describes more fully, these rules are neither “permissive” nor optional. Not only must the railroad and its employees follow these specific rules, the railroad is also liable for not preventing third parties from violating these rules.

As the Board is aware, under the Federal Employers Liability Act (“FELA”), 45 U.S.C. § 51, any negligence on the railroad's part, no matter how slight, would support a recovery on a railroad employee’s stand-alone FELA claim. *CSX Transportation, Inc. v. McBride*, 131 S.Ct.

³ Regulation of railroad operations practice is generally within the purview of the Federal Railroad Administration. See 49 C.F.R. part 217, and 49 C.F.R. part 218.

2630, 2636 (2011). FELA affords railroad employees their only remedy for injuries sustained while engaged in interstate commerce. Federal Employer's Liability Act, § 1, 45 U.S.C. § 51 and *Smith v. Medical and Surgical Clinic Ass'n*, 118 F.3d 416, (5th Cir. 1997).

A railroad may be liable to its own employee who is injured at work if GCOR 6.32.4 is not followed and railcars are not spotted at least 250' from an at-grade crossing, **even if the railroad was not responsible for the placement of the cars.** See *Campbell v. BNSF Railway Co.*, 2011 WL 233183, No. 4:09-CV-49 (D. ND 1-24-2011).

V. **MISCELLANEOUS POINTS**

Throughout its supplemental reply brief the Cities make many of the same arguments they made in their Reply Brief. Since TCRY has already provided substantial briefing on these issues, for the sake of brevity, TCRY will identify the Cities' main arguments and provide a short response.

Cities' Argument: "TCRY's intransigence should not be allowed to scuttle years of good faith cooperation and hard work by all other rail carriers and planners on an important regional project." (Cities' Sur Reply p. 3)

TCRY's Response: If by "intransigence" the Cities mean that TCRY has resisted the Cities' attempts to significantly interfere with its railroad operations, then the answer is yes.

If by "intransigence" the Cities mean that TCRY defended itself when the Cities sued in 2007, and lost, then the answer is yes.

If by "intransigence" the Cities mean that TCRY defended itself when the Cities again sued in 2013, and lost before an administrative law judge, then the answer is yes

If by “intransigence” the Cities mean that after it paid Union Pacific \$2.1 million to move its operations, and TCRY refused to accept \$38,000 for the disruption of its railroad operations and the effective elimination of 1/3 of its only parallel siding, then the answer is yes.

As shown in the procedural timeline above, it has been the Cities who have been intransigent. This intransigence has been manifested in the current proceedings before the Board. Rather than honestly address the instant Petition, the Cities chose not to initially respond to the Petition, and instead developed a strategy to ignore the STB and race to the state court house so as to create a *fiat accompli* through eminent domain, while concealing from the state court these proceedings, as demonstrated by the text of the Cities’ May 7, 2015 state condemnation pleading:

By this action, the City of Kennewick and the City of Richland (“Cities”) are acquiring certain, limited property rights (easement) necessary for the extension of Center Parkway between Kennewick and Richland. After years of local and regional planning, and extensive hearings and review, the State of Washington Utility and Transportation Commission (“WUTC”) approved the extension of Center Parkway between Kennewick and Richland. Docket TR-130499. This Court affirmed the WUTC orders on December 9, 2014. *Tri-City R.R. Co. v. State of Washington*, Benton County Cause No. 14-2-07894-8. The WUTC found the Port of Benton, Burlington Northern Santa Fe Railroad, Union Pacific Railroad do not oppose the Center Parkway extension. State, regional and local planning and transportation agencies, and public comment on the record before the WUTC, all support the project. The Port of Benton owns the property; Tri-City Railroad Company, LLC (“TCRY”) is a tenant under a lease.

(See May 7, 2015 Complaint for Condemnation, **Exhibit 4** to the June 24, 2015 Supplemental Verified Statement of Counsel)

Cities’ Argument: ‘Safety of the crossing is not in dispute’. (Cities’ Sur Reply p. 5)

TCRY’s Response: As TCRY quoted in its March 19, 2015, Petition from the Washington UTC’s Final Order, “the benefits to public safety alleged by the Cities are too slight on their own to support the [proposed crossing], even though the inherent risks are mitigated to a large extent

by the project design.” The only railroad operations expert to present testimony to the Board in the instant matter is Foster Peterson, who describes how not having a crossing is safer than establishing a new at-grade crossing.

Cities’ Argument: ‘TCRY does not operate unit trains.’ (Cities’ Sur Reply p. 6)

TCRY’s Response: TCRY is Union Pacific’s handling carrier and, as such, operates their unit trains for them. As described in the Sur Rebuttal Verified Statement of Rhett Peterson, due to the CWCP pit fire, TCRY has not operated a unit train in 2015.

Cities’ Argument: ‘The crossing will be blocked less than 3% of the day’. (Cities’ Sur Reply p. 7)

TCRY’s Response: Presumably, the Cities mean “blocked” to motor vehicle traffic. It is unclear how this factoid bears upon whether the proposed at-grade unreasonably interferes with planned or future railroad operations. Presently, there is no crossing, and instead this location is the sole parallel main and siding on TCRY’s system. Presently, there being no crossing, this location is closed to motor vehicle traffic 100% of the time.

Cities’ Argument: ‘All vehicular traffic will stop during railway operations’. (Cities’ Sur Reply p. 8)

TCRY’s Response: At-grade crossing accidents are a relatively common occurrence, resulting in injuries and fatalities to railroad employees and members of the public. Active warnings only mitigate safety risks inherent in at-grade crossings. The only way to prevent motor vehicles and trains from interfacing with each other is to not have an at-grade crossing. The exact problem with at-grade crossings is some “vehicular traffic” will not stop, gates and lights notwithstanding.

Cities' Argument: 'The track owner has granted the easement'. (Cities' Sur Reply p. 8)

TCRY's Response: The Cities and the Port of Benton entered into an agreement in 2006 that the Cities must obtain authority from TCRY for the construction of the extension of Center Parkway. (See **Exhibit 4** to the Rebuttal Verified Statement of John Miller)

Cities' Argument: 'TCRY refused to participate in any dialogue or project planning to remove the siding track from the crossing location'. (Cities' Sur Reply p. 20)

TCRY's Response: The Cities' previous position stated to the Board was that they never actually sought to remove the siding. As described in the verified statements of Randolph Peterson, because this siding is TCRY's only parallel siding, it is critical to TCRY's operation, and so TCRY was not interested in removing the siding. As described both above and in previous pleadings, Union Pacific only moved its operations from this same location upon being paid \$2.1 million and other consideration by the Cities.

Cities' Argument: 'TCRY's arguments and objections to the project have been carefully considered and repeatedly objected over several years'. (Cities' Sur Reply p. 21)

"Because the issue of operational interference was raised and adjudicated in a prior proceeding involving the same parties, waiver and estoppel apply." (Cities' Sur Reply p. 11 Footnote 5)

TCRY's Response: Please see the timeline above. Not only did the Cities never consider the near exclusive role federal law plays in railroad matters, they concealed the existence of the instant proceedings from the state court in the Cities' condemnation action they filed on May 7, 2015.

Moreover, this argument is contradicted by the Final Order of the Washington UTC presently, separately on appeal by TCRY. Specifically, the UTC rejected the Cities' safety-based

arguments to justify the crossing. Instead, the UTC created three new, non-safety-related criteria to justify the new crossing. Their state statutory authority to do so is the matter on appeal. Yet, the UTC's Final Order specifically provides that it was the Cities' safety arguments which were rejected. Additionally, that Final Order contains neither findings of fact nor conclusions of law concerning railroad operations, or interference therewith, as that was not the issue before that state administrative agency.

It is noteworthy the Cities relegate their "estoppel" argument to a footnote in a sur reply. It is also noteworthy that the "estoppel" argument within that footnote bears no supporting citation to the factual record.

Cities' Argument: "The Cities also acknowledge that local regulations cannot regulate railroad operations. That is why the Kennewick Municipal Code begins with the phrase 'When it can be avoided...'" (Cities' Sur Reply p. 18 Footnote 9)

TCRY's Response: KMC 11.80.090 does not begin with the phrase "when it can be avoided". Rather, it begins with the complete sentence: "Cars or engines must be left clear of road crossing signal circuits."

It is interesting that the Cities acknowledge that local ordinances cannot regulate railroad operations, but they only do so now, in their Sur Reply, and only after they determined that Kennewick Municipal Code 11.80.090 is adverse to their position. As a practical matter, GCOR 6.32.4 and 6.32.6 provide for the prohibitions described in the municipal code.

VI. CONCLUSION

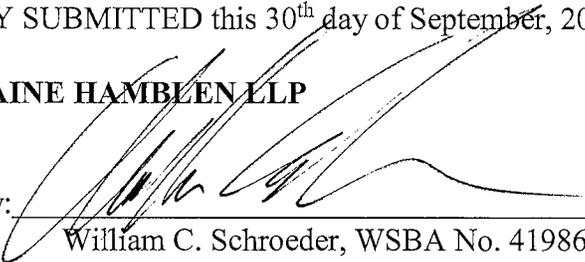
The question presented is whether the use of state condemnation law to condemn a new at-grade crossing over TCRY's sole parallel main track and siding unreasonably interferes with TCRY's current or planned railroad operations. TCRY has presented evidence from experienced

railroaders, as well as from a nationally recognized railroad operations expert. The Cities have failed to produce competent evidence rebutting this testimony, and instead have relied upon unqualified opinions of experts from a different field (*i.e.* traffic engineering). Consequently, the Board should answer the question of whether the pending condemnation will unreasonably interfere with TCRY's current or planned railroad operations in the affirmative.

TCRY therefore requests that the Board find that the Cities' use of state condemnation law to obtain through eminent domain a new at-grade crossing over TCRY's sole parallel main and siding is preempted.

RESPECTFULLY SUBMITTED this 30th day of September, 2015.

PAINE HAMBLEN LLP

By: 

William C. Schroeder, WSBA No. 41986
Anne K. Schroeder, WSBA No. 47952
717 W. Sprague Avenue, Suite 1200
Spokane, WA 99201-3505
(509) 455-6000

CERTIFICATE OF SERVICE

I hereby certify that on this 30TH day of September, 2015, I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

Heather Kintzley
Richland City Attorney
975 George Washington Way
PO Box 190 MS-07
Richland, WA 99352

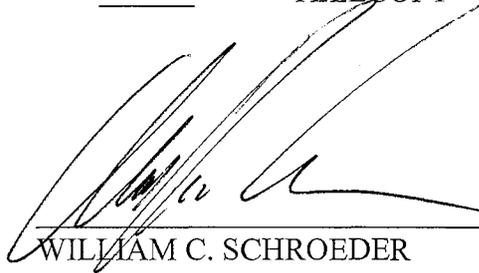
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WILLIAM C. SCHROEDER

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Before the
SURFACE TRANSPORTATION BOARD

TRI-CITY RAILROAD)	
COMPANY, LLC, a Washington)	
limited liability company,	)	SUR-REBUTTAL VERIFIED
	)	STATEMENT OF FOSTER
Petitioner,	)	PETERSON RE: PETITION FOR
	)	DECLARATORY ORDER
vs.)	
)	
THE CITY OF KENNEWICK, of)	
the State of Washington, located in)	
Benton County, Washington; THE)	
CITY OF RICHLAND, of the State)	
of Washington, located in Benton)	
County, Washington,)	
)	
Respondents.)	
_____)	

FOSTER PETERSON, being first duly sworn on oath, does hereby depose and state:

1. Since this is my second verified statement on this matter, I will not repeat testimony that does not address new material, but rather rely upon my previous verified statement.

2. I note that the supplemental verified statements presented by the Cities contain argument that I have ‘not rebutted’ various paragraphs in their statements. I stand by my previous verified statement.

PROFESSIONAL EXPERIENCE

3. I have been in the railroad industry for more than 25 years, as I described in my previous verified statement. My previous statement specifically describes my experience with and role in implementing General Code of Operating Rules (“GCOR”) on the Railroads I manage, acting as a locomotive engineer and conductor while following GCOR and in training employees on GCOR as well as the Canadian equivalent, CROR (Canada Rail Operations Rules). As previously described, I am a partner at Full Service Railroad Consulting Inc. In my capacity as an expert on railroad operations, particularly GCOR, I have offered trial testimony in 61 cases since 2002, and offered deposition testimony in 189 cases since 1997. **Exhibit 1** is my trial and deposition case list. A large portion of my clients for railroad operations expert consultancy are the Class I railroads that utilize the GCOR (Union Pacific, BNSF, Canadian Pacific, and Kansas City Southern) as well as many Class II regional and Class III shortline railroads.

4. Particularly with respect to the GCOR issues, I offer the following to rebut paragraphs 11, 16, 22, 26 of Rogalsky’s supplemental verified statement; paragraphs 3, 4, 5, 6, 7, 17, 22, 25 of Jeffers supplemental verified statement; and paragraphs 3, 4, 8, 25, 32, and 34 of Grabler supplemental verified statement.

5. In addition to not disclosing railroad operational expertise, Mr. Rogalsky, Mr. Jeffers, and Ms. Grabler do not disclose any expertise in the

interpretation or railroad operational application of the GCOR. Nonetheless, they each opine that the requirements of GCOR 6.32.4 and 6.32.6 are 'permissive'. Therefore, because under their interpretation any railroad can choose not to follow GCOR 6.32.4 and 6.32.6 since they are 'permissive', they conclude the application of those rules to the proposed crossing will not interfere with railroad operations. Implicit in their supplemental verified statements is that if their interpretation of the applicable rules within the General Code of Operating Rules is incorrect, the proposed crossing would unreasonably interfere with railroad operations.

6. The GCOR are not guidelines nor are they 'permissive'. GCOR, by definition, are rules. Many of these rules are required by Federal Railroad Administration ("FRA") regulations. Railroads which adopt the GCOR must follow those rules.

7. As I stated previously, I have been trained and tested on the GCOR. I also have trained and tested railroad employees on the GCOR. The "when practical" language GCOR 6.32.4 only comes into play when there is a specific operational or physical impediment that prevents a railroad from spotting cars at least 250 feet from a crossing. There is no such operational impediment or obstacle applicable to the proposed crossing. Given this fact, in my opinion, if the crossing is allowed and TCRY must leave cars within 250 feet of the crossing, it can be accused of having violated GCOR 6.32.4. Such an alleged violation would

expose TCRY to liability, and potentially expose railroad workers and motorists to danger since GCOR 6.32.4 is a safety rule.

8. Ms. Grabler suggests in ¶ 8 of her supplemental verified statement that the fact that there are 'Railroad Automatic Warning Devices' at a crossing allows a railroad to spot within 250 feet of a crossing. I disagree with Ms. Grabler's interpretation of GCOR 6.32.4 in that regard. I know of no railroad that follows that interpretation.

9. There are several reasons why it can be dangerous for railroads to spot cars within 250 feet of an at-grade crossing. The main reasons are the reduction in visibility down the adjacent track and encouragement of signal disregard. While it is not legal nor prudent to do so, motorists often proceed across a crossing with active warning devices even though a train is approaching and the warning devices are affirmatively activated when railcars are spotted near an at-grade crossing; the presence of those railcars at times leads motorists to believe that the spotted railcars themselves activated the signals, rather than the approaching train. The Cities' experts' opinions concerning and apparently approving of railcars being spotted on top of or too near an at-grade crossing is inconsistent with my more than 25 years' experience of railroad operations, management, and expert consultancy. I would not advise any of the railroads I manage, nor any of the railroads which retain me in my expert capacity, to instruct or permit their employees to regularly engage in switching and spotting in

proximity to an at-grade crossing (and to regularly violate GCOR 6.32.4) as described by the Cities' experts.

10. With respect to GCOR 6.32.6, the "when practical" language only comes into play when there is a specific operational or physical impediment that requires the train to block the crossing for more than ten minutes. There is no such operational impediment or obstacle applicable to the proposed crossing.

11. It is common for a state or federal regulator, or local law enforcement, to order rail crews to park cars away from crossings, and to not block crossings for any more than a short time. The testimony offered by the Cities' traffic engineers I believe to be inconsistent about how railroad operations work and how railroad litigation works in this country. To put it another way, when a local, state, or federal authority is at a crossing demanding that a crew move the railcars or issuing citations to the railroad for blocking the crossing, the opinion of the Cities' traffic engineers will not dissuade the authorities. In my more than 25 years of experience, I know that when at-grade crossings are blocked, people and companies often start making phone calls to complain, and upon pressure from authorities, the railroad has little choice but to yield use of any area within 250 of the crossing on either side.

SUPPLEMENTAL VERIFIED STATEMENTS

12. I offer the following rebuttal to **Paragraph 16** of the Rogalsky supplemental verified statement and **Paragraphs 4-7** of the Jeffers supplemental verified statement:

Response: From an operations perspective, GCOR 6.32.4 and 6.32.6 are only permissive in theory. The “when practical” language presumes that equipment is left standing 250 feet away from a crossing where there is an adjacent track unless there is a specific operational reason that it may not be done. The reality of railroad litigation is that in cases of a train vs. motor vehicle or pedestrian collisions at a grade crossing where equipment is left standing within 250 feet of the crossing a railroad can expect allegations of negligence by the other party and the potential exposure to penalties in these civil actions, in spite of having complied with the “when practical” language and having violated no Federal law. I additionally have personal experience with a regulator not allowing a railroad to park equipment within 250 feet of a crossing. At one of the railroads that I manage in Tennessee, railcars would often be stored less than 250 feet away on both sides of a grade crossing (with lights and gates) with a single track (GCOR 6.32.4 is specifically for a crossing with two or more adjacent tracks) in an industrial park. The Tennessee Department of Transportation, during an unannounced inspection, demanded that railcars be moved so that they were no closer than 250 feet to the crossing despite of our explanation of the rule, the fact

that the single track was blocked on both sides and a train could not even operate across the crossing with the cars in that position, and that there was no adjacent track over which a train could operate at the crossing.

13. **Paragraph 17** of the Rogalsky supplemental verified statement argues:

TCRY's arguments about the operational impact of the Crossing ignore the fact that a simple engineering solution is available that could more than mitigate the claimed impact of the Crossing on the siding track. More than 2,000 feet of unobstructed Port of Benton right of way lies immediately to the west of the existing siding. TCRY has refused to consider this engineering solution, instead litigating the impacts of the crossing on the existing track.

Response: By Mr. Rogalsky's proposal that the siding at issue be relocated to a different place by constructing a new parallel siding, I think Mr. Rogalsky agrees with me. My previous statement described the effects that the proposed crossing would have on the use of the existing siding. Because of the proposed placement of the crossing, the southern approximately 600 feet of the 1900 foot siding, and the southern switch, are rendered mostly useless from a railroad operations perspective as it pertains to the current and planned operations of TCRY. Due to the significant impact the proposed crossing will have on TCRY's operations, Mr. Rogalsky is correct that TCRY's operations would then need to be relocated. In my professional opinion, the fact that the siding would need to be relocated in order to not significantly impact TCRY's operations is

itself a demonstration that the proposed crossing would unreasonably interfere with TCRY's planned and future railroad operations.

14. I offer the following rebuttal to **Paragraphs 32 and 34** of the Grabler Supplemental verified statement:

Response: GCOR 6.32.4 generally disallows spotting cars within 250 feet of a crossing where there are two or more adjacent tracks unless there is an operational reason to do so. There are several reasons why it can be dangerous for railroads to spot cars within 250 feet of an at-grade crossing. The main reasons are the reduction in visibility down the adjacent track and encouragement of signal disregard. While it is not legal nor prudent to do so, motorists often proceed across a crossing with active warning devices even though a train is approaching and the warning devices are affirmatively activated when railcars are spotted near an at-grade crossing; the presence of those railcars at times leads motorists to believe that the spotted railcars themselves activated the signals, rather than the approaching train. The Cities' experts' opinions concerning and apparently approving of railcars being spotted on top of or too near an at-grade crossing is inconsistent with my more than 25 years' experience of railroad operations, management, and expert consultancy. I would not advise any of the railroads I manage, nor any of the railroads which retain me in my expert capacity, to instruct or permit their employees to regularly engage in switching and spotting in

proximity to an at-grade crossing (and to regularly violate GCOR 6.32.4) as described by the Cities' experts.

15. I offer the following rebuttal to **Paragraph 33** of the Grabler supplemental verified statement:

Response: A hierarchy exists for the safety of crossings. From the perspective of operations and safety, 'no crossing' is better than 'a crossing'- the safest crossing is the one that does not exist. If you have a crossing, then a grade-separated crossing is safer than an at-grade crossing. If you must have an at-grade crossing, then active warnings are safer than passive warnings.

Reviewing the Cities' materials, when they talk about crossing safety, I think they are comparing at-grade crossings with active warnings to at-grade crossings with passive warnings. And, generally, if you already have an at-grade crossing, active warning devices provide more information to users of the crossing than passive signage.

However, if no at-grade crossing currently exists, in my experience, any new at-grade crossing you install is inherently less safe than not having a crossing at all. Establishing a new at-grade crossing creates a potential new safety problem; installing active warnings and gates only mitigates the safety problems the new crossing introduces.

Ms. Grabler states that "Foster Peterson appears to take the unprecedented position that STB must extend jurisdiction anytime there is a 'possibility' for

train/motor vehicle interaction,” and she cites ¶18 p. 23 of my rebuttal verified statement. I reproduce below that paragraph, which speaks for itself.

Paragraph 20 of the Grabler verified statement provides:

Statement: “The Automatic Constant Warning Devices included in the Crossing’s safety features give a constant warning time to all motorists using an at-grade highway-railroad crossing equipped with gates and lights. The CWT is defined by the Federal Highway Administration as a warning time of not less than 20 seconds. The railroads will typically use approximately 30-35 seconds of CWT, which will give a CWT whether the train is traveling at 5 mph or 35 mph”

Rebuttal: I have been asked to offer my professional opinions, from the perspective of a railroad operations expert, as to whether the proposed at grade crossing will unreasonably interfere with current or planned railroad operations. Paragraph 20 of the Grabler verified statement does not appear to address a railroad operations issue.

Currently, no at-grade crossing exists at this location. Not having an at-grade crossing is, from a railroad operations standpoint, safer than installing a new at-grade crossing given that the separation of track and roadway removes the possibility of train / motor vehicle interaction. Describing establishing a new at-grade crossing, and then describing the warning systems protecting the crossing, only describes mitigating the safety risk you create by installing the new crossing in the first place. I agree with the quotation from the UTC in TCRY’s Petition at page 20, that “the benefits to public safety alleged by the Cities are too slight on their own to support the [proposed crossing], even though the inherent risks are mitigated to a large extent by the project design.”

As I’ve stated above, regardless of the warning systems which accompany this proposed crossing, the establishment of the crossing itself is exclusive of use of that location for car storage, and for practical car switching

I further note that in my railroad operations experience, it is unusual to have an at-grade crossing across a main

track with a parallel siding of this size, simply because of the significant impact the proximity of an at grade crossing to a switch and siding has on operations. Installation of gates and lights at an at-grade crossing does not reduce the inherent interference on railroad operations presented by the presence of the crossing itself. In my years of railroading experience, I know of many instances of error and equipment failure which have resulted in injuries and fatalities to railroad crew and motorists at at-grade crossings equipped with gates and lights. From an operations perspective, it is preferred to close at-grade crossings or separate the grade, rather than to open new at-grade crossings.

STATE OF GEORGIA)

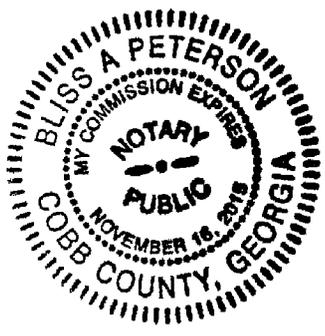
County of COBB) : ss.

Foster Peterson being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted there are true and that the same are true as stated.

[Signature]
FOSTER PETERSON

SUBSCRIBED AND SWORN to before me this 30th day of September, 2015, by FOSTER PETERSON.

[Signature]
Notary Public in and for the State of Georgia, residing at Cobb County
My Commission Expires: 11/16/2015



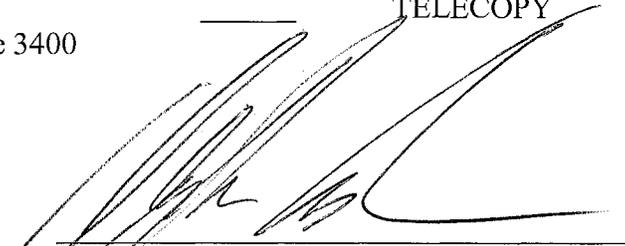
CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 2015, I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

Heather Kintzley	<u> X </u>	U.S. MAIL
Richland City Attorney	<u> X </u>	ELECTRONIC MAIL
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P. Stephen DiJulio	<u> X </u>	U.S. MAIL
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Stephanie G. Weir	_____	HAND DELIVERED
Foster Pepper PLLC	_____	OVERNIGHT MAIL
1111 Third Avenue, Suite 3400	_____	TELECOPY
Seattle, WA 98101		



WILLIAM C. SCHROEDER

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EXHIBIT 1



FULL SERVICE RAILROAD CONSULTING, INC.

Testimony at Trial and Deposition of Foster J. Peterson As of August, 2015

Trial Testimony

- Feaster v. CSX Transportation, Inc., Civil Action No. 10,913-CV in the Circuit Court for the District of Tennessee in the 12th Judicial District, Franklin County, 11/02
- Torres vs. Union Pacific Railroad Company and Rodney S. Wilson, Cause No. 2003CI08222 in the District Court of Bexar County, TX, 7/04
- The Burlington Northern Santa Fe Railway Company vs. ABC-NACO, TTX Company and Norfolk Southern Railway, No. 02 L 8180 in the Circuit Court of Cook County, Illinois, County Department, Law Division, 1/06
- Antonio Arellano v. Burlington Northern and Santa Fe Railway Company, a Foreign Corporation, and Harsco Track Technologies, a Division of Harsco Corporation, a Foreign Corporation, Case No. 2004 CV 9754 in the District Court for the City and County of Denver, 3/06
- Andrew H. Blackburn vs. CSX Transportation, Inc., No. 03C1016 in the Circuit Court for Davidson County, Tennessee at Nashville, 3/06
- Javorsky, Administrator, Etc., vs. National Railroad Passenger Corp., et al., Case No. 04-CV-0401 in the Wayne County, Ohio Common Pleas Court, 5/06
- National Railroad Passenger Corporation vs. Hopson Brothers Grain Company, Inc. vs. BNSF Railway Company, Civil Action No. W05CA012 in the United States District Court for the Western District of Texas, Waco Division, 6/06
- Gary Pierce vs. Chicago Rail Link, LLC, CSX Transportation, Inc., CSX Intermodal, Inc. and CSX Intermodal Terminals, Inc. No. 03 C 7524 in the United States District Court, Northern District of Illinois, Eastern Division, 7/06
- Olaniyan vs. CSX Transportation, et al., No: 04-CV-5827 in the United States District Court for the Northern District of Illinois, Eastern Division, 7/06
- Ave Clark vs. Long Island Railroad, New York and Atlantic Railway, et al., Ind. No. 2565-05 in the Supreme Court, State of New York, County of Queens: Civil Term, Part 10, 10/06
- Reginald Booker vs. CSX Transportation, Inc., Case No. 1:04-cv-646 in the United States District Court for the Western District of Michigan, 1/07
- Veit vs. BNSF Railway, No. 03-2-02056-3 in the Superior Court for the State of Washington in and for Whatcom County, 3/07
- Brooks vs. Illinois Central Railroad Company, et al., Case No. 02 L 12721 in the Circuit Court of Cook County, Illinois, County Department – Law Division, 5/07

FULL SERVICE RAILROAD CONSULTING, INC.

- Shannon Thornton and Michael Rudisail vs. CSX Transportation, Inc., et al., Civil Action File No.: 02-V-99 in the United States District Court for the Southern District of Georgia, Waycross, Georgia, 7/07
- BNSF Mt. Vernon – Hickox Rd. Crossing Closure Hearing, 1/08
- Jaime Botello vs. Illinois Central Railroad Company, et al., No. 05 L 000602 in the Circuit Court of DuPage County, Illinois, 18th Judicial Circuit, 1/08
- Kenneth R. Dellos vs. Burlington Northern Santa Fe Railway, Cause No. DV 06-0774 in the Montana Thirteenth Judicial Court, Yellowstone County, 4/08
- Finis Henry, et al. vs. BNSF Railway, et al., Cause No. 2006-598 in the District Court of Rusk County, Texas, 4th Judicial District, 5/08
- Eric Lacy vs. BNSF Railway Company, Case No.: 07CEG00339 MWS in the Superior Court of the State of California for the County of Fresno, 5/08
- Sandra C. Butler, et al. vs. Illinois Central Railroad Company, et al., No. C536236 in the Nineteenth Judicial District court, Parish of East Baton Rouge, State of Louisiana, 1/09
- BNSF Railway Company vs. Lafarge Southwest, et al., No. CIV-06-1076 MCA/LFG in the United States District Court for the District of New Mexico, 3/09
- Tamara Lee Gradert vs. Union Pacific Railroad Company, Burlington Northern Santa Fe Railway Company and Monte R. Sims, No. 2004-67031 in the District Court of Harris County, Texas, 152nd Judicial District, 3/09
- Sylvester Weaver vs. BNSF Railway Company, No. C07-00524 in the Superior Court of California in and for the County of Contra Costa, 5/09
- Young vs. Illinois Central Railroad Company and Fred Herndon, Civil Action No. 2006-0129 in the Circuit Court of Holmes County, Mississippi, 10/09
- Larry L. Koger vs. Norfolk Southern Railway Company, Civil Action No. 1:08-0909 in the United States District Court for the Southern District of West Virginia at Bluefield, 11/09
- Robert Hamilton and Karen Hamilton vs. BNSF Railway Company, No. 05-CV-1455 in the District Court of Galveston County, Texas, 56th Judicial District, 12/09
- Joseph Jarreau vs. BNSF Railway Company, Cause No. 343-229460-08 in the District Court of Tarrant County, Texas, 344th Judicial District, 1/10
- Andrew Schulte vs. Iowa Interstate Railroad, No. 07 L 82 in the Circuit Court for the 14th Judicial Circuit, Rock Island County, Illinois, 3/10
- Terry Michael Sands, Jr., vs. Canadian National/Illinois Central Railroad, Case No. CT-0005250-07 in the Circuit Court of Shelby County, Tennessee for the Thirtieth Judicial District at Memphis, 9/10
- Gary Kent Taylor vs. BNSF Railroad, No. 348-232444-08 in the District Court of Tarrant County, Texas, 348th Judicial District, 9/10
- Norman T. Wolf vs. CSX and Chicago Rail Link, No. 06 L 9925 in the Circuit Court of Cook County, Illinois, County Department –Law Division, 10/10
- Earl E. Anderson vs. CSX Transportation, Civil Action No. 04-27254 CA 24 in the Circuit Court, Civil Division, Judicial Circuit, In and For Miami-Dade County, Florida, 10/10

FULL SERVICE RAILROAD CONSULTING, INC.

- Michele Fells, et al, vs. BNSF Railway Company, et al., Case No. 09CV104 in the District Court of Sumner County, Kansas, 3/11
- Small, et al. vs. BNSF Railway Company, No. 30-2009 00325206 in the Superior Court of the State of California for the County of Orange, 8/11
- John L. Brown vs. National Railroad Passenger Corporation, Civil Action No. 3:08-CV-559-TSL-JCS in the United States District Court for the Southern District of Mississippi, Jackson Division, 8/11
- Miranda Farris vs. BNSF Railway Company and Sean Collins, No. 07WR-CV00467 in the Circuit Court of Wright County, Missouri, Division One, 8/11
- Estate of Herschel Greg Fowler, et al. vs. BNSF Railway Company, et al., No. LALA 104405 in the Iowa District Court for Wapello County, 9/11
- Kenneth Campbell , Administrator of the Estate of Jeffrey Alan Campbell vs. Kentucky Employer's Mutual Insurance, Intervening Plaintiff, vs. CSX Transportation, Inc., Civil Action No. 07-CI-00449 in the Commonwealth of Kentucky, 27th Judicial Court, Knox Circuit Court, Division No. 1, 2/12
- Heidi Deveney vs. BNSF Railway Corporation, No. 141-244470-10 in the District Court of Tarrant County, Texas, 141st Judicial District, 3/12
- Christopher M. Veldhuizen vs. Illinois Central Railroad Company, et al., No. 07-MS-0022368 in the Circuit Court of Cook County, Illinois, Fifth Municipal District, 3/12
- Wally Kawasaki vs. BNSF Railway Company, No. 1011-15970 in the Circuit Court of the State of Oregon for the County of Multnomah, 4/12
- Griffin vs. Union Pacific Railroad Company, et al., Cause No. 2010-C108523 in the District of Court of Bexar County, Texas, 407th Judicial District, 10/12
- Robert Kevin Spragg vs. The Burlington Northern and Santa Fe Railway Company, No. CT-002454-10 in the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis, 11/12
- Thomas Middleton vs. Burlington Northern and Santa Fe Railway Company, No. 39-2009-00213965 in the Superior Court for the State of California in and for the County of San Joaquin, 2/13
- Laura Seiden and Joseph Ferriero vs. New Jersey Transit, et al., Docket No. MID-L-4792-09 in the Superior Court of New Jersey, Law Division-Middlesex County, 3/13
- Dale W. Black vs. BNSF Railway Company, et al., Case No. CV2008-022738 in the Superior Court for the State of Arizona in and for Maricopa County, 4/13
- Nye vs. Burlington Northern and Santa Fe Railway Company, et al., Case No. CJ-2009-743 in the District Court in and for Pontotoc County, State of Oklahoma, 12/13
- Roger Wogstad vs. Soo Line Railroad Company, Court File No. 27-CV-13-2643 in the State of Minnesota, Hennepin County District Court, Fourth Judicial District, 1/14
- Sean Ditton vs. BNSF Railway Company, Case No. CV12-6932-SVW in the United States District Court, Central District of California, 1/14
- Christopher M. Soule vs. BNSF Railway Company, Cause No. CI 11-6280 in the District Court of Douglas County, Nebraska, 3/14
- Stan Kingsley and Timothy Presley vs. BNSF Railway Company, No. 0931-CV18150 in the Circuit Court of Greene County, State of Missouri, 3/14

- Chad Hyman vs. Union Pacific Railroad Company, Cause No. 11SL-CC01865 in the Circuit Court of the County of St. Louis, State of Missouri, 4/14
- Steve B. Glenn vs. Union Pacific Railroad Company, et al., Civil Action No. C-04-434-J in the District Court of the Third Judicial District Within and For Sweetwater County, Wyoming, 4/14
- Shan Martineau vs. BNSF Railway Company, File No. 69DU-CV-1999 in the District Court of St. Louis County, Minnesota, Sixth Judicial District, 4/14
- Thomas L. Henniger vs. CSX Transportation, Inc., NO. 12-CI-01879 in the Circuit Court of Jefferson, Kentucky, Division Six, 7/14
- Young vs. Illinois Central Railroad Company and Fred Herndon, Civil Action No. 2006-0129 in the Circuit Court of Holmes County, Mississippi, 10/14 (Re-Trial)
- BNSF Railway Company vs. Yakima County and Yakima Nation, Docket No. TR-140382 and TR-140383 Before the Washington State Utilities and Transportation Commission, 4/15
- Steven Winkler vs. BNSF Railway Company, No. 12-L-23 in the Circuit Court of the Ninth Judicial Circuit, Knox County, Illinois, 4/15
- Lungaro vs. Norfolk Southern Railway Company, Civil Action File No.: 13-C-02708-2 in the State Court of Gwinnett County, Georgia, 8/15
- Eric L. Burton vs. CSX Transportation, Inc., Case No.. 2013-CP-21-2478 in the Court of Common Pleas, County of Florence, State of South Carolina, 8/15
- Kevin M. Winder vs. Union Pacific Railroad Company, Case No. CI13-8161 in the District Court of Douglas County, Nebraska, 8/15

Deposition Testimony

- Maxson vs. WATCO: Style Unknown, 12/97
- Brown vs. Port Terminal Railroad Assoc.: No. 55,896 in the District Court of Liberty County, TX, 5/99
McNew vs. Port Terminal Railroad Assoc.: No.98-05-01728 in the District Court of Montgomery County, Texas, 5/99
Wilkerson vs. Port Terminal Railroad Assoc.: No. 98-21259 in the District Court of Harris County, TX, 5/99
- Craig vs. Union Pacific: Style unknown, 11/99
- Beyerle vs. I&M Rail Link: Case No. 399-CV-10079, US District Court, Southern District of Illinois, 3/00
- Korpi vs. Railroad Friction Products
Twohig vs. Railroad Friction Products: Civil Action File No. 98-1684 and 98-1683, US District Court for the District of Minnesota, Fifth Division, 4/00
- SIRC vs. BASF: Civil Action File No. 97-L-319, Third Judicial Circuit, Madison County, Illinois, 10/00
- New England Central Railroad vs. M.G. Metal and Commodity Corp.: Docket S 50-00Fc, State of Vermont, Franklin Superior Court, 4/01
- Feaster v. CSX Transportation, Inc., Civil Action No. 10,913-CV in the Circuit Court for the District of Tennessee in the 12th Judicial District, Franklin County, 10/02

FULL SERVICE RAILROAD CONSULTING, INC.

- Leingang vs. Burlington Northern Santa Fe Railway Company, No. 348-180898-99 in the District Court of Tarrant County, Texas, 348th Judicial District, 11/02
- Williams v. James Gardner and CSXT, Civil Action No. I014613G in the State Court of Chatham County, Georgia, 3/03
- Joseph R. and Debra Miciotto v. Michael F. Brown, et al., USDC, E.D. La. No. 02-1486 "A", 7/03
- Emmie Hight vs. CSX Transportation, Inc., Civil Action File No. 01-A-83376-5 in the Superior Court of DeKalb, County, Georgia, 8/03
- John Huey v. Norfolk Southern, et al., Civil District Court, Parish of Orleans, State of Louisiana, No. 97-5047, 10/03
- Larry Hill v. The Burlington Northern and Santa Fe Railway Company, et al., Consolidated Case No. 4:03CV3195 in the United States District Court for the District of Nebraska, 12/03
- Union Pacific Railroad Company vs. Inchcape Shipping Service, Inc., et al., Cause No. 4:02CV01695 CEJ in the United States District Court for the Eastern District of Missouri, Eastern Division, 12/03
- Charles Dale Green vs. De Queen and Eastern Railroad, et al., Cause No. CIV 2001-18 in the Circuit Court of Howard County, Arkansas, 1/04
- Torres vs. Union Pacific Railroad Company and Rodney S. Wilson, Cause No. 2003CI08222 in the District Court of Bexar County, TX, 4/04
- Jerome J. Smith v. Burlington Northern and Santa Fe Railway Company, Case No. 04CV2289 in the District Court, City and County of Denver, State of Colorado, 11/04
- NYK Line and NYK Line (North America) Inc. vs. The Burlington Northern and Santa Fe Railway Company, No. CV 03-6523 GAF in the United States District Court, Central District of California, 1/05
- Gary Pierce vs. Chicago Rail Link, LLC, CSX Transportation, Inc., CSX Intermodal, Inc. and CSX Intermodal Terminals, Inc. No. 03 C 7524 in the United States District Court, Northern District of Illinois, Eastern Division, 3/05
- Allen L. Hill vs. The Burlington Northern and Santa Fe Railway Company, Cause No. 236-199918-03 in the District Court of Tarrant County, Texas, 236th Judicial Court, 5/05
- Daniel B. Chapp vs. The Burlington Northern Santa Fe Railway Company, Case No. 4:04-CV-3021 in the United States District Court for the District of Nebraska, 5/05
- Rodney Frazier and O.C. Moore vs. East Coast Live Stock Express, Inc. and the Kansas City Southern Railway Company, Cause No. 2-04CV-263 in the United States District Court for the Eastern District of Texas, Marshall Division, 6/05
- Kathryn L. Kornblum vs. CSX Transportation, Inc., Case No. 3:03-CV-57RLY-WGH in the United States District Court, Southern District of Indiana, Evansville Division, 7/05
- Illinois Central Railroad Company vs. JP Trucking, et al, Civil Action No. 04-0432 c/w 04-2582 in the United States District Court, Eastern District of Louisiana, 8/05
- The Burlington Northern Santa Fe Railway Company vs. ABC-NACO, TTX Company and Norfolk Southern Railway, No. 02 L 8180 in the Circuit Court of Cook County, Illinois, County Department, Law Division, 9/05

FULL SERVICE RAILROAD CONSULTING, INC.

- Southern California Regional Rail Authority v. Wysocki, Vivendi Universal, et al., Case No. EC 036018 (Lead Case) in the Superior Court of the State of California, County of Los Angeles, 10/05 (Produced as Person Most Knowledgeable regarding various matters)
- Boyd vs. Georgia Central Railway, Civil Action No. 2004-0398-S in the Circuit Court of Laurens County, State of Georgia, 11/05
- CSX Transportation, Inc. vs. Exxon/Mobil Oil Corporation, et al., Case No. 3:04CV7308 in the United States District Court for the Northern District of Ohio, Western Division, 11/05
- Javorsky, Administrator, Etc., vs. National Railroad Passenger Corp., et. al., Case No. 04-CV-0401 in the Wayne County, Ohio Common Pleas Court, 12/05
- Antonio Arellano v. Burlington Northern and Santa Fe Railway Company, a Foreign Corporation, and Harsco Track Technologies, a Division of Harsco Corporation, a Foreign Corporation, Case No. 2004 CV 9754 in the District Court for the City and County of Denver, 12/05
- Reginald Booker vs. CSX Transportation, Inc., Case No. 1:04-cv-646 in the United States District Court for the Western District of Michigan, 12/05
- Danny Tolliver vs. Burlington Northern Santa Fe Railway Company; Kansas City Southern Railway Company, et al., No. 342-207821-04 on the District Court of Tarrant County, Texas, 342nd Judicial District, 1/06
- The Burlington Northern Santa Fe Railway Company vs. ABC-NACO, TTX Company and Norfolk Southern Railway, No. 02 L 8180 in the Circuit Court of Cook County, Illinois, County Department, Law Division, Supplemental Deposition 1/06
- Andrew H. Blackburn vs. CSX Transportation, Inc., No. 03C1016 in the Circuit Court for Davidson County, Tennessee at Nashville, 2/06
- Christopher Martin vs. The BNSF Railway Company, et al., No. 236-203507-03 in the District Court of Tarrant County, Texas, 236th Judicial District, 3/06
- Union Pacific Railroad Company vs. NACME Steel Processing, et al., No. 03 CH 13971 in the Circuit Court of Cook County, Illinois, 3/06
- Anthony Schirmer vs. I&M Rail Link, LLC, et al., Law No. LACV47640 in the Iowa District Court for Linn County, 4/06
- Joseph R. and Debra Miciotto v. Michael F. Brown, et al., USDC, E.D. La. No. 02-1486 "A", Trial Deposition, 6/06
- Stamper vs. Illinois Central Railroad Company, et al., No. 02 LK 158 in the Circuit Court for the 16th Judicial District, Jane County, Illinois, 6/06
- Brooks vs. Illinois Central Railroad Company, et al., Case No. 02 L 12721 in the Circuit Court of Cook County, Illinois, County Department – Law Division, 2/07
- Veit vs. BNSF Railway, No. 03-2-02056-3 in the Superior Court for the State of Washington in and for Whatcom County, 2/07
- L.C. Joiner vs. Amtrak et al., No. 3:06CV58-HTW-C in the United States District Court for the Southern District of Mississippi, Jackson Division, 3/07
- Cezar vs. BNSF Railway, et al., Cause No. B-0176429 in the District Court of Jefferson County, Texas, 60th Judicial District, 5/07

FULL SERVICE RAILROAD CONSULTING, INC.

- Rodney Shelton vs. Burlington Northern Santa Fe Railway Co., No. 04 L 011902 in the Circuit Court of Cook County, Illinois, County Department – Law Division, 6/07
- Bunkley vs. CSX Transportation, Inc., et al., Civil Action File No. 06A46436-2 in the State Court of Dekalb County, State of Georgia, 7/07
- Melton vs. BNSF Railway Company, Circuit Court No. CT-05244-06, Division VIII, in the Circuit Court of Tennessee For the Thirteenth Judicial Circuit in Shelby County, at Memphis, 8/07
- Jaime Botello vs. Illinois Central Railroad Company, et al., No. 05 L 000602 in the Circuit Court of DuPage County, Illinois, 18th Judicial Circuit, 8/07
- Leone vs. CSX Transportation, Inc., Civil No: 06-CV-389 in the United States District Court, Northern District of New York, 8/07
- Severiano Garcia, as Personal Representative For the Purpose of Bringing this Wrongful Death Action Arising from the Deaths of Francisco Holguin and Rosa Garcia de Holguin vs. Burlington Northern and Santa Fe Railway Company, et al. No. CV-2005-1728 in the Third Judicial District Court, County of Dona Ana, State of New Mexico, 8/07
- McBride, et al. vs. BNSF Railway, et al., Case No. 141-216581-06 In the 14th Judicial District Court In and For Tarrant County, Texas, 10/07
- Knoerzer vs. CSX Transportation, et al., Case No.: CV2005 0943 in the Court of Common please, Allen County, Ohio, 10/07
- Melton vs. BNSF Railway Company, Circuit Court No. CT-05244-06, Division VIII, in the Circuit Court of Tennessee For the Thirteenth Judicial Circuit in Shelby County, at Memphis, 10/07 (Volume II)
- Clayton vs. Union Pacific Railroad Company, et al, No. 2005-393 in the 33rd Judicial District Court, Parish of Allen, State of Louisiana, 10/07
- Sam Peregoy vs. Illinois Central Railroad Company, Civil Action File No. CT-000873-03 in the Circuit Court of Shelby County, Tennessee, in the Thirtieth Judicial District at Memphis, 11/07
- Lee Scott Hartson vs. Pacific and Arctic Railway & Navigation Co., d/b/a White Pass & Yukon Route Railroad, Case No. 1JU-07-486 CI in the Superior Court for the State of Alaska, First Judicial District at Juneau, 1/08
- William T. Kennedy, et al. vs. Union Pacific Railroad, et al., NO. C-2004-464-B in the 33rd Judicial District Court, Parish of Allen, State of Louisiana, 1/08
- Zambrano vs. CSX Transportation, et al., Docket No. HUD-L-6320-04 in the Superior Court of New Jersey, Law Division, Hudson County, 1/08
- King vs. South Carolina Central Railroad Company, et al., Civil Action No.: 06-CP-16-0282 in the Court of Common Pleas for the Fourth Judicial Circuit, State of South Carolina, County of Darlington, 2/08
- Marnie Hall, et al. vs. Canadian Pacific Railway, et al., Cause No. 84D06-0605-CT-4021 in the Vigo Superior Court, State of Indiana, 2006 Term, 2/08
- Kenneth R. Dellos vs. Burlington Northern Santa Fe Railway, Cause No. DV 06-0774 in the Montana Thirteenth Judicial Court, Yellowstone County, 2/08

FULL SERVICE RAILROAD CONSULTING, INC.

- Amber Burns vs. CSX Transportation, Inc., Civil Action No. 3:07-CV-68-CDL in the United States District Court, Middle District of Georgia, Athens Division, 2/08
- Eric Lacy vs. BNSF Railway Company, Case No.: 07CEG00339 MWS in the Superior Court of the State of California for the county of Fresno, 4/08
- Finis Henry, et al. vs. BNSF Railway, et al., Cause No. 2006-598 in the District Court of Rusk County, Texas, 4th Judicial District, 4/08
- Eric Lacy vs. BNSF Railway Company, Case No.: 07CEG00339 MWS in the Superior Court of the State of California for the county of Fresno, 4/08 (Continuation of deposition given earlier in 4/08)
- Jason and Lisa West vs. Texas North Western Railway, L.P., a/k/a Texas North Western Railway Company, Case No. DC-07-02470-B in the District Court of Dallas County, Texas, 44th Judicial District, 5/08
- BNSF Railway Company vs. Lafarge Southwest, et al., No. CIV-06-1076 MCA/LFG in the United States District Court for the District of New Mexico, 7/08
- Belynda K. Smith vs. BNSF Railway Company, No. CV2006-008476 in the Superior Court of State of Arizona in and Maricopa County, 9/08
- Edward Hurst vs. CSX Transportation, Inc., Case No. 3:07-0195 in the United States District Court, Middle District of Tennessee, Nashville Division, 10/08
- Richard McTague as Administrator of the Estate of Robert McTague v. Massachusetts Bay Commuter Railroad Company, LLC and CSX Transportation, Case No. 04-4627H in the Superior Court of the Commonwealth of Massachusetts, 10/08
- Doug Burchfield vs. CSX Transportation, Inc., et al., Civil Action File No.: 1:07-CV-1263(TWT) in the United States District court, Northern District of Georgia, Atlanta Division, 10/08
- Sandra C. Butler, et al. vs. Illinois Central Railroad Company, et al., No. C536236 in the Nineteenth Judicial District court, Parish of East Baton Rouge, State of Louisiana, 10/08
- Sylvester Weaver vs. BNSF Railway Company, No. C07-00524 in the Superior Court of California in and for the County of Contra Costa, 11/08
- Melton Samuels vs. CSX Transportation, Civil Action No. 1:08-CV-0223 in the United States District Court for the Northern District of Georgia, Atlanta Division, 12/08
- Jean Hanson, et al. vs. Illinois Railway, Inc., et al., No. 05-L-72 in the Circuit Court of the Thirteenth Judicial District, LaSalle County, Illinois, 12/08
- Patsy Freeman, et al. vs. CSX Transportation, Inc., No. 49982 in the Circuit Court of Tennessee for the Sixteenth Judicial District at Murfreesboro, Rutherford County, 12/08
- Tamara Lee Gradert vs. Union Pacific Railroad Company, Burlington Northern Santa Fe Railway Company and Monte R. Sims, No. 2004-67031 in the District Court of Harris County, Texas, 152nd Judicial District, 1/09
- Amanda McClellan vs. CSX Transportation, et al., Case No. 07-251-CA in the Circuit Court of the Second Judicial Circuit, In and For Jefferson County, Florida, 1/09
- Lorie Jean Rogers, et al. vs. Florida East Coast Railway, et al., Case No. 06-CA-014119-MB in the Fifteenth Judicial Circuit Court, In and For Palm Beach County, Florida, 3/09
- Gerald Hailey vs. BNSF Railway Company, et al., No. 07-1085 in the United States District Court for the Central District of Illinois, Peoria Division, 3/09

FULL SERVICE RAILROAD CONSULTING, INC.

- National Railroad Passenger Corporation, and CSX Transportation, Inc., vs. gateway Brokers, Inc., and R.G.S. Properties, Inc., Case No. 8:08-cv-201-T-33 TGW in the United States District Court for the Middle District of Florida, Tampa Division, 3/09
- Reher vs. Savage Transportation management, Inc., et al, Civil Action No. 08-CV-077J in the United States District Court for the District of Wyoming, 4/09
- James Paul Yanez vs. Burlington Northern and Santa Fe Railway Company, et al., No. 2006-3255 in the County Court at Law Number Three, El Paso County, Texas, 5/09
- Hamilton vs. BNSF Railway Company, Cause No. 05-CV-1455 in the District Court of Galveston County, Texas, 6/09
- Little, et al. vs. BNSF Railway Company, et al., Case No.: 05 L 008747 in the Circuit Court of Cook County, Illinois, County Department, Law Division, 6/09
- Carmen, et al. vs. CSX Transportation, Inc., et al., Case Nos.: CV-07-900061, 900072, 900101, 900102 in the Circuit Court of Chilton County, Alabama, 7/09
- Linda Stephans vs. CSX Transportation and Norfolk Southern Railway, File No. 1: 08-cv-468 in the United States District Court for the Western District of Michigan, 9/09
- Fernandez, et al. vs. BNSF Railway Company, et al., No. 153-228548-08 in the District Court of Tarrant County, Texas, 153rd Judicial District, 9/09
- Evans, et al. vs. Columbus and Greenville Railway Company, et al., Cause No.: CI2005-53 and Harris, et al. vs. Columbus and Greenville Railway Company, et al., Cause No.: CI2007-60 in the Circuit Court of Washington County, Mississippi, 9/09
- Christopher Robertson vs. Canadian National/Illinois Central Railroad Co., No. 84,498 in the 23rd Judicial Court, Parish of Ascension, State of Louisiana, 9/09
- John L. Brown vs. National Railroad Passenger Corporation, Civil Action No. 3:08-CV-559-TSL-JCS in the United States District Court for the Southern District of Mississippi, Jackson Division, 10/09
- Johnny W. Roberts vs. BNSF Railway Company, Cause No. 08SL-CC01878 in the Circuit Court of the County of St. Louis, State of Missouri, Division No. 15, 10/09
- Malcolm Ivy vs. Union Pacific Railroad Company, Case No. 07 CE CG 03234 DRF in the Superior Court of California, County of Fresno, 10/09
- Todd A. Damron, et al. vs. CSX Transportation, Inc, et al., Case No. 05-CV-2496 in the Court of Common Pleas, Montgomery County, Ohio, 11/09
- Joseph Jarreau vs. BNSF Railway Company, Cause No. 343-229460-08 in the District Court of Tarrant County, Texas, 344th Judicial District, 12/09
- Jack R. Lipp vs. BNSF Railway Company, Cause No. DV-08-1503 in the Montana Thirteenth Judicial Court, Yellowstone County, 1/10
- Andrew Schulte vs. Iowa Interstate Railroad, No. 07 L 82 in the Circuit Court for the 14th Judicial Circuit, Rock Island County, Illinois, 1/10
- Norman T. Wolf vs. CSX and Chicago Rail Link, No. 06 L 9925 in the Circuit Court of Cook County, Illinois, County Department –Law Division, 1/10
- Todd A. Damron, et al. vs. CSX Transportation, Inc, et al., Case No. 05-CV-2496 in the Court of Common Pleas, Montgomery County, Ohio, Supplemental Deposition, 1/10
- Martin vs. Union Pacific Railroad, et al., Case No. 2003 CV 710 in the District Court of Douglas County, Colorado, 2/10

FULL SERVICE RAILROAD CONSULTING, INC.

- Gary Kent Taylor vs. BNSF Railroad, No. 348-232444-08 in the District Court of Tarrant County, Texas, 348th Judicial District, 2/10
- Cesar Carrera and Daniel Compton vs. Artemio Vargas, Cesar Delgado, Sunline Commercial Carriers, Borderline Leasing, Sequa Corporation, Precoat Metals, Kansas City Southern Railway Company and Texas Mexican Railway Company, Cause No. 2008CVE000513D3 in the District Court of Webb County, Texas, 2/10
- Christopher M. Veldhuizen vs. Illinois Central Railroad Company, et al., No. 07-MS-0022368 in the Circuit Court of Cook County, Illinois, Fifth Municipal District, 3/10
- Jack G. Fox vs. WATCO Companies, Inc., et al., No. 09-CV-2078 JWL/JPO in the United States District Court for the District of Kansas, 4/10
- Walter Wiest, et al, vs. Union Pacific Railroad Company, et al., Cause No. 052-10516 in the Circuit Court of the Twenty-Second Judicial District, City of St. Louis, Missouri, 4/10
- Lucio Corral Rodriguez, etc. vs. County of Stanislaus, et al., Case No. I-0-CV-00856-OWW-GSA in the United States Court, Eastern District of California, Fresno Division, 7/10
- Bloodworth, et al. vs. Illinois Central Railroad Company, et al., Cause No. CV-2006-L-T2 in the Circuit Court of Tallahatchie County, Mississippi, Second Judicial District, 8/10
- Baker vs. BNSF Railway Company and Amtrak, Civil Action No. 3:09-CV-00787-B in the United States District Court for the Northern District of Texas, Dallas Division, 8/10
- Strand vs. City of Berwyn, BNSF Railway Company and Indiana Harbor Belt Railroad Company, No. 06 L 006429 in the Circuit Court of Cook County, Illinois, County Department, Law Division, 8/10
- Charles J. Byrne, et. al. vs. CSXT, Inc., et al., Case No. 3:09-CV-919 in the United States District Court for the Northern District of Ohio, Western Division, 9/10
- Earl E. Anderson vs. CSX Transportation, Civil Action No. 04-27254 CA 24 in the Circuit Court, Civil Division, Judicial Circuit, In and For Miami-Dade County, Florida, 9/10
- Edward W. Waugh vs. Northeast Illinois Regional Commuter Railroad Corporation d/b/a Metra, No. 07 L 009774 in the Circuit Court of Cook County, Illinois, County Department, Law Division, 9/10
- Damon L. Hubbard vs. Norfolk Southern Railway Company, Case No. 08-124246-NO in the State of Michigan Wayne County Circuit Court, 9/10
- Earl E. Anderson vs. CSX Transportation, Civil Action No. 04-27254 CA 24 in the Circuit Court, Civil Division, Judicial Circuit, In and For Miami-Dade County, Florida, Supplemental Deposition, 9/10
- Craig Williams vs. Union Pacific Railroad Company, et al., Case No. NC 052861 in the Superior Court of the State of California for the County of Los Angeles - South District, 10/10
- Brown, et al. vs. Southern California Regional Rail Authority dba Metrolink, et al., Case No. KC052988 in the Superior Court of the State of California for the County of Los Angeles, 10/10

FULL SERVICE RAILROAD CONSULTING, INC.

- Rachel Priebe vs. Northeast Illinois Regional Commuter Railroad Corporation d/b/a Metra, No. 06 L 291 in the Circuit Court of Cook County, Illinois, County Department-Law Division, 10/10
- Edwards vs. Norfolk Southern, et al., No. 08-L-440 in the Circuit Court of St. Clair County, Illinois, Twentieth Judicial District, 10/10
- Hans Harris vs. BNSF Railway Company, Cause No. 342-335434-09 in the District Court of Tarrant County, TX, 342nd Judicial District, 10/10
- Willie J. Monroe vs. Birmingham Southern Railroad Company, et al., C.A. No. CV 03-276 in the Circuit Court of Jefferson County, Alabama, Bessemer Division, 11/10
- Susan E. Holloway vs. CSX Transportation, Inc., Civil Action File No. 2009-EV-006569G in the State Court of Fulton County, Georgia, 12/10
- Kevin J. O'Connor vs. Illinois Central Railroad Company, et al., No. 08 L 2469 in the Circuit Court of Cook County, Illinois, County Department, Law Division, 12/10
- Settle vs. Norfolk Southern et al., Case No. CL79219 in the Circuit Court of the County of Prince William, Virginia, 1/11
- Eugene Anderson, et al. vs. Illinois Central Railroad Company, Civil Action No. 10-00153 in the United States District Court, Eastern District of Louisiana, 2/11
- Isiah Taylor vs. Port Bienville Railroad, et al., Cause No. 08-0359 in the Circuit Court of Hancock County, Mississippi, 3/11
- Cima vs. Providence and Worcester Railroad Company, CA No.: 3:10 CV 1428 WWE in the United States Court, District of Connecticut, 5/11
- Small, et al. vs. BNSF Railway Company, No. 30-2009 00325206 in the Superior Court of the State of California for the County of Orange, 6/11
- Tony E. Evans vs. Union Pacific Railroad Company, No. 2010-19731 on the District Court of Harris County, Texas, 164th Judicial District, 7/11
- Scott W. Seddon vs. BNSF Railway Company Case No. 1016 CV 12985 in the Circuit Court of Jackson County, Missouri at Kansas City, 7/11
- Kenneth Campbell , Administrator of the Estate of Jeffrey Alan Campbell vs. Kentucky Employer's Mutual Insurance, Intervening Plaintiff, vs. CSX Transportation, Inc., Civil Action No. 07-CI-00449 in the Commonwealth of Kentucky, 27th Judicial Court, Knox Circuit Court, Division No. 1, 8/11
- Miranda Farris vs. BNSF Railway Company and Sean Collins, No. 07WR-CV00467 in the Circuit Court of Wright County, Missouri, Division One, 8/11
- Michael Hughes vs. Canadian National Railway Company d/b/a Duluth, Winnipeg and Pacific Railway, Court File No. 10-cv-04058 in the US District Court, District of Minnesota, 9/11
- Estate of Herschel Greg Fowler, et al. vs. BNSF Railway Company, et al., No. LALA 104405 in the Iowa District Court for Wapello County, 9/11
- Eric Larson vs. Wisconsin Central, Ltd., Case No. 10-C-446 in the United States District Court, Eastern District of Wisconsin, Green Bay Div., 12/11
- Heidi Deveney vs. BNSF Railway Corporation, No. 141-244470-10 in the District Court of Tarrant County, Texas, 141st Judicial District, 1/12

- Turrubiarres vs. Chicago, Central & Pacific Railroad Company, et al., No. 07 LK 651 in the Circuit Court for the Sixteenth Judicial District, Kane County, Illinois, 1/12
- Griffin vs. Union Pacific Railroad Company, et al., Cause No. 2010-C108523 in the District of Court of Bexar County, Texas, 407th Judicial District, 1/12
- Michael Hernandez vs. Mittal Steel USA-Railways Inc., No. 2 10 CV 312 in the United States District Court, Northern District of Indiana, Hammond Division, 3/12
- Danny L. Grimes vs. BNSF Railway Company, Civil Action No. 1:11CV066-D-D in the United States District Court, Northern District of Mississippi, 5/12
- Sandra Rodriguez, as Personal Representative of the Estate of Cristina A. Rosa vs. CSX Transportation, et al., Case No.:6:10-cv-1687-Orl-31-DAB in the United States District Court for the Middle District of Florida, Orlando Division, 5/12
- Edward E. Beckwith v. Union Pacific Railroad, CI 10-9391524 in the District Court of Douglas County, Nebraska, 5/12
- Robert Kevin Spragg vs. The Burlington Northern and Santa Fe Railway Company, No. CT-002454-10 in the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis, 5/12
- Leonard George Campbell vs. TNW Corporation, No.11-62 in the District Court of Moore County, Texas, 69th Judicial District, 6/12
- Erik Weber vs. BNSF Railroad Company, No. 39-2009-00214627 in the Superior Court of the State of California for the County of San Joaquin, 7/12
- Janice Rudd, et al. vs. The Bay Line Railroad Company, LLC, et al., Case No. 09-6005-CA in the Circuit Court for the Fourteenth Judicial Circuit in and for Bay County, Florida, 8/12
- Aguilera, et al. vs. CSX Transportation, et al., Case No. 08-693 CA 31 in the Circuit Court of the 11th Judicial Circuit, In and For Miami-Dade County, Florida, 8/12
- James Dean vs. BNF Railway Company, et al., No. 11-2-18153-7 SEA in the Superior Court of the State of Washington in and For the County of King, 8/12
- Luis Palos vs. SCRRA d/b/a Metrolink, Case No. PC051298 in the Superior Court of the State of California, County of Los Angeles, 10/12
- Joshua N. Newton and Carissa Newton v. New England Central Railroad, Inc., et al., Case No.2:11-CV-263 in the United States District Court for the District of Vermont, 11/12
- Chad Hyman vs. Union Pacific Railroad Company, Cause No. 11SL-CC01865 in the Circuit Court of the County of St. Louis, State of Missouri, 11/12
- Scott vs. Puget Sound and Pacific Railway, NO. 11-2-02541-9 in the Superior Court for the State of Washington in and for the County of Thurston, 2/13
- Jon W. Scheinost vs. Iowa Interstate Railroad, Ltd., 04781 LACV 105941 in the Iowa District Court for Pottawattamie County, 5/13
- Christopher M. Soule vs. BNSF Railway Company, Cause No. CI 11-6280 in the District Court of Douglas County, Nebraska, 6/13
- Jermaine Dunbar and Judith Dunbar vs. National Railroad Passenger Corporation, et al., Civil Action No. 3-10-cv-03924 in the United States District Court, District of New Jersey, 7/13

FULL SERVICE RAILROAD CONSULTING, INC.

- Rogelio Segura, Norma Segura, et al., Plaintiffs vs. Union Pacific Railroad Company, et al., Defendants, No. 3:12-CV-00419-KC in the United States District Court for the Western District of Texas, El Paso Division, 8/13
- Tarvis Atkins vs. South Central Florida Express, No. 50-2012-CA-004115-MB in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, 8/13
- Daniel W. Sickler vs. BNSF Railway Company, et al., Case Number CV2011-012451 in the Superior Court of Arizona, Maricopa County, 8/13
- Estate of Alana Kerr vs. Southern California Regional Railroad Authority, Case No. RIC 1201851 in the Superior Court of the State of California for the County of Riverside, 8/13
- Ricky Bennett vs. BNSF Railway Company, Cause No. 348-258407-12 in the District Court of Tarrant County, Texas, 348th Judicial District, 9/13
- Eric Foeckler vs. Wisconsin & Southern Railroad, Civil Case No. 2:11-CV-0909-WEC in the United States District Court for the Eastern District of Wisconsin, 9/13
- Deboles vs. The National Railroad Passenger Corporation, dba Amtrak, et al., Case No.: 2:11-CV-00276 in the United States District Court for the District of Nevada, 9/13
- Benny Richardson v. Illinois Central Railroad Company, Case Number: 2010 L 001748 in the Circuit Court of Cook County, Illinois, County Department, Law Division, 10/13
- Raul D. Padilla vs. Norfolk Southern Railway, Case #: CL2011-344 in the Circuit Court of the City of Charlottesville, Virginia, 10/13
- Barnes vs. Hennen Restaurant Group, LLC. et al. (Norfolk Southern), Case No. 12-C-893 in the Circuit Court of Hamilton County, State of Tennessee, 11/13
- Stan Kingsley and Timothy Presley vs. BNSF Railway Company, No. 0931-CV18150 in the Circuit Court of Greene County, State of Missouri, 3/14
- Matadial vs. National Railroad Passenger Corporation, CSX Transportation and Sunrail, Case No: 6:13-cv-440-Orl-19DAB in the United States District court, Middle District of Florida, Orlando Division, 4/14
- Matthew Montgomery vs. The Kansas City Southern Railway Company, Civil Action No. 2-13-CV-00620-JRG in the United States District Court for the Eastern District of Texas, Marshall Division, 5/14
- M.B., an infant by parent and natural guardian Maureen Scott and Maureen Scott, Individually v. CSX Transportation, Civil No. 12-CV-00825 in the United States District Court, Northern District of New York, 5/14
- Jones vs. Union Pacific Railroad Company, et al., Case Number: 12-C-0771 in the United States District Court Northern District of Illinois, Eastern Division, 8/14
- Long vs. CSX Transportation, Case Number:1:13-cv-009900-ODE in the United States District Court for the Northern District of Georgia, Atlanta Division, 9/14
- Rayner vs. Union Pacific Railroad Company, Case No. CIV-13-46-M in the United States District Court for the Western District of Oklahoma, 10/14
- Trisha Stiles vs. Illinois Central Railroad Company, et al., No. C624510 in the 19th Judicial District Court, East Baton Rouge, State of Louisiana, 11/14

- Glen Armstrong, Sr. vs. BNSF Railway Company, Civil Action No. 1:12-cv-07962 in the United States District Court, Northern District of Illinois, 11/14
- Lungaro vs. Norfolk Southern Railway Company, Civil Action File No.: 13-C-02708-2 in the State Court of Gwinnett County, Georgia, and Wilkerson vs. Norfolk Southern Railway Company, Civil Action No. 13A47876-5 in the State Court of Dekalb County, Georgia, 12/14
- UP Midland Cases: Catherine Stouffer, et al., Plaintiffs and Angele Boivin, et al., Intervenors and Leonce and Lucette Boivin, Intervenors and Tiffanie Lubbers, et al., Intervenors and Richard Sanchez, et al., Intervenors vs. Union Pacific Railroad Company and Smith Industries, Inc., Defendants, Cause No. CV50285 in the District Court of Midland County, Texas, 4412st Judicial District, 12/14
- Scott Christian vs. Illinois Central Railroad Company, Civil Action No. 3:14cv57-HTW-LRA in the United States District Court for the Southern District of Mississippi, Northern Division, 1/15
- Siemer and Case vs. CSX Transportation and Renessenz, Case No. 16-2012-CA-010210 in the Circuit Court of the Fourth Judicial Circuit in a Duval County, Florida, 2/15
- Tommy Horn vs. BNSF Railway Company, Cause No. CC-13-00520-E in the County Court at Law Number Five of Dallas County, Texas, 3/15
- Stephen Price Edwards vs. Central of Georgia Railroad Company, C.A. No. 12-S-00552 in the Superior Court of Carrol County, State of Georgia, 4/15
- Christopher L. Murphy, et al. vs. Union Pacific Railroad Company, et al., No. 13-2-14479-4 SEA in the Superior Court of the State of Washington in and For the County of King, 4/15
- Kurt Ochsner vs. BNSF Railway Company, Case No. CJ-11-103 in the District Court of Pawnee County, State of Oklahoma, 5/15
- Benjamin King, et al. v. Union Pacific Railroad Co., et al., Case No. CI-09-1545 in the District Court of Muskogee County, State of Oklahoma, 5/15
- Jeffrey Young vs. Union Pacific Railroad Co., et al., No. BC5425493 in the Superior Court of the State of California for the County of Los Angeles – Central District, 6/15
- Pratt vs. National Railroad Passenger Corporation, et al., Case Number: 2:13-cv-00197 in the United States District Court, District of Vermont, 6/15
- Amber Hale (f/k/a Amber Koester) vs. BNSF Railway Company, et al., Case No. 09WE-CC00051-01 in the Circuit Court of Webster County, Missouri, 7/15
- Matthew Ziniti vs. New England Central Railroad, et al., Docket No. 260-6-14-Cncv in the Superior Court for the State of Vermont, Chittenden Unit, 7/15
- Toby Crosby v. The Indiana Rail Road Company, Case No. 14-974-NJR-SCW in the United States District Court, Southern District of Illinois, 7/15
- Douglas W. McGinn vs. Union Pacific Railroad Company, Case No. CI 14-829 in the District Court of Douglas County, Nebraska, 8/15
- Johns vs. CSX Transportation, Inc., Civil Action File No. 1:14-cv-00125(LJA) in the United States District Court for the Middle District of Georgia, Albany Division, 8/15

Before the
SURFACE TRANSPORTATION BOARD

TRI-CITY RAILROAD)	
COMPANY, LLC, a Washington)	
limited liability company,	)	SUR-REBUTTAL VERIFIED
	)	STATEMENT OF JOHN MILLER
Petitioner,	)	RE: PETITION FOR
	)	DECLARATORY ORDER
vs.)	
)	
THE CITY OF KENNEWICK, of)	
the State of Washington, located in)	
Benton County, Washington; THE)	
CITY OF RICHLAND, of the State)	
of Washington, located in Benton)	
County, Washington,)	
)	
Respondents.)	
_____)	

JOHN MILLER, being first duly sworn on oath, does hereby depose and state:

1. Since this is my third verified statement on this matter, I will not repeat my previous testimony. Instead, I will only address new material raised in the Cities' supplemental verified statements.

2. I note that the supplemental verified statements presented by the Cities contain argument that I have 'not rebutted' various paragraphs in their statements. I stand by my previous verified statements.

3. I offer this in rebuttal to **Paragraph 13** of the Rogalsky supplemental verified statement:

TCRY's arguments about the operational impact of the Crossing ignore the fact that a simple engineering solution is available that could more than mitigate the claimed impact of the Crossing on the siding track. More than 2,000 feet of unobstructed Port of Benton right of way lies immediately to the west of the existing siding. **TCRY has refused to consider this engineering solution, instead litigating the impacts of the crossing on the existing track.**

Response: I am puzzled by Mr. Rogalsky's reference to 2000 feet of unobstructed right-of-way. I do not know what he is referring to. It appears that this is the first time that he has raised this issue. I also do not understand what he is referring to when he states "TCRY has refused to consider this engineering solution, instead litigating the impacts of the crossing on the existing track." If by engineering solution, he is referring to the possibility of TCRY moving its operations to a different location, like Union Pacific did, I guess from an engineering standpoint, it may be possible but very expensive. The Cities paid Union Pacific (a Class I railroad) 2.1 million dollars to move its operations, but yet want to condemn a crossing and pay TCRY (a Class III railroad) \$38,000 for the adverse impact on its operations.

In addition, the fact that Mr. Rogalsky even raises an "engineering solution" suggests to me that the Cities now recognize that the crossing will unreasonably interfere with TCRY's planned and future operations.

Mr. Rogalsky's statement that TCRY has chosen to litigate is unfounded. TCRY is a small railroad, and the tracks at issue are critical to its operation.

Despite this fact, the Cities have been attempting to take these tracks through litigation since 2007. The Cities commenced suit against TCRY, UP, and BNSF; that suit failed. Then, while I was working at UP, I was one of the people responsible for negotiating with the Cities. The result of the negotiations was UP being paid \$2.1 million and allowed access to the City of Richland Railroad's new Loop, in exchange for moving UP's operations from the proposed crossing location. Then, in 2013, the Cities again commenced suit against TCRY, seeking to eliminate the siding and establish the proposed crossing. As previously described, that suit was denied by an administrative law judge, reversed by the state agency, and is now on appeal in Washington State Appellate Court. In February 2015, the Cities served TCRY with notice of proposed condemnation, notwithstanding that the matter remains on state court appeal. Consequently, TCRY initiated the instant petition for Declaratory Order with the Board in March 2015. Despite the pendency of this proceeding, the Cities initiated yet another suit against TCRY in state court, expressly seeking condemnation of the proposed crossing on an expedited basis.

Given the above facts, it is difficult for me to understand Mr. Rogalsky's statement that TCRY has 'chosen to litigate', when it has been the Cities who have been the instigators of the litigation against TCRY.

STATE OF WASHINGTON)

: ss.

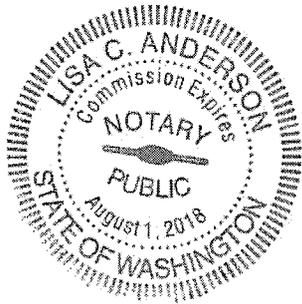
County of BENTON)

JOHN MILLER being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted there are true and that the same are true as stated.

John J. Miller
JOHN MILLER

SUBSCRIBED AND SWORN to before me this 30th day of September, 2015, by JOHN MILLER.

Lisa C. Anderson
Notary Public in and for the State of
Washington residing at Kennewick
My Commission Expires: August 1, 2018



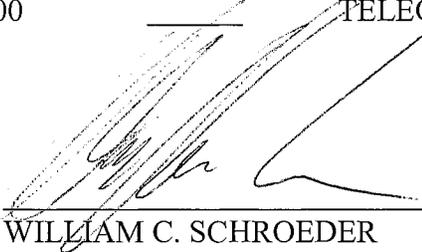
CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 2015, I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

Heather Kintzley	<u> X </u>	U.S. MAIL
Richland City Attorney	<u> X </u>	ELECTRONIC MAIL
975 George Washington Way	_____	HAND DELIVERED
PO Box 190 MS-07	_____	OVERNIGHT MAIL
Richland, WA 99352	_____	TELECOPY

Lisa Beaton	<u> X </u>	U.S. MAIL
Kennewick City Attorney	<u> X </u>	ELECTRONIC MAIL
210 West 6 th Avenue	_____	HAND DELIVERED
P.O. Box 6108	_____	OVERNIGHT MAIL
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P. Stephen DiJulio	<u> X </u>	U.S. MAIL
Christopher G. Emch	<u> X </u>	ELECTRONIC MAIL
Stephanie G. Weir	_____	HAND DELIVERED
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1111 Third Avenue, Suite 3400	_____	TELECOPY
Seattle, WA 98101	_____	



WILLIAM C. SCHROEDER

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Before the
SURFACE TRANSPORTATION BOARD

TRI-CITY RAILROAD)	
COMPANY, LLC, a Washington)	
limited liability company,	)	SUR-REBUTTAL VERIFIED
	)	STATEMENT OF RANDOLPH
Petitioner,	)	PETERSON RE: PETITION FOR
	)	DECLARATORY ORDER
vs.)	
)	
THE CITY OF KENNEWICK, of)	
the State of Washington, located in)	
Benton County, Washington; THE)	
CITY OF RICHLAND, of the State)	
of Washington, located in Benton)	
County, Washington,)	
)	
Respondents.)	
_____)	

RANDOLPH PETERSON, being first duly sworn on oath, does hereby
depose and state:

1. Since this is my second verified statement on this matter, I will not
repeat my previous testimony. Instead, I will only address new material raised in
the Cities' supplemental verified statements.

2. I note that the supplemental verified statements presented by the
Cities contain argument that I have 'not rebutted' various paragraphs in their
statements. I stand by my previous verified statement.

3. I offer the following rebuttal to **Paragraph 3** of the Jeffers
supplemental verified statement:

Response: Mr. Jeffers points to a selective portion of testimony from the UTC hearing in 2013. The hearing before the UTC did not deal with whether the proposed crossing would unreasonably interfere with planned or future railroad operations. As the record shows, the UTC made no finding regarding that issue as that issue was not before it. The issue before the UTC was solely whether acute public need justified the establishment of a new at-grade crossing; determination under Washington law of acute public need, involving considerations of safety, among other things, is described more fully in the appellate briefing, copies of which were already provided to the Board.

My full testimony before the UTC speaks for itself. That testimony concerned the safety issues that were being asked of me. Since the Cities provided the entire UTC record to the Board and not just the portions they cite for the first time, the Board has all of my testimony on this issue and can see the remainder of my testimony for itself. In addition, the administrative judge, in his initial order, summarized the evidence I presented that he felt was significant.

11 TCRY is a rail carrier conducting interstate rail operations through Kennewick and Richland. TCRY leases the track west and north of Richland Junction from the Port of Benton; BNSF and UPRR also operate on this track. Randolph V. Peterson, Managing Member of TCRY, explained that the second set of tracks immediately west of Richland Junction allows trains to meet and pass when entering or exiting the area. According to Mr. Peterson, this passing track is “absolutely essential” because TCRY makes frequent, if not daily, use of that facility.¹¹ When no passing operations are scheduled, TCRY also uses the second track as a siding to store idle freight cars.¹²

12 Mr. Peterson estimates that TCRY presently operates 10 to 20 freight trains each week on the mainline track that passes through the Richland Junction. BNSF operates another 10 freight trains each week and, on occasion, UPRR operates a “unit train,” a mile-long freight train consisting of approximately 100 to 120 cars all carrying the same cargo. No passenger trains operate on this track. Mr. Peterson testified that the combined annual train traffic through the Richland Junction increased from nearly 4,500 railcars in 2012 to over 5,100 railcars in 2013.¹³ Mr. Peterson expects further

increases in train traffic because of TCRY’s continued growth and new commercial developments in the Horn Rapids Industrial Park that will be served by rail.¹⁴

...

14 All trains traveling to the Horn Rapids area must pass through the Richland Junction and cross the proposed Center Parkway extension.¹⁹ Considering the expected increase train traffic across Richland Junction, TCRY contends that the passing track will become even more essential and perhaps need to be extended to accommodate longer trains.²⁰ Mr. Peterson testified that he opposes the new Center Parkway crossing because rail operations could regularly require freight trains to block the crossing, occasionally for lengthy periods of time.²¹

(TCRY provided the Board with this February 24, 2014 Initial Order Denying Petition to Open At-Grade Railroad Crossing, Washington State Utilities and Transportation Commission Docket TR-130499-P, as Exhibit 3 to the March 19, 2015 Counsel Affidavit filed in the present matter)

STATE OF WASHINGTON)

: ss.

County of BENTON)

RANDOLPH PETERSON being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted there are true and that the same are true as stated.

Randolph Peterson

RANDOLPH PETERSON

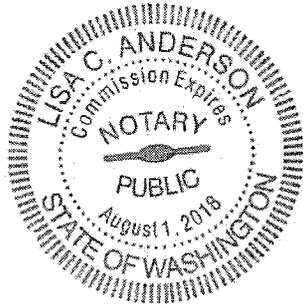
SUBSCRIBED AND SWORN to before me this 30th day of September, 2015, by RANDOLPH PETERSON.

Lisa C. Anderson

Notary Public in and for the State of

Washington residing at Kennewick

My Commission Expires: August 1, 2018



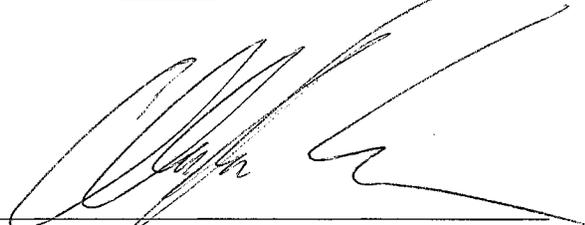
CERTIFICATE OF SERVICE

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Seattle, WA 98101		



WILLIAM C. SCHROEDER

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Before the
SURFACE TRANSPORTATION BOARD

TRI-CITY RAILROAD)	
COMPANY, LLC, a Washington)	
limited liability company,	)	SUR-REBUTTAL VERIFIED
	)	STATEMENT OF RHETT
Petitioner,	)	PETERSON RE: PETITION FOR
	)	DECLARATORY ORDER
vs.)	
)	
THE CITY OF KENNEWICK, of)	
the State of Washington, located in)	
Benton County, Washington; THE)	
CITY OF RICHLAND, of the State)	
of Washington, located in Benton)	
County, Washington,)	
)	
Respondents.)	
_____)	

RHETT PETERSON, being first duly sworn on oath, does hereby depose and state:

1. Since this is my third verified statement on this matter, I will not repeat testimony. Instead, I will only address new material raised in the Cities' supplemental verified statements.

2. I note that the supplemental verified statements presented by the Cities contain argument that I have 'not rebutted' various paragraphs in their statements. I stand by my previous verified statements.

3. I offer the following rebuttal to **Paragraph 22** of the Rogalsky supplemental verified statement:

Response: As I pointed out in my June 24 verified statement, the Cities did not present argument or testimony as to the content of my March 19 verified statement. When Mr. Rogalsky states that the contents of my March 19 verified statement were ‘raised for the first time in rebuttal’, he is incorrect.

With respect to Mr. Rogalsky’s statement that it would cost money to install a double track and expand the trestle, there is no dispute that it costs money to build railroad tracks.

The need to accommodate future unit trains has already been described to the Board extensively and need not be repeated here.

3. I offer the following rebuttal to **Paragraph 26** of the Rogalsky supplemental verified statement:

Response: I do not know what ‘crossing will be closed 3% a day’ means. I presume he is talking about the proposed crossing being closed to automobile traffic. Stated a different way, it means that 97% of the time the crossing would be open for automobile traffic. Presently, there is no crossing, so it is ‘closed’ to automobile traffic 100% of the day.

I also disagree with Mr. Rogalsky’s opinions concerning railroad operations. As the manager of operations for TCRY, I have first hand knowledge concerning its railroad operations. It does not appear that Mr. Rogalsky has any railroad operations experience or expertise.

4. I offer the following rebuttal to **Paragraphs 27 and 28** of the Rogalsky supplemental verified statement:

Response: A rail loop, separate from the loop operated by the City of Richland Railroad, was constructed by one of TCRY's affiliate companies over the past few years. An entity called Central Washington Corn Processors ("CWCP") formerly operated on that loop. TCRY would deliver unit trains to CWCP.

In the spring of 2014, a fire in the loading pit at the rail loop shut down CWCP's operations and damaged the pit. CWCP then relocated its operations to the City of Richland Railroad's new loop. Should Union Pacific once again have unit trains for CWCP, those unit trains will be operated by TCRY.

Mr. Rogalsky's statement that Union Pacific has subsequently operated unit trains to the Horn Rapids Loop is correct, but what he fails to state is that those unit trains are operated by TCRY as the handling carrier for Union Pacific. The same will be true for any other new customers, served by Union Pacific, that the City of Richland Railroad successfully encourages to relocate or open business on its Loop.

STATE OF WASHINGTON)

: ss.

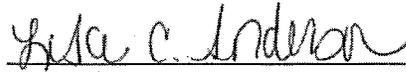
County of BENTON)

RHETT PETERSON being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted there are true and that the same are true as stated.

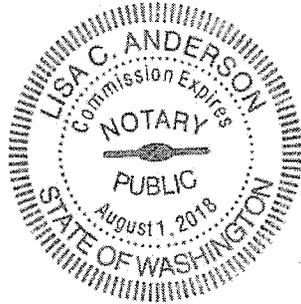


RHETT PETERSON

SUBSCRIBED AND SWORN to before me this 30th day of September, 2015, by RHETT PETERSON.



Notary Public in and for the State of
Washington, residing at Kennedick
My Commission Expires: August 1, 2018



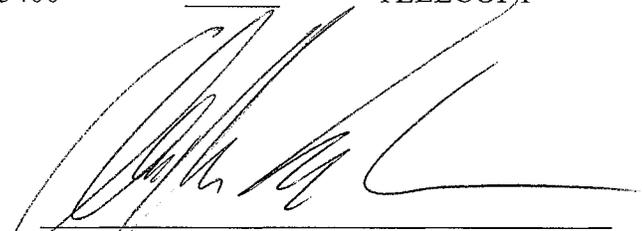
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WILLIAM C. SCHROEDER

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