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December 9, 2013

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**Via E-Filing**

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423

ENTERED  
Office of Proceedings  
December 9, 2013  
Part of the Public Record

**Re: *Docket FD 35765 – Wichita Terminal Association, BNSF Railway Company and Union Pacific Railroad Company – Petition for Declaratory Order***

Dear Ms. Brown:

Accompanying this letter for filing in the referenced docket is the Reply to Petition for Declaratory Order submitted on behalf of F.Y.G. Investments, Inc. and Treatco, Inc., the entities identified as “respondents” by the Petition.

Please do not hesitate to contact the undersigned with any questions.

Sincerely,

Thomas W. Wilcox

Enclosures

Cc: Counsel for Petitioners  
Wyatt A. Hoch, Esquire  
Toby Crouse, Esquire

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Docket FD 35765**

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

**REPLY TO PETITION FOR DECLARATORY ORDER**

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## **GLOSSARY**

FYG provides the following glossary of terms and citation conventions utilized in this Reply:

### **People or entities**

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

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

City – The City of Wichita, Kansas.

Judge Bribiesca – Sedgwick County, Kansas District Court Judge Joseph Bribiesca. Presided over hearings and made rulings reflected in the attached transcripts on February 20, 2007, November 21, 2011, and December 12, 2011, and entered the 2008 Permanent Injunction ordering the WTA to build a crossing at Emporia Court.

Judge Henderson – Sedgwick County, Kansas District Court Judge Timothy Henderson. Presided over hearings and made rulings reflected in the attached transcripts on June 9, 2009.

### **Pleadings, transcripts, and other rulings**

Verified Petition – WTA’s Verified Petition, filed in the Sedgwick County, Kansas District Court on November 6, 2002, attached hereto as Exhibit 3.

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

February 2007 Hearing Tr. – Official transcript and ruling of bench trial held before Sedgwick County, Kansas District Court Judge Joseph Bribiesca on February 20, 2007, attached as Exhibit 5.

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

June 2009 Hearing Tr. – Official transcript of evidentiary hearing held before Sedgwick County, Kansas District Court Judge Timothy Henderson on June 9, 2009, attached as Exhibit 7.

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

November 2011 Bench Trial Tr. – Official transcript of bench trial held before Sedgwick County, Kansas District Court Judge Joseph Bribiesca on November 21, 2011, attached as Exhibit 9.

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

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

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

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

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

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

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

### **Regulatory terms and documents**

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

Ordinance 5436 – Wichita City Ordinance No. 5436 (1916), attached hereto as Exhibit 1.

### **Exhibits**

Ex. 1 – Wichita City Ordinance No. 5436 (1916).

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

Ex. 3 – WTA's Verified Petition, filed November 6, 2002.

Ex. 4 – WTA's Second Amended Verified Petition, filed December 6, 2002.

Ex. 5 – Official transcript and ruling of bench trial held before Sedgwick County, Kansas District Court Judge Joseph Bribiesca on February 20, 2007.

Ex. 6 – Sedgwick County, Kansas District Court's Journal Entry on Remand and Permanent Injunction, filed August 1, 2008.

Ex. 7 – Official transcript of evidentiary hearing held before Sedgwick County, Kansas District Court Judge Timothy Henderson on June 9, 2009.

Ex. 8 – Official transcript of Sedgwick County, Kansas District Court Judge Timothy Henderson's ruling following evidentiary hearing. The date is incorrectly listed as June 8, 2009.

Ex. 9 – Official transcript of bench trial held before Sedgwick County, Kansas District Court Judge Joseph Bribiesca on November 21, 2011.

Ex. 10 – Official transcript of oral ruling issued on December 12, 2001 by Sedgwick County, Kansas District Court Judge Joseph Bribiesca following the bench trial that was held on November 21, 2011.

Ex. 11 – June 6, 2013 Letter from FYG to WTA offering to sell right of way.

Ex. 12 – July 15, 2013 Letter from WTA to FYG declining offer to sell right of way.

## INTRODUCTION

Contrary to WTA's assertion, this dispute is not a "demand for a crossing." That ship has sailed. This is a property dispute. Kansas courts have repeatedly held that Kansas law gives FYG a right of ingress to and egress from its land-locked property over the two industrial tracks separating FYG's property from a public street in Wichita, Kansas. Indeed, the city ordinance granting WTA permission to construct the two "industrial tracks" at issue in this dispute contained an express condition that *required* WTA to construct and maintain a crossing along the entire portion of its tracks. Now, eleven years after WTA filed suit in state court concerning this property dispute, WTA seeks to avoid complying with the remedy thrice ordered by the Kansas courts after hearing evidence – placement of that crossing at Emporia Court – by suggesting the crossing is a matter of interstate commercial import that this Board has exclusive jurisdiction to re-consider pursuant to 49 U.S.C. § 10501(b). But the decisions from the Kansas courts are final decisions resolving the parties' rights arising under state law that cannot and should not be re-opened.

The single issue presented by WTA's Petition is whether the Kansas courts' conclusion that relocation of the northern track described in WTA's Petition, if necessary to accommodate WTA's recently-created concern of compliance with MUTCD, is preempted by federal law. FYG respectfully asks the Board to deny WTA's Petition. Specifically, this Board should conclude that it has no licensing jurisdiction over the relocation of the northern track, if that is what WTA chooses to do in order to meet its

obligation, because both tracks at issue were constructed and are used as industrial tracks that fall under 49 U.S.C. § 10906. Moreover, the rule relied upon by WTA – that states are generally forbidden from filling the regulatory void created by 49 U.S.C. §§ 10501(b) and 10906 – is inapplicable because WTA voluntarily obligated itself to provide a crossing to FYG; the Kansas courts are merely enforcing that property right. WTA cannot invoke this Board’s jurisdiction to immunize itself from WTA’s state law obligations (and take a property right from FYG without just compensation).

Even if the Board were to assume WTA’s tracks are “main line tracks” and that it has exclusive jurisdiction over relocation of the northern track, WTA must still provide the crossing Kansas courts long ago ordered. Again, WTA voluntarily agreed to accept the benefit of placing these tracks along 25th Street upon the express condition that it would build and maintain the tracks “in such condition that teams and vehicles on such street can safely pass over such tracks at any point on said street.” Ordinance 5436, § 2. Enforcing this voluntary agreement is not rail regulation preempted by ICCTA. In addition, WTA has not and cannot establish that its choice to relocate the northern track to accommodate the crossing at Emporia Court is an unreasonable interference with interstate commerce. Fewer than 100 rail cars per day traverse the track; most are simply stored as if the tracks were a parking lot. Finally, if the Board decides to grant the Petition and commence a proceeding, FYG requests that the Board not disturb the rulings of the Kansas courts that – in 2008 – ordered the crossing at the Emporia Court location.

## STATEMENT OF THE CASE

This property dispute has a long litigation history, dating back to WTA’s decision in 2002 to file a lawsuit in the Sedgwick County, Kansas District Court. Testimony has been provided, evidence has been considered, and Kansas courts – both trial and appellate – have rendered multiple rulings on issues of fact and law that cabin the relief WTA now seeks. While the litigation history began in 2002, WTA omitted the procedural details and important historical background (which dates to 1916) that demonstrate WTA’s plea for Board intervention is misplaced.

### **IN 2002, WTA FILED ITS STATE COURT PETITION CONCERNING THIS PROPERTY DISPUTE WITH FYG.**

WTA “was formed as a co-partnership sometime on or after September 30, 1889, composed of the Chicago, Kansas & Nebraska Railway Company, and the Kansas Midland Railroad Company relating to the joint ownership and operation of tracks in the stockyards, packing houses, and milling district of Wichita, Sedgwick County, Kansas.” Verified Petition, ¶ 5. WTA further claims it continued to operate for the purpose “economy and efficiency in the handling of railroad business” and “to have direct charge over the maintenance of said railroad property and tracks and of the switching thereover.” Verified Petition, ¶ 5.<sup>1</sup>

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<sup>1</sup> In a 1983 ICC decision, the Commission described WTA as “a switching carrier.” *Burlington Northern, Inc. – Control and Merger – St. Louis-San Francisco*

WTA obtained the land rights to construct the two tracks at issue in this proceeding pursuant to a 1916 Wichita City Ordinance – Ordinance 5436 – that included two important provisions. In Section 1, the City gave WTA the right “to construct, operate and maintain *industrial tracks and switches*, and also such roadbed and embankments as may be or become necessary along and across what is known as 25th street . . . .” Ordinance 5436, § 1 (emphasis added). Section 2, however, explained the grant of permission to build the tracks was subject to an express condition of providing complete access across the tracks over their entire run:

This permission is hereby made subject to the following conditions, terms and stipulations: . . . *The said Association shall construct and maintain in good order the portion of sidewalks crossed and railway crossings, and shall keep said track in good repair, and in such condition that teams and vehicles on such street can safely pass over such tracks at any point on said street. . . .*

City Ordinance 5436, § 2 (emphasis added).<sup>2</sup>

Consistent with Ordinance 5436, WTA pled in the underlying state court proceeding that these two tracks have been used by WTA as “interchange or transfer”

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*Railway Co.*, ICC Finance Docket No. 28583 (Sub.-No. 1), 366 I.C.C. 862, 871 (1983).

<sup>2</sup> Ordinance 5436 required the WTA to permit crossings “at any point on said street.” Since construction, however, BNSF and UP have raised the railroad bed such that it sits about 2 feet above the street, preventing crossing at any point on the street.

tracks for the rail cars of its owner companies since at least 1922. Verified Petition, ¶ 7. But contrary to the condition that it would permit access across “at any point” along the entire run of the tracks, WTA has also permitted BNSF and UP to park their rail cars on for extended periods of time so that no access to FYG’s property is possible. *See* Ex. G to WTA’s Petition for Declaratory Order (reflecting both tracks filled with parked rail cars). This latter conduct not only severs FYG’s property from the public street in violation of FYG’s state property rights, it blatantly contradicts WTA’s obligation to provide access along “any point on said street.”

“In 1996, FYG purchased approximately 27 acres of land between 23rd and 25th Streets at the southeast corner of 25th Street and Broadway in Wichita, Kansas.” *Wichita Terminal Ass’n v. F.Y.G. Invs., Inc.*, Case No. 92,132, 2005 WL 824042, at \*1 (Kan. Ct. App. Apr. 8, 2005) (hereinafter “*FYG I*”). “A boundary survey disclosed a 30-foot right-of-way easement along the north side of the property where 25th Street was located,” and further disclosed “existing railroad tracks along the south side of 25th Street within the 30-foot right-of-way.” *FYG I*, at \*1.

At some time prior to 2002, WTA’s tracks fell into disrepair. The south track “became unusable as a result of a derailment and was in need of repair.” Verified Petition, ¶ 10. The north track was also in need of repair. Verified Petition, ¶ 10. When WTA attempted to make repairs to the tracks, a dispute with FYG concerning WTA’s trespass upon FYG’s property ensued. Verified Petition, ¶ 10. WTA filed suit in Sedgwick County, Kansas District Court asserting a claim of tortious interference and,

later, a variety of claims against FYG seeking to expand its limited property rights. Verified Petition; *see also* 2d Am. Verified Petition, ¶¶ 26-33. FYG, in turn, filed a counterclaim asserting its right to access the public street from its 27-acre property.

**BY AUGUST 2008, A FINAL JUDGMENT HAD BEEN ENTERED, CONFIRMING THAT WTA HAS AN OBLIGATION TO PROVIDE FYG WITH INGRESS AND EGRESS AT EMPORIA COURT.**

In the District Court, both parties filed for summary judgment concerning their respective rights on the property. District Court Judge Bribiesca granted WTA's motion for summary judgment, ruling that WTA had no legal duty to provide FYG with ingress and egress as abutting property owners over and across WTA's railroad easement. *FYG I*, at \*2.

On appeal, the Kansas Court of Appeals reversed. The Court of Appeals held that Kansas law gives every landowner the right of access if the landowner's property abuts a public street or highway. *FYG I*, at \*3. But because the District Court made no finding of fact concerning whether 25th Street was a public street, the Court of Appeals found summary judgment on this point was not appropriate. *FYG I*, at \*3. In addition and more significantly for purposes of this proceeding, the Kansas Court of Appeals recognized that FYG's right to ingress and egress could also be confirmed by the express condition placed on WTA by Wichita City Ordinance 5436. *FYG I*, at \*4. Thus, the Court of Appeals remanded for the District Court to determine whether "25th Street is public" and, if so, whether "an injunction to provide ingress and egress is appropriate." *FYG*, at \*4.

Upon remand, Judge Bribiesca held a trial to resolve these questions and made an oral ruling on the parties' contentions. First, the District Court found "based on the evidence presented and the exhibits that were alluded to in Closing Argument, the Court does find that 25th Street is a public street." February 2007 Hearing Tr., 58:21 – 59:1. Second, the District Court considered whether FYG was entitled to ingress and egress. The Court ruled as follows:

Now, the evidence before the Court is that we do have in existence still today ordinance number 5436, Wichita City Ordinance No. 5436. Now, granted, that ordinance was put in place back on September 12, 1916. Still in the books.

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

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

***So the city fathers didn't grant this right out of the kindness of their heart. They granted it on a big condition, frankly. Based on the language of the ordinance, the court finds that WTA has an obligation to provide FYG ingress and egress over the tracks based on Section 2 of Wichita City Ordinance 5436.***

February 2007 Hearing Tr., 59:4 – 60:3 (emphasis added). The District Court further ruled that not only was FYG's right to ingress and egress guaranteed by Ordinance 5436,

but it was also guaranteed by the common law of the State of Kansas. February 2007 Hearing Tr., 62:3-7.

“Because the parties could not agree on the terms of the journal entry, one was not filed until August 1, 2008.” *Wichita Terminal Ass’n v. F.Y.G. Invs.*, 305 P.3d 13, 16 (Kan. Ct. App. 2013) (*FYG III*). In that Journal Entry,<sup>3</sup> the District Court ruled “[a]n injunction is hereby entered for WTA and its principal Plaintiffs to construct a crossing to allow ingress and egress to FYG’s abutting property and directing Plaintiffs to keep the crossing clear in accordance with the Wichita City Code 12.04.080.” August 1, 2008 Journal Entry, p. 4. Although recognizing that WTA “temporarily provided” FYG “with ingress and egress” via a 32-foot timber crossing, the District Court specifically ordered WTA to “construct and install, within 90 days after [FYG’s] presentation to Plaintiffs of sealed engineering drawings for the construction of Emporia Court street, (i) a permanent railroad crossing at least 32 feet in width at the point where the centerline of the dedicated Emporia Court street intersects the railroad tracks, and (ii) permanent railroad crossing protection in compliance with Federal Railroad Administration requirements.” Aug. 1, 2008 Journal Entry, p. 4. “No appeal was filed from this journal entry, and it became a final order of the district court.” *FYG III*, 305 P.3d at 17.

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<sup>3</sup> Under Kansas law, oral rulings are frequently reduced to writing by a Journal Entry that the parties prepare, typically by agreement, and the Court thereafter adopts as its final, appealable Order. Kan. Sup. Ct. R. 170.

**DESPITE THE FINAL ORDER TO DO SO, WTA REFUSED TO CONSTRUCT A CROSSING AT EMPORIA COURT.**

On December 18, 2009, FYG presented WTA with a set of City-approved engineering drawings for the construction of a permanent crossing at Emporia Court. Although the August 1, 2008 Journal Entry required construction to be completed by March 22, 2009, it was not even commenced as of April 2, 2009. FYG thereafter filed a motion requesting “that the court hold the WTA in contempt for failing to begin work on the Emporia Court crossing and for failing to keep the temporary crossing open as required by the journal entry filed on August 1, 2008.” *FYG III*, 305 P.3d at 17.

Another Sedgwick County, Kansas District Court Judge, Judge Henderson, conducted an evidentiary hearing on FYG’s motion on June 9, 2009. Almost a year after the final order was entered, WTA argued – for the first time – that the location of the crossing as determined by the August 1, 2008 Journal Entry was impractical because a traffic device would need to be placed too far into 25th Street and any crossing would prevent WTA from using the industrial tracks as a parking lot.<sup>4</sup> After hearing the

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<sup>4</sup> WTA warns that any crossing will shut down free-flowing interstate commerce across its 1000’-long tracks. But WTA’s alleged concern for interstate commerce is a red herring. The real concern with the Emporia Court crossing – whether the northern track is relocated or not – is that WTA will no longer be able to use the tracks as a parking lot for rail cars. According to WTA’s witnesses, the current effective length of the tracks for storage purposes is 850 feet. *See* November 2011 Bench Trial Tr., 37:13 – 38:21. And, WTA can and has historically stored between 28 to 40 rail cars along the tracks November 2011 Bench Trial Tr., 41:3-

evidence and testimony of witnesses, the District Court rejected WTA's arguments. First, the District Court rejected WTA's argument that the prior order of to construct the Emporia Court crossing was impractical, noting that the matter had been fully litigated, experienced counsel had advised them, the parties were sophisticated, and WTA chose not to appeal the order. June 2009 Ruling Tr., 3:25 – 5:12.<sup>5</sup> But, to the extent WTA now deemed complying with the Emporia Court crossing obligation impractical, the District Court modified the language of the permanent injunction as follows:

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

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9; June 2009 Hearing Tr., p. 22:19-24; December 2011 Ruling Tr., 4:6 – 5:4; *see also* Exhibit G (reflecting rail cars are parked on both tracks). The Emporia Court crossing “basically wipes out 18 storage cars, cars that would be stored there, can only have room for 12.” November 2011 Bench Trial Tr., 41:15-20. This is true regardless of whether the northern track is relocated to the south. November 2011 Bench Trial Tr., 42:21 – 43:3.

<sup>5</sup> The finality of the August 1, 2008 Journal Entry selecting the Emporia Court crossing and WTA's failure to appeal from that Order was of paramount concern to the District Court:

The whole due process of law is built upon a basic foundation that once an order is final we don't get to keep coming back and litigating that. . . . We cannot and will not continue to relitigate what Judge Bribiesca already decided.

June 2009 Ruling Tr., 6:9-19.

[WTA] may replace the north track upon the improvements of 25th Street if such improvements allow said crossing to not impede upon 25th Street.

[WTA has] 90 days from entry of the journal entry of this order to have such crossing constructed.

June 2009 Ruling Tr., 7:18 – 8:5 (emphasis added); *see also Wichita Terminal Ass’n v. F.Y.G. Invs., Inc.*, Case No. 103,015, 2011 WL 588505, at \*1 (Kan. Ct. App. Feb. 11, 2011) (hereinafter “*FYG II*”). Thus, for the *second* time, the District Court, via a different presiding judge, ordered WTA to construct a crossing at Emporia Court.

**AFTER ANOTHER APPEAL, THE KANSAS COURT RECEIVED EVIDENCE AND DETERMINED THAT RELOCATION OF THE NORTH TRACK AT EMPORIA COURT WAS THE MOST VIABLE OPTION TO ADDRESS WTA’S CONCERNS.**

WTA appealed again. After recounting the already-lengthy factual and procedural history, the Court of Appeals remanded the case back to the District Court with instructions to “give both parties a limited time period in which to propose and address the options for viably implementing the injunction in compliance with MUTCD, including but not limited to removal of the north track at Emporia Court and/or any other legally compliant crossing location.” *FYG II*, 2011 WL 588505, at \*11.

Upon remand, Judge Bribiesca held a third evidentiary hearing on November 21, 2011. Several weeks later, the parties returned to court and the District Court issued its ruling. The District Court recognized that it was duty-bound given the Court of Appeals’ order to consider the best option for implementing the injunction in light of the MUTCD and the fact that “FYG is legally entitled to ingress and egress.” December 2011 Ruling

Tr., 2:11 – 3:4. With regard to WTA’s and FYG’s competing assertions as to the best location for the crossing, Judge Bribiesca made a finding of fact that the temporary crossing WTA favored (and now proposes to the Board as an alternative) “is located in an area that is a low point and a virtual swamp with a creek running through it,” meaning that this “location is not the most viable access point, because of the grade and swampy nature of the land at that location.” December 2011 Ruling Tr., 2:11 – 3:4. Further, the Court ruled as follows:

***Based on the evidence presented, the Court is of the opinion that the removal of the north track, coupled with the [laying] of a track south of the existing tracks, is the most viable option.*** The removal of the north track line would allow the Emporia Court location to be built in compliance with the Manual on Uniform Traffic Control Device, which is what this Court was called upon to decide.

The [temporary crossing site favored by WTA] is not a feasible option for reasons I already stated. Widening of the street is not the best viable option, because of its impact on the existing business owners.

In this Court’s opinion, the new southern track line could be laid prior to the removal of the north track line. If done in that sequential manner, WTA’s concern of losing parking lot spaces, I believe that was the language that was utilized at the - - in the course of the evidentiary hearing, should be alleviated to a great degree.

***To summarize, the Court is ordering the crossing to be located at the proposed Emporia Court location. The Court is also ordering the removal of the north track and the laying of a new line south of the existing line.***

December 2011 Ruling Tr., 4:6 – 5:4 (emphasis added).

**THE KANSAS COURT OF APPEALS SEEKS THIS BOARD’S BLESSING OF THE  
RELOCATION OPTION GIVEN TO WTA.**

Although the District Court again ordered WTA to construct a crossing at Emporia Court and, if necessary, to relocate the north track away from the public road, WTA *again* chose instead to appeal. But “WTA [did] not dispute the district court’s authority to require it to install a permanent railroad crossing to provide access to FGY’s property . . . .” *FYG III*, 305 P.3d at 16. And “WTA . . . [did] not challenge the district court’s jurisdiction to require it to provide access to FGY’s real property from the adjacent public street.” *Id.* at 18. Rather, WTA argued that, despite its obligation to provide a crossing at the Emporia Court location, federal law preempts state courts from requiring interstate rail carriers to relocate existing tracks. *Id.*

The Kansas Court of Appeals determined that, in light of the preemption concerns, this Board should determine whether it has jurisdiction and, if so, either relinquish it to the District Court or approve the relocation portion of the remedy the District Court ordered. *See FYG III*, 305 P.3d at 22-23. The Court of Appeals discussed the general rules governing the Board’s jurisdiction under 49 U.S.C. §§ 10501(b)(2), 10903, and 10906, and the general rules governing preemption of state laws, but it did not reach the issue of whether the two tracks at issue are “main line tracks,” or exempt trackage falling under 49 U.S.C. § 10906. *See FYG III*, 305 P.3d at 21-22. Rather, the Court of Appeals concluded that, regardless of the category the tracks were in, “the STB has exclusive jurisdiction over the question of whether the WTA should be required to remove the

north track and to construct a new track south of the existing tracks.” *FYG III*, 305 P.3d at 22. Having made this determination, the court elected to “vacate those portions of the journal entry filed January 25, 2012, which purported to require the ‘removal of the north track coupled with the laying of a new track south of the existing tracks.’” *Id.*

Although concerned with preemption, the Kansas Court of Appeals expressly affirmed the factual findings of the District Court. In particular, the Court of Appeals found that the District Court’s conclusion that the most viable option for providing FYG with access to its property is removal of the north track coupled with laying a new track south of the existing tracks and also found that such an action would permit the crossing to be built in compliance with the MUTCD. *FYG III*, 305 P.3d at 22 (“we find that substantial evidence supported both of these conclusions”).

As a result, the Kansas Court of Appeals directed WTA to request this Board’s input. It ordered WTA to “file an application with the STB to resolve any issues concerning the STB’s jurisdiction within 14 days following the issuance of a mandate from this court.” *Id.* at 23. WTA’s Petition followed soon thereafter.

## ARGUMENT AND AUTHORITIES

The sole inquiry before this Board is whether WTA may, if it chooses, relocate the northern industrial track to the south in order to construct the long-ago ordered crossing in compliance with the MUTCD. The MUTCD is purely an excuse; WTA does not want any crossing along its industrial tracks. As the Petition for Declaratory Order makes clear, WTA asks this Board to eliminate any obligation to provide a crossing at all. This argument must be rejected.

This Board has no jurisdiction over the relocation of the northern track pursuant to 49 U.S.C. § 10906. Contrary to WTA's current claim that the tracks are "main line" tracks, their history and consistent use to switch or store rail cars confirm they are industrial switch tracks that are not subject to the Board's direct regulation. The Board therefore has no licensing jurisdiction over the north track to "relinquish." Moreover, the general rules that preempt the use of state tort laws and regulations from forcing a railroad to take actions concerning Section 10906 tracks have no application because WTA agreed to provide a crossing of its track and the scope of that agreement has been construed by the Kansas courts to include, if WTA believes necessary, relocation of the northern track. This Board's jurisdiction is not a shield WTA can use to avoid its obligations under state law.

Even entertaining WTA's claim that these are "main line" tracks subject to this Board's exclusive jurisdiction, the same result follows. WTA cannot use the preemptive effect of Sections 10906 and 10502(b) to abrogate agreements and obligations under state

law. WTA has failed to establish the Kansas courts' rulings do anything more than resolve routine real-property rights and obligations and do not seek in any way to regulate interstate commerce. In addition to the commitment WTA made concerning a crossing, WTA cannot establish any burden – unreasonable or otherwise – upon interstate commerce. Evidence already adduced established that fewer than 100 rail cars per day use the track. Indeed, the tracks are most frequently used as a parking lot.

The Kansas courts' repeated determinations that the crossing should be located at Emporia Court were based upon the evidence presented and considered. These decisions are therefore entitled to significant deference by the Board. There is no dispute that this Board has jurisdiction over “transportation by rail carrier,” 49 U.S.C. § 10501(a), that this jurisdiction extends to property, facilities, and instrumentalities of rail transportation, and that it covers railroad tracks, including those located at the site of crossings with public or private roads. “But this does not mean that all aspects of crossings are within the Board’s exclusive jurisdiction.” *En Banc Brief of Amicus Curiae Surface Transportation Board in Franks Inv. Co. v. Union Pac. R. Co.*, 2009 WL 6297302, at \*6 (Apr. 15, 2009) (hereinafter “*En Banc Brief*”). Deference to the Kansas Courts’ determinations would be consistent with the Board’s established recognition that these are issues that state courts are equally adept at policing. *See Franks Inv. Co. v. Union Pac. R. Co.*, 593 F.3d 404, 415 (5th Cir. 2010) (en banc); *see also En Banc Brief, supra*, at \*6.

Although this Board has discretionary authority to issue a declaratory order to eliminate a controversy or to remove uncertainty, “there is no need for the Board to

institute a proceeding” in this crossing dispute. *Maumee & W. Ry. Corp. and RMW Ventures, LLC – Petition for Declaratory Order*, STB Fin. Docket No. 34354, 2004 WL 395835, at \*1 (S.T.B. Mar. 2, 2004). Accordingly, FYG respectfully requests that this Board deny WTA’s Petition so that WTA will – after eleven years – construct the crossing Kansas law requires.

**I. This Board has no authority to intervene in WTA’s decision to relocate the northern track because it is an industrial track.**

WTA no crossing along its tracks. It therefore asserts (at p. 2) that its tracks are “double main line tracks.” And, as a result, WTA states (at p. 10) that “[t]he District Court cannot force the WTA to remove or relocate the north track because the ICCTA expressly preempts Kansas law when state action would affect matters directly regulated by the Board.” *Id.* at 10.<sup>6</sup> But WTA is wrong to urge, contrary to facts it has pled, that its tracks are “main line” tracks. They are not. And WTA does not and has never conducted common carrier railroad operations on these tracks. Rather, these tracks were constructed and have been consistently used as industrial switch tracks, the disposition of

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<sup>6</sup> WTA’s preemption claim is quite narrow. As it confirmed to the Kansas Court of Appeals, “WTA asserts that the ICCTA expressly preempts state law regarding the removal and reconstruction of railroad tracks, [but] it concedes that federal law does not expressly preempt the resolution of railroad crossing disputes by state courts.” *FYG III*, 305 P.3d at 19. WTA’s concession concerning simple crossing disputes is not surprising. *See generally Franks Inv. Co. v. Union Pac. R. Co.*, 593 F.3d 404, 413 (5th Cir. 2010); *En Banc Brief*, 2009 WL 6297302, at \*11-12 & n.17 (recognizing crossing disputes between private parties and railroads are ordinarily purely a property dispute that state law ordinarily resolves).

which is expressly exempted from the Board's direct regulation pursuant to 49 U.S.C. § 10906.

**A. WTA is a switching company that was granted permission “to construct, operate and maintain industrial tracks.”**

WTA argues (at p. 11) that the tracks should now be considered main line tracks subject to this Board's exclusive jurisdiction under 49 U.S.C. §§ 10901 and 10903. As noted in the cases WTA cites, merely labelling a particular track a “main line track” is not determinative of whether the track is a common carrier line or one falling under Section 10906. *See Nicholson v. ICC*, 711 F.2d 364, 367 (D.C. Cir. 1983). Rather, it is the intended and actual use of the track that is determinative. *Id.* Both factors belie WTA's assertion of “main line” status.

WTA is a switching company that constructed and has always used the tracks as industrial tracks for switching purposes. It was originally formed as a co-partnership in 1889, composed of the Chicago, Kansas & Nebraska Railway Company and the Kansas Midland Railroad Company. These railroads created an entity to conduct switching operations for them in the stockyards, packing houses, and milling district of Wichita. Verified Petition, ¶ 5. By 1911, the WTA was owned by the Chicago, Rock Island and Pacific Railway Company, The Atchison, Topeka and Santa Fe Railway Company, the Missouri Pacific Railroad Company, and the St. Louis-San Francisco Railway Company, and it provided switching operations to stockyards in Wichita.

In 1916, WTA obtained the land rights to construct the two tracks at issue in Ordinance 5436. This Ordinance granted to WTA “permission and right . . . *to construct, operate and maintain industrial tracks and switches*, and also such roadbed and embankments as may be or necessary, along and across what is known and called 25<sup>th</sup> Street . . . .” Ordinance 5436, § 1 (emphasis added). No permission to conduct interstate common carrier rail operations was granted in Ordinance 5436. Moreover, the express condition for the permission to construct these “industrial tracks and switches” was the following: “The said Association shall construct and maintain in good order the portion of sidewalks crossed and railway crossings, and shall keep said track in good repair, and in such condition that teams and vehicles on such street can safely pass over such tracks at any point on said street. . . .” Ordinance 5436, Section 2. As Judge Bribiesca noted, the right to build the tracks in the first place was not a gift given “out of the kindness of [the City’s] heart.” February 2007 Hearing Tr., 59:23 – 60:3. Instead, the grant was based upon “a big condition,” *id.*, that being the maintenance of the tracks so that vehicles “can safely pass over such tracks at any point on said street,” Ordinance 5436, § 2.

By 1923, WTA’s principal railroads owned undivided shares in approximately 12 miles of switch tracks in Wichita, and they entered into a new agreement re-forming the WTA “to have direct charge over the maintenance of said property and tracks and the switching thereof.” June 29, 1923 Agreement, p. 1 (Ex. 2). There is no indication that WTA conducted common carrier rail service for its own customers on its own account.

Indeed, under the June 29, 1923 Agreement, the railroads collected all switch charges for switching performed by WTA, and then paid WTA a fee based on the number of cars switched.<sup>7</sup> *Id.* at 5.

These two industry tracks have been used by WTA as “interchange or transfer” tracks since at least 1922. Verified Petition, ¶ 7. And, as summarized above, the two tracks have been used by UP and BNSF to park their respective loaded and empty cars so that WTA can conduct its switching duties and interchange cars between the two railroad owners. *See* Verified Petition, at 14.

**B. Section 10906 deprives this Board of jurisdiction to interfere with WTA’s decision to relocate the northern track.**

WTA’s construction and use of the tracks at issue establish they are merely industrial tracks. This fact is fatal to WTA’s claim that the order to construct the Emporia Court crossing is expressly preempted. The Board lacks authority “over

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<sup>7</sup> A review of the STB’s records did not reveal any filings by BNSF and UP, or by WTA’s prior owners, seeking authority from the ICC or the STB to acquire the WTA. Nor are there any filings made by WTA, BNSF, or UP seeking operating authority over the two tracks at issue. Indeed the only filings mentioning the WTA in any substantive manner appear to be a 2005 Verified Notice of Exemption, by which UP obtained trackage rights over certain unrelated tracks of the BNSF in Wichita. In that proceeding, WTA was identified as UP’s “agent” to provide service to an existing UP rail shipper using the trackage rights granted by BNSF. UP further identified WTA as “its agent to switch certain industries currently served by UP.” *See* STB Finance Docket No. 34771 - *Union Pacific Railroad Company and Wichita Terminal Association -- Trackage Rights Exemption -- BNSF Railway Company*, Letter from Robert T. Opal filed November 4, 2005 submitting final agreements, at Bates 28.

construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching or side tracks.” 49 U.S.C. § 10906. As a result, the Board has no jurisdiction to approve or deny the WTA’s disposition of the tracks and WTA has no obligation to seek the Board’s permission. *See Port City Properties v. Union Pacific R. Co.*, 518 F.3d 1186, 1188 (10th Cir. 2008) (“the STB has no authority over the regulation of spur or industrial tracks as opposed to main railroad lines.”)

States cannot fill the regulatory void. As the Kansas Court of Appeals summarized, “even a railroad track ‘excepted’ under 49 U.S.C. 10906 from the need to obtain Board authority for the construction, abandonment or operation, is nevertheless subject to the Board’s jurisdiction and is not subject to state or local regulation.” *FYG III*, 305 P.3d at 21 (citation omitted). This is because “Congress intended to remove [STB] authority over the entry and exit of these auxiliary tracks, while still preempting state jurisdiction over them, leaving the construction and disposition of [them] entirely to railroad management.” *Port City Props. v. Union Pacific*, 518 F.3d at 1188.

But the absence of state or federal regulatory authority does not permit railroads to take property rights of its neighbors or to ignore final judgments of state courts that confirm agreements and management decisions concerning industrial tracks. In other words, Section 10906 does not promote the anarchy WTA seeks. To the contrary, courts, as here, retain the obligation to administer the legal rights of any and all litigants that may arise as a matter of state law, even when one of the parties is a railroad. *See Lincoln Lumber Co. – Petition for Declaratory Order*, STB Finance Docket No. 34915, 2007 WL

2299735, at \*2-3 (S.T.B. served Aug. 13, 2007); *Mid-America Locomotive & Car Repair, Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34599, 2005 WL 1326958, at \*3-4 (S.T.B. served June 6, 2005). After all, these questions are simply ones of state law that operate without any peculiar impact upon railroads or rail operations.

FYG has never sought, nor have any of the courts attempted to impose, a regulatory requirement on WTA's tracks or to force a change in railroad operations under the guise of a state regulation, nuisance law, or other tort law. Rather, the state court proceedings – which WTA initiated – have always concerned the scope of the respective property rights of FYG and WTA, including the obligation of WTA to provide a crossing of its tracks under City Ordinance 5436 and state law. The parties' respective claims and the remedies ordered are state law matters that therefore are properly for a court of competent jurisdiction to decide without Board intervention. *See The New York, Susquehanna & W. Ry. Corp. – Discontinuance of Service Exemption*, STB Docket No. AB-286, 2008 WL 4415853, at \*2 (S.T.B. served Sept. 30, 2008) (recognizing a court of competent jurisdiction – not the Board – is the place to bring a dispute over state law claims); *Saginaw Bay S. Ry. Co. – Acquisition & Operation Exemption*, STB Finance Docket No. 34729, 2006 WL 1201791, at \*2 (S.T.B. served May 5, 2006) (same).

Similarly, the equities of the situation cannot be ignored. WTA, having voluntarily accepted the benefit of the land use conferred by Ordinance 5436, seeks to avoid the express condition it accepted. Indeed, FYG is not even seeking the ability to cross the tracks along their entire run, as Ordinance 5436 expressly requires. It is simply

seeking what the Kansas courts have thrice ordered: a single crossing at the City-approved, court-ordered Emporia Court location. Federal preemption cannot be used to avoid an obligation WTA voluntarily assumed: WTA “cannot hide behind the shield [of federal preemption] to avoid [its] commitments.” *Pejepscot Indus. Park, Inc. v. Maine Cent. R. Co.*, 297 F. Supp. 2d 326, 333 (D. Me. 2003). Moreover, WTA’s voluntary decision not to appeal the August 1, 2008 order that the crossing was to be placed at the City-approved Emporia Court location is an act of railroad management. This choice was accorded great significance by the Kansas courts and is one this Board lacks authority to reconsider pursuant to 49 U.S.C. § 10906. This Board should therefore defer to that choice. *See Township of Woodbridge v. Consolidated Rail Corp.*, STB Docket No. 42053, 2000 WL 1771044, at \*3 (S.T.B. served Dec. 1, 2000). (recognizing a railroad’s “voluntary agreements must be seen as reflecting the carrier’s own determination and admission that the agreements would not unreasonably interfere with the railroad’s operations”).<sup>8</sup>

The cases offered (at p. 15 & n.4) by WTA to support its state law preemption arguments concerning Section 10906 are inapposite. For example, in *Port City*

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<sup>8</sup> Although this Board has subsequently clarified this portion of its decision to confirm that a broadened contract interpretation may give the carrier a basis to argue for unreasonable interference, 2001 WL 283507, at \*2, WTA cannot take advantage of this clarification because WTA agreed that it would maintain the tracks to permit a crossing at any point along the tracks.

*Properties*, the Tenth Circuit rejected an attempt by the operator of an industrial park from using state law to force Union Pacific to reinstate industrial track because the disposition of the tracks was a matter of railroad management. *See* 518 F.3d at 1188. But, the Tenth Circuit also observed that if a valid contract between the industrial park operator and Union Pacific concerning the rail service had been in effect, the operator's state contract law claim would have been allowed to proceed. *See* 518 F.3d at 1190-91. Unlike the operator in *Port City Properties*, FYG's rights to a crossing at the Emporia Court location have been resolved in a final judgment based upon the legal obligations originating in Ordinance 5436 and Kansas property law. None of the cases relied upon by WTA for the unremarkable proposition that neither the Board nor the state courts can regulate the use of industrial tracks involved obligations imposed by an express condition (Ordinance 5436) and state property law. *See Pace v. CSX Transp. Inc.*, 613 F.2d 1066 (11th Cir. 2010); *Cedarapids, Inc. v. Chicago, Central and Pacific RR*, 265 F. Supp. 2d 1005 (N.D. Iowa 2003). WTA must honor its commitment to maintain a crossing and be held to the final judgment it chose not to appeal.

In summary, WTA's tracks are industrial tracks that were constructed with the permission of the City of Wichita upon the express condition that WTA provide a crossing at any location along the tracks. Therefore, relocation of the northern track – if that is what WTA believes it must do to construct the Emporia Court crossing – does not require STB authority. Congress has removed this Board's authority to weigh in on such a choice. And, the Kansas courts' decisions interpreting the rights of the parties is not a

regulation of rail operations. Instead, these decision merely determine the respective rights and obligations of the parties under Ordinance 5436 and Kansas real property law. Pursuant to Section 10906, this Board cannot and should not upend this result.

**C. WTA’s operations over the tracks undermines its assertion that these are “main line” tracks.**

Despite this history and use of the “industrial tracks,” WTA principally relies (at p. 11) upon *New Orleans Terminal Co. v. Spencer*, 366 F.2d 160 (5th Cir. 1966), to avoid the grasp of Section 10906. But *New Orleans Terminal Co.* is so factually incongruent that WTA’s reliance upon it demonstrates the weakness of WTA’s position. First, unlike WTA, the New Orleans Terminal Company “was a common carrier serving the public.” *Id.* at 162. Second, unlike WTA, which was formed to provide switching operations only for its owners in Wichita, New Orleans Terminal’s tracks provided interchange and other services for numerous railroads, “not only between other components of the Southern Railway System but also others serving the other lines in and out of New Orleans.” *Id.* Significantly, the Fifth Circuit’s finding of ICC jurisdiction was based almost exclusively on its conclusion that “the New Orleans Terminal Company is part of the Southern Railway System. It is not, as its name might indicate, merely a terminal facility. It is engaged in the handling of freight movements, both interstate and intrastate, from, to, and through the metropolitan area of New Orleans.” *Id.* at 166.

Moreover, subsequent decisions have narrowly applied *New Orleans Terminal* based upon its facts. The D.C. Circuit, for example, distinguished *New Orleans Terminal*

to apply only to its facts, where “the tracks at issue connected major freight lines on opposite sides of the city, and their predominant use was for the uninterrupted passage of long-haul trains.” *Brotherhood of Locomotive Eng’rs v. United States*, 101 F.3d 718, 730 (D.C. Cir. 1996). As noted, WTA’s tracks here are frequently used as a parking lot, *see* Exhibit G & n. 4, *supra*, or a way to switch fewer than 100 cars per day between the two carriers that own WTA. This Board has also narrowly construed the holding in *New Orleans Terminal*, stating it to be simply that construction of the track at issue there was not subject to state regulation as a spur and recognizing that it may be contrary to “years of implicit and explicit Commission precedent.” *See City of Stafford v. Southern Pacific Transportation Co.*, Finance Docket No. 32395, 1994 WL 613381, at \*4 (Served November 8, 1994). Accordingly, WTA’s heavy reliance on *New Orleans Terminal* to support their argument that the tracks at issue are “main line tracks” is misplaced.

WTA also suggests (at p. 12) that this Board should focus less on use and more upon “the larger purpose and effect of the [track].” In support, WTA cites two Board decisions that are inapposite. Specifically, in *Texas Central Business Lines Corporation – Operation Exemption – MidTexas International Center*, Finance Docket No. 33997, 2002 WL 31097635 (STB served September 20, 2002), TCBLC unsuccessfully sought a determination that the Board would not require operating rights authority for it to provide service over five miles of track owned by the developer of an industrial park. The Board disagreed, holding “[w]here, as here, the operations at issue would constitute the carrier’s entire line of railroad, enabling it to serve shippers in territory it had not previously

served, we have held that the larger purpose and effect of *transactions such as this one* before us is to create a new common carrier by rail.” *Id.* at \*2 (emphasis added). Similarly, in *Effingham Railroad Company – Petition for Declaratory Order – Construction at Effingham, Illinois*, STB Docket No. 41986, 2 STB 606 (1997), Effingham, which was “an Illinois chartered rail common carrier,” sought to have the Board declare that its construction and operation of a new track into an industrial park was not subject to the Board’s licensing authority. Again, the Board found the line to be a common carrier line of rail based on the fact that the proposed trackage extended into territory not already served by Effingham, and that “the larger purpose and effect of ERRC’s proposal is to construct what will constitute ERRC’s entire line of railroad to serve a new rail shipper, Ready-Mix, or additional shippers whose facilities are to be constructed.” 2 STB at 609.<sup>9</sup>

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<sup>9</sup> WTA’s citation (at p. 13) to the “holding” of *Effingham* takes significant liberties with the Board’s decision. Specifically, the phrase “because it aided and expanded the through movement of freight” is not used in the decision. It instead appears to be derived from the Board’s statement that the ERRC’s purported switching operations had “the effect of substantially extending *the tenant railroad’s lines* into new territory.” 1997 WL 564155, at \*3 (emphasis added). The fact that the ERRC would directly serve other rail shippers and then enter into joint line movements with the connecting carriers is materially different than the interchange and switching services WTA provides to its two owner companies.

These cases are inapplicable here because the “larger purpose and effect” in both was the railroad’s operation over existing track or newly-constructed track for the purpose of providing common carrier service to a new shipper in new territory that the railroad had not previously served. Here, the sole issue is a typical rail crossing WTA agreed to provide when it received permission to build the two tracks nearly 100 years ago. WTA has no “larger purpose.” It has always existed to provide switching and terminal operations for the sole benefit of its owner companies. That will not change with the construction of a crossing.

**II. Even if the tracks are assumed to be “main line” tracks, the Kansas courts’ determination of the parties’ legal rights must be enforced.**

Entertaining WTA’s assertion that the 1000’ feet of railway is a “main line” does not change the result. WTA, when accepting the grant of right to construct these tracks, voluntarily agreed to provide a crossing over the entire length of the tracks. WTA cannot, after nearly 100 years of enjoying the benefits of those tracks, raise preemption as a defense to its obligation. Judicial remedies enforcing state law rights between FYG and WTA are not a regulation of interstate commerce that is expressly preempted. Moreover, it is not impliedly preempted as applied. Constructing a crossing over tracks that are used to store cars and, at most, move less than 100 cars per day is not an unreasonable burden upon interstate commerce.

**A. Enforcing an agreement to construct a crossing that WTA voluntarily struck is not a regulation that is expressly preempted.**

FYG acknowledges that treating the tracks as main line tracks imbued with a common carrier obligation would mean that the Board ordinarily has exclusive jurisdiction over their relocation or removal. But this preemptive authority does not extend to overriding enforcement by state courts of agreements railroads have voluntarily made with other parties concerning the tracks because it is not a “regulation” contemplated by Congress. *See PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 220 (4th Cir. 2009).

In *PCS Phosphate* the railroad agreed, in exchange for an easement to construct a portion of a common carrier line of rail into a mine’s facility, that it would relocate a portion of the rail line if the mine operations required it in the future. *Id.* at 215-16. Years after the agreement was struck, the railroad claimed immunity from this agreement based upon preemption. The Board and the Fourth Circuit Court of Appeals rejected the railroad’s assertion because the express preemption clause of 49 U.S.C. § 10501(b) “focuses specifically on ‘regulation,’” such as state laws that seek to manage or govern rail transportation. 559 F.3d at 218. But Congress chose not to interfere with state laws having a more remote or incidental impact upon rail transportation. In particular, the Fourth Circuit found that voluntary agreements are not regulatory acts that are preempted. *See id.* As in *PCS Phosphate*, the state court lawsuit WTA initiated has never been about “regulation.” Nor has FYG or the courts sought to erect any barrier to

the flow of interstate commerce. Instead, it is and has been a property law dispute that the Kansas courts have already resolved in FYG's favor. *See Saratoga & N. Creek Ry., LLC – Operation Exemption – Tahawus Line*, STB Docket FD 35631, 2012 WL 4840014, at \*3 (Served Oct. 11, 2012) (denying request for preemption because the issue was one of state law); *Allegheny Valley R.R. Co. – Petition for Declaratory Order – William Fiore*, STB Docket FD 35388, at \*3 (Served Apr. 25, 2011) (rejecting request for preemption where the issue was one of state law).

The Kansas courts have already determined two legal issues confirming the duty WTA is under to construct a crossing for FYG to access 25th Street. First, WTA acquired the property to construct the tracks at issue upon the express condition that they provide a crossing “at any point on said street.” Second, Kansas law gives every property owner an inalienable right to access its property from a public street. These rulings are incidental to and not a regulation of covered rail transportation. *See PCS Phosphate*, 518 F.3d at 220; *Franks Inv. Co. v. Union Pac. R. Co.*, 593 F.3d 404, 411 (5th Cir. 2010) (rail crossing disputes are not regulation governed by the exclusive jurisdiction of the Board). Accordingly, FYG asks that this Board conclude – even if it determines that the tracks at issue are “main line” tracks subject to regulation under 49 U.S.C. § 10901(a) – that the order to construct the Emporia Court crossing is not expressly preempted because the Kansas court's enforcement of the voluntary agreement WTA struck is not a regulation of rail transportation.

**B. Constructing a crossing over tracks that see fewer than 100 rail cars per day is not an unreasonable burden on interstate commerce.**

Not only is the order enforcing the parties' respective rights under state law not a regulation expressly preempted by the ICCTA, but it is also not impliedly preempted. As this Board has recognized, the touchstone of the as-applied challenge is whether or not the order for a crossing would have the effect of preventing or unreasonably interfering with railroad transportation. *See Franks*, 593 F.3d at 413; *En Banc Brief*, 2009 WL 6297302, at \*8-9. WTA has failed to establish unreasonable interference. Indeed, the evidence adduced in the multiple proceedings in WTA's state court litigation confirm any interference with WTA's switching operation will be minimal, at most. Accordingly, this Board should adopt the remedy ordered by the Kansas courts. *See En Banc Brief*, 2009 WL 6297302, at \*9-10 (recognizing that "crossing cases are typically resolved in state courts," and that "the field of real property rights is one that states have traditionally occupied").<sup>10</sup>

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<sup>10</sup> There is good reason for this Board's traditional deference to state courts. As the Board has noted, "only a few preemption cases involving railroad/private road or sewer crossings have been brought to the Board . . ." *En Banc Brief*, 2009 WL 6297302, at \*17. The reason for the lack of cases or Board decisions concerning them is a two-pronged, practical concern:

[T]he Board consistently has made it clear that states continue to play their traditional role in resolving disputes in this area. If the Board had to resolve all crossing disputes, the crush of

**1. The Emporia Court crossing will not burden WTA's ability to move fewer than 100 rail cars per day.**

Constructing the Emporia Court crossing would not affect the productivity of using the tracks as an artery of commerce, as WTA contends. The speed limit on this track is 10 miles per hour, *see* June 2009 Hearing Tr., 23:13-17, there are usually “30 to 40 cars per day” and, even during the peak use, fewer than 100 cars per day traversing the industrial tracks, *see* June 9, 2009 Hearing Tr., 23:1-9, and, as WTA notes (at p. 17), the Emporia Court “crossing itself would be 32 feet wide.” Given the permissible speed limit, the limited number of cars traversing the tracks per day, and the limited width of the crossing, there is no colorable claim that an Emporia Court crossing would hinder or delay the use of the tracks as an artery of commerce without blocking access to FYG’s land as ordered by the Court or violating the crossing regulations governing WTA’s (and every other rail carrier’s) conduct.

But, interference with *moving* rail cars is not WTA’s real concern. Instead, the true concern is *parking* on WTA’s tracks. WTA claims (at p. 16) that the Kansas court’s

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cases would significantly overburden the STB’s resources. This is so, not only because of the sheer number of cases that could be brought given the thousands of crossings that exist throughout the country, but because the Board has no particular expertise or familiarity with the property laws of each state.

*En Banc Brief*, 2009 WL 6297302, at \*17.

order to construct a crossing at Emporia Court would “effectively end the WTA’s operations” on the 850’ of industrial tracks because WTA – contrary to Ordinance 5436 and FYG’s right under state law for ingress and egress to the public street – wants to use the tracks as a parking lot. According to WTA’s witnesses, WTA has historically stored 28 to 40 rail cars along the tracks. *See* November 2011 Bench Trial Tr., 41:3-9; June 2009 Hearing Tr., p. 22:19-24; December 2011 Ruling Tr., 4:6 – 5:4; *see also* Exhibit G (reflecting rail cars parked on both tracks). The Emporia Court crossing “basically wipes out 18 storage cars, cars that would be stored there, can only have room for 12.” November 2011 Bench Trial Tr., 41:15-20. This is true regardless of whether the northern track is relocated to the south, *see* November 2011 Bench Trial Tr., 42:21 – 43:3, because it would reduce the ability to store cars on the track. In other words, WTA concedes that the primary use of the industrial tracks is for rail car storage, not interchange activity between its owners’ lines. If WTA wants the ability to use the tracks for any purpose, it must – like anyone else – purchase those rights. *Cf. Saratoga & N. Creek Ry., LLC*, 2012 WL 4840014, at \*3 (recognizing the rail company cannot ignore its lack of a property right by seeking Board intervention). It cannot simply take them from FYG without just compensation.

WTA also complains (at p. 17) that removing its ability to use the industrial tracks as a parking lot would force WTA to undertake “railroad gymnastics” in order to conduct its business. Any “railroad gymnastics” can and should be accomplished before the rail cars touch WTA’s interchange tracks. If WTA’s owners have insufficient facilities to do

this, they may condemn such property as deemed necessary to accomplish these tasks on their facilities. WTA's tracks, however, are not and have never been intended to be such a rail yard. And, more importantly, FYG is not responsible for shouldering this burden WTA asks this Board to foist upon it.

**2. Kansas courts have already received evidence and determined the Emporia Court crossing is the most feasible location for the crossing.**

Contrary to WTA's assertion (at pp. 18-20), relocating a track south to satisfy WTA's late-arriving MUTCD concern with the Emporia Court crossing is quite feasible. WTA has at least two options available to it. First, Kansas law provides railroads with the power to exercise eminent domain, meaning that if the two tracks can in fact be found to have the status of main line tracks, either of the owners of WTA can condemn the FYG property necessary to relocate WTA's northern track further south. Kan. Stat. Ann. § 66-501; *Steele v. Missouri Pac. R. Co.*, 659 P.2d 217, 222-23 (Kan. 1983) (railroads can use eminent domain to create and add to existing lines). And even if WTA did not want to be troubled with the hassle of initiating an eminent domain proceeding, FYG has already offered (and remains willing) to sell WTA the land necessary to relocate its tracks in a manner that respects FYG's ingress/egress rights and permits construction of a crossing that complies with MUTCD. *See* June 6, 2013 Letter to WTA (Ex. 11); July 15, 2013 Letter from WTA (Ex. 12). WTA's "it-is-not-possible-to-obtain-the-land" excuse fails as a matter of Kansas law and fact.

**3. The alternative crossing, even if it can be considered, is not feasible and is not less burdensome.**

WTA finally argues (at pp. 23-25) that any crossing should be placed at the western edge of FYG's property where the temporary crossing currently exists. In particular, it contends that this Board may want to "institute a proceeding and establish a procedural schedule for the parties to submit evidence" on the topic. This is nothing more than an invitation to undo years of fact-finding already undertaken by the state courts and to force FYG to continue riding the merry-go-round while WTA refuses to honor its judicial obligation to provide a crossing required by Kansas law.

WTA has previously presented evidence, testimony, and argument on its proposed swamp crossing. The District Court judge, familiar with the real estate at issue, able to see and evaluate the credibility of the witnesses, and able to weigh all information WTA submitted concluded the Emporia Court crossing was the most viable location for the crossing. Every argument that WTA now makes to this Board (at p. 23-24) for any location other than the court-ordered, City approved Emporia Court location either was made to the Kansas courts or should have been made years ago. Again, the Kansas courts have ruled – and the Kansas Court of Appeals has determined that the ruling is supported by substantial evidence – that the Emporia Court crossing is the best available option. This Board should not be drawn into seventh-guessing the Kansas courts' decision.

## CONCLUSION

This is a dispute over the respective property rights of WTA and FYG. Kansas courts have repeatedly and conclusively determined that WTA has an obligation to provide a crossing at the Emporia Court location. Until this crossing is built, WTA has taken (without compensation), and FYG cannot enjoy, the property rights Kansas law guarantees FYG.

FYG therefore respectfully asks this Board to bring a final conclusion to the long-running feud WTA started eleven years ago in state court. In particular, FYG asks this Board to conclude it has no jurisdiction over WTA's possible relocation of the north interchange track because it is an industrial track and the obligation to provide the crossing arises pursuant to WTA's voluntary agreement. Alternatively, this Board should determine that Kansas courts can enforce the agreement WTA struck concerning a crossing because it is not a "regulation" of rail transportation and because the crossing has no unreasonable or unusual interference with rail transportation.

Respectfully submitted,

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**ATTORNEYS FOR F.Y.G.  
INVESTMENTS, INC. AND TREATCO,  
INC.**

**CERTIFICATE OF SERVICE**

I do hereby certify that on this 9th day of December, 2013, I served a copy of the foregoing Reply to Petition for Declaratory Order by hand-delivery upon counsel for Petitioner BNSF Railway Company at the following address:

Karl Morell  
Of Counsel  
Ball Janik LLP  
655 Fifteenth Street N.W., Suite 225  
Washington, D.C. 20005

and by first-class mail to:

K. Paul Day  
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Kansas City, MO 64108-2618

Jeffrey R. King  
Lathrop & Gage LLP  
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s/Thomas W. Wilcox  
Thomas W. Wilcox

## INDEX OF EXHIBITS

Ex. 1 – Wichita City Ordinance No. 5436 (1916).

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

Ex. 3 – WTA’s Verified Petition, filed November 6, 2002.

Ex. 4 – WTA’s Second Amended Verified Petition, filed December 6, 2002.

Ex. 5 – Official transcript and ruling of bench trial held before Sedgwick County, Kansas District Court Judge Joseph Bribiesca on February 20, 2007.

Ex. 6 – Sedgwick County, Kansas District Court’s Journal Entry on Remand and Permanent Injunction, filed August 1, 2008.

Ex. 7 – Official transcript of evidentiary hearing held before Sedgwick County, Kansas District Court Judge Timothy Henderson on June 9, 2009. Given the size of the transcript, FYG is only attaching excerpts of the proceeding. FYG will, at the Board’s request, submit the entire transcript under separate cover.

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

Ex. 9 – Official transcript of bench trial held before Sedgwick County, Kansas District Court Judge Joseph Bribiesca on November 21, 2011. Given the size of the transcript, FYG is only attaching excerpts of the proceeding. FYG will, at the Board’s request, submit the entire transcript under separate cover.

Ex. 10 – Official transcript of oral ruling issued on December 12, 2001 by Sedgwick County, Kansas District Court Judge Joseph Bribiesca following the bench trial that was held on November 21, 2011.

Ex. 11 – June 6, 2013 Letter from FYG to WTA offering to sell right of way.

Ex. 12 – July 15, 2013 Letter from WTA to FYG declining offer to sell right of way.

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Docket FD 35765

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# Exhibit 1

F.Y.G. Investments, Inc. and Treatco, Inc.'s  
Reply to Petition for Declaratory Order

WICHITA TERMINAL ASSOCIATION  
(Published in the Daily Record September 12, 1916)

ORDINANCE No. 5436

AN ORDINANCE GRANTING TO THE WICHITA TERMINAL ASSOCIATION, composed of The Atchison, Topeka & Santa Fe Ry. Co., the Chicago, Rock Island & Pacific Ry. Co. and Jacob M. Dickinson, its Receiver, The Missouri Pacific Ry. Co. and B. F. Bush, its receiver, and the St. Louis & San Francisco Rd. Co., and James W. Lusk, W. B. Biddle and W. C.

F46  
EX U.

OF THE CITY OF WICHITA:

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Nixon, its receivers, and the successors and assigns of such association, the right to construct, operate and maintain Industrial Tracks on and across what is ordinarily known and called Twenty-fifth Street, in the City of Wichita, Kansas.

Be It Ordained By the Board of Commissioners of the City of Wichita:

SECTION 1. That permission and right are hereby granted to The Wichita Terminal Association, hereinafter called "Association" composed of The Atchison, Topeka & Santa Fe Railway Company, The Chicago, Rock Island & Pacific Ry. Co. and Jacob M. Dickinson, its Receiver, The Missouri Pacific Ry. Co. and B. F. Dush, its Receiver, The St. Louis & San Francisco Rd. Co. and James W. Lusk, W. B. Middle and W. C. Nixon, its Receivers, and the successors and assigns of such association, to construct, operate and maintain industrial tracks and switches, and also such roadbed and embankments as may be or become necessary along and across what is known and called 25th Street, from a point sixty (60) feet east of the west line of Section 4, in Twp. 27 S. of Range 1 east of the 6th P.M. to the west line of Washington Avenue, in the City of Wichita, Kansas, as follows: The center line of the south track, being 21 1/4 feet south of the north line of the SW 1/4 of said Section 4, with the right to cross said 25th Street, and build such curves and connections for such tracks as may be desired, also a second track 12 feet from center to center north of and connected by switches with the above described track but extending only from near Topeka Avenue on the west to near Mead Avenue as platted in Illinois Add. to the City of Wichita on the east.

SECTION 2. This permission is hereby made subject to the following conditions, terms and stipulations: Said Association shall construct said tracks under such directions and supervisions of the City Engineer of the City of Wichita, as by law provided, as to lines, grades, crossings and methods of carrying on the construction work in so far as public use of streets is concerned. Said Association shall at all times keep and maintain said tracks on grade set by the City Engineer, and should the grade be changed at any time said Association shall immediately change said tracks to conform to such grade at its own expense. The said Association shall construct and maintain in good order the portion of sidewalks crossed and railway crossings, and shall keep said track in good repair, and in such condition that teams and vehicles on such street can safely pass over such tracks at any point on said street. The said Association when duly ordered to do so, shall pay the cost of paying its track as provided by law, and the work shall be done in accordance with the plans and specifications furnished by the City Engineer. Said Association shall hold the City of Wichita forever harmless for damages that may result by reason of the construction, maintenance and operation of said tracks, including all damage, if any to adjacent property.

SECTION 3. That this grant is hereby made subject to all valid laws governing cities of the first class now in force or that may hereafter be enacted, and all valid ordinances and parts of ordinances of Wichita, Kansas, in relation thereto.

SECTION 4. Amended and Repealed by Ordinance 5634.

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

APPROVED: This 5th day of Sept. 1916.

O. H. BENTLEY,  
Mayor.

Attest: H. D. LESTER,  
City Clerk.

0595A

(Acceptance filed Oct. 11, 1916. No. 344 Minn. File of 1916).

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Docket FD 35765

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# Exhibit 2

F.Y.G. Investments, Inc. and Treatco, Inc.'s  
Reply to Petition for Declaratory Order

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KINKO'S

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*11/2/03  
Bring in  
file 3-1*

CONTRACT NO \_\_\_\_\_

---oOo---

Between

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

MISSOURI PACIFIC RAILROAD COMPANY

and

ST. LOUIS - SAN FRANCISCO RAILWAY COMPANY

---oOo---

AGREEMENT

Covering ownership, operation  
and maintenance of Wichita Ter-  
minal Association.

DATED June 29th 1923

Ex.K

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KINKO'S

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AGREEMENT, dated this 29th day of June, 1923, between THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, (an Illinois and Iowa corporation duly qualified to do business in Kansas), hereinafter for convenience sometimes called the "Rock Island Company", party of the first part; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, (a Kansas corporation) hereinafter for convenience sometimes called the "Atchison Company", party of the second part; MISSOURI PACIFIC RAILROAD COMPANY, (a Missouri corporation duly qualified to do business in Kansas) hereinafter for convenience sometimes called the "Pacific Company", party of the third part; and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, (a Missouri corporation duly qualified to do business in Kansas) hereinafter for convenience sometimes called the "Frisco Company" party of the fourth part.

RECITALS:

The parties (hereinafter called the "Proprietary Companies") own in equal undivided shares all certain real and personal property including tracks aggregating Sixty-three Thousand, Four Hundred Eighty-five feet (63,485 ft.) in length (hereinafter called the "Association Tracks") in the stock yards, packing houses and milling district at Wichita, Sedgwick County, Kansas, such tracks being shown in red coloring upon print hereto attached marked Exhibit "A" and made a part hereof.

A valuation of such property and Tracks as of December 1, 1921, is shown in detail on Schedule "B", also attached and made a part hereof. Subsequent additions shall be added to Schedule "B" by the filing of exhibits numbered "C", "D", "E", etc., supported by maps and actual cost data.

For purposes of economy and efficiency in the handling of the business in said District, the parties have formed the Wichita Terminal Association (hereinafter called "Association") to have direct charge over the maintenance of said property and tracks and of the switching thereover. The Proprietary Companies now desire to set forth in writing their several rights and obligations in respect to the Association and to each other.

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A G R E E M E N T:

The Proprietary Companies mutually agree as follows:

1. The Association shall be governed by a Managing Board, composed of a General Superintendent, or other ranking officer, of each Proprietary Company, said Board to select as chairman one of its members who shall hold office for a period of two years or until the elaction of his successor by a majority vote. The Managing Board shall hold regular quarterly meetings, the exact dates thereof to be fixed by the Chairman, and shall hold such special meetings as a Chairman, or any two of the Board members may request, each Proprietary Company to have at least ten (10) day's advance written notice of any such special meeting. A majority vote of the Managing Board shall be sufficient to bind the parties hereto.

2. The Managing Board shall appoint a Superintendent which appointment shall be by majority vote of the entire Managing Board. Said Superintendent, in turn, subject to the approval of the Board, shall appoint such of the following officers and employees as he or the Board shall deem necessary for the maintenance and operation of said tracks:

POSITION

Chief Clerk and Cashier  
Station Agent  
Yardmaster  
Track Foreman

The Superintendent shall also from time to time through his subordinate officials employ such office help engineman, switchmen, trackmen, and other employees as shall in his judgment, concurred in by the Managing Board, be necessary for the efficient and economical operation of the business of the Association. Salaries of such officials and employees shall be subject to approval of the Board.

3. THE SUPERINTENDENT shall have direct charge of the Association Tracks and the working forces. He shall be responsible for the property and for the efficient and economical conduct of the work. He shall report to and receive instructions from the Managing Board through its Chairman, and shall make such reports to the Board and the Proprietary Companies as may from time to time be required by the Board or any of such Companies. He shall countersign all checks against the bank deposits of the Association. He may also act as Station Agent.

THE CHIEF CLERK AND CASHIER shall certify to the correctness of all bills, vouchers and timechecks, and shall, subject to counter signature of the Superintendent, sign all checks against the bank deposits of the Association. He shall have charge of the office of the Superintendent, under the direction of the Superintendent, and the force employed therein, and shall otherwise assist the Superintendent in handling the affairs of the Association.

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THE STATION AGENT, if any, shall report to and receive instructions from the Superintendent and shall have direct charge of all outside transportation work and of matters relating to traffic of the Association. He shall make such reports to the Proprietary Companies as may from time to time be requested by such Companies, or any of them.

THE YARDMASTER shall have direct charge of yard forces and switching operations. He shall report to and receive instructions from the Agent respecting station matters, but in all other duties he shall report to and receive instructions from the Superintendent. He shall be responsible for the prompt movement of cars and proper position of switches, and shall make such reports as the Proprietary Companies may request from time to time.

THE TRACK FOREMAN shall report to and receive instructions from the Superintendent and shall be responsible for the efficient and economical maintenance of the Association Tracks and any other physical property belonging to or used by the Association. He shall construct such new tracks or structures as may from time to time be authorized by the Managing Board. He shall make requisition on the Superintendent for materials and supplies necessary for his work.

The Association shall bond each the Superintendent, Chief Clerk and Cashier, or other employees having to do with the handling of moneys or negotiable paper, for the full amount of the working fund or in such other amounts as the Managing Board may direct. Such bonds to run in favor of Wichita Terminal Association, a voluntary association composed of The Chicago, Rock Island and Pacific Railway Company, The Atchison, Topeka and Santa Fe Railway Company, Missouri Pacific Railroad Company and the St. Louis-San Francisco Railway Company.

4. The Proprietary Companies shall furnish the switch engines necessary to properly handle the business of the Association. The Rock Island shall furnish such engines during the first six months' period of the term of this agreement, the Atchison Company shall furnish the same for the second six months' period, the Pacific Company during the third six months' period, the Frieco Company during the fourth six months' period and so on in rotation until the termination of this agreement.

All such switch engines so furnished shall be acceptable to the Chairman of the Managing Board and shall be in good condition and running order when delivered to the Association, and shall be adequate for the maximum service to be performed. When an engine is leased to the Association or released by the Association a joint inspection by the Chairman of the Managing Board or his representative and a representative of the owner line shall be had and a definite record of same shall be made and copy filed with the Association. When an engine is leased to the Association, it shall remain in its service during the entire period that the Proprietary Company owning it may be required to furnish a switch engine to the Association, and another engine shall not be substituted therefor unless the engine first furnished shall be damaged while in service of the Association or shall require repairs which cannot be made during the period of time provided for roundhouse attention.

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As rental, which shall start upon the date accepted by Chairman of the Managing Board, the Association shall pay to the owning Proprietary Company monthly within twenty (20) days after bills are rendered therefor, at the rate of one (1) mill per pound of tractive power per day of twenty-four hours, or at such different rate as may from time to time be decided upon by a majority of all members of the Managing Board, and the Association shall also pay for all ordinary or running repairs to such engines during the time they are leased to the Association. The owning Proprietary Company whose turn it may be to furnish the Association with power shall deliver said power to the Association at Wichita at its own expense and at the end of such period shall accept said power from the Association at Wichita in like manner. When turned back to the owner Proprietary Company it shall be in as relatively good condition as when delivered, ordinary wear-and tear excepted. This to also be determined by a joint inspection.

The Association shall bear and pay the cost of all repairs to engines damaged while in its service, and shall also pay rental at the rate above described during the time actually consumed in making repairs and in transporting the damaged engines to and from the nearest shop of the owning Proprietary Company, and in addition shall pay for the transportation of such engine to and from from such shop at the rate of twenty (20) cents per engine mile.

The Proprietary Company at the time furnishing such engines shall, at the option of the Association, care for the same in its roundhouse facilities at Wichita, charging for such service at the rate of Two Dollars (\$2.00) for each engine passing over turntable, such charge to include all roundhouse service except the washing of boilers and the changing of water in boilers. A charge of Three Dollars (\$3.00) may be made for each boiler washed and One Dollar (\$1.00) for each change of water in boilers, said charges being in addition to the said rate of Two Dollars (\$2.00). Such roundhouse care shall include the use, at the sole risk of said Association and under the direction of the Proprietary Company, of so much of said Proprietary Company's tracks as may be necessary in reaching said roundhouse facilities.

Any party hereto may be relieved from furnishing such engine for any such period, provided it shall arrange with the party immediately theretofore furnishing the same or with the party next following to furnish an engine for such period in its stead; but no such arrangement shall relieve such party from its obligation for any subsequent rotational period, unless again so arranged.

5. If any Proprietary Company shall perform any labor for said Association or shall furnish the Association with any materials or supplies, it will charge the Association therefor the cost plus ten percent (10%) to cover supervision and handling, and plus freight on materials and supplies at the rate of one-half cent ( $\frac{1}{2}$ ) per ton per mile for the distance transported over the rails of each Proprietary Company, or at such different rate per ton from time to time be fixed by a majority of the members of the Managing Board.

6. Each Proprietary Company shall advance to the Association for use as a WORKING FUND, the sum of Two Thousand Dollars (\$2,000.00) and shall also from time to time within twenty (20) days after written call therefor from the Chairman of the Managing Board,

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advance an equal share of such further sum or sums as the majority of the members of the Managing Board shall deem necessary, to make the Working Fund adequate for the proper conduct of the business of the Association. If, however, at any time the majority of the Managing Board shall deem the amount of the Working Fund larger than reasonably necessary for the business of the Association, then said fund shall be reduced to such amount as will suffice, and the difference shall be paid to the Proprietary Companies in equal shares. The Working Fund shall be kept on deposit in a Wichita bank or banks acceptable to the Managing Board, subject to check by the Chief Clerk and Cashier of the Association with the countersignature of the Superintendent.

7. The Association shall perform all the switching service required on the Association Tracks, and shall make no charge against the Proprietary Companies therefor, except as provided in Section 8 hereof. None of the Proprietary Companies shall permit its engines (except those at the time leased to the Association under Section 4) to enter upon the Association Tracks for the purpose of switching, except upon the request of the Superintendent and under the supervision of the Station Agent and Yardmaster of the Association.

Each Proprietary Company shall collect and retain switching revenue accruing on business from or to an Industry on such Proprietary Company's rails and an Industry on Association Tracks, or from or to an Industry on Association Tracks, and connecting lines not members of the Association, where such Proprietary Company acts as intermediate carrier.

The Association shall collect all switching revenue accruing through Intra-Plant or Intra-Terminal switching each month, such revenue as received to be credited to the Proprietary Companies; and at the close of each month the Association shall pay to each Proprietary Company its proportion of such revenue in the same ratio as such Proprietary Company contributes to the operating expenses of the Association in said month.

8. Each Proprietary Company shall pay to the Association within twenty (20) days after bills are rendered therefor, the following sums:

(a) Monthly, a share of the cost of managing, operating, maintaining, repairing and renewing the Association, including premiums on insurance or Surety Bonds, and the Association's tracks, and property in the proportion that the number of loaded or empty cars switched for its account during such month bears to the number of loaded or empty cars switched for the account of all the Proprietary Companies during such month.

(b) From time to time one-fourth of any taxes and assessments paid by the Association on account of or in respect to the property of the Association. *gms*

The Association is authorized to make sight drafts against any Proprietary Company for any sums remaining unpaid after the same shall become due and payable hereunder. Errors or disputed items shall be adjusted in subsequent bills.

9. Each Proprietary Company shall at its sole cost provide storage tracks connecting with the Association Tracks, having a capacity ample to accom-

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update all cars interchanged with the Association. Any main line switches shall be constructed and maintained by and at the sole cost of the company owning the main line, and the Association's enginees shall not pass through such switches onto the main line of any Proprietary Company until the exprees permission of the Superintendent of such company has been obtained.

10. If any Association Tracks now or hereafter located upon the exclusive right of way of any party hereto shall interfere with the use such party desires to make thereof, then upon written notica to such effect, the track or tracks causing the interference shall be relocated at the expense of the parties hereto, and in case it shall be necessary to remove said track or tracks entirely from said exclusive right of way, then the parties shall contribute equally to the purchase of the additional right of way needed for said track or tracks and the right of way so purchased shall forthwith become and be treated as a part of the Association Tracks hereunder.

11. The Association shall from time to time construct such additional tracks or other structures as may be authorized by the Managing Board with the consent of each Proprietary Company, and the cost thereof, less any share to be borne by an industry, shall be borne equally by the Proprietary Companies. That portion of any such additional track or structures, which is not owned by an Industry, shall become a part of the property owned equally and in common by the parties hereunder. In the case of an industry track, an agreement shall first be executed by the Industry, the Association, and each Proprietary Company, providing for the construction of the track upon such basis as may be decided upon from time to time by the Proprietary Companies. The Industry shall be required to furnish free of cost, by lease, ordinance, or in such other manner as the Managing Board may designate, the necessary right of way for that part of the track, if any, lying outside the right of way of any Proprietary Company, with the right in the Association to enter upon such right of way for the purpose of constructing, maintaining and renewing such track and of operating thereover, and of removing such track upon any termination of said agreement. The Industry shall be required to deposit with the Association in advance of construction the estimated cost of the track and roadbed, to be borne by it. The Industry, under the direction of the Superintendent of the Association, may itself do the grading.

Upon any additional fixed property being acquired or provided as in this Section 11 provided, prints lettered "Exhibit C", "Exhibit D", "Exhibit E", and so on, identified in four counterparts by the General Manager of each Proprietary Company, suitably and fully identifying and describing same, shall be attached to and become a part of this agreement.

In determining whether any expenditures are for additions and betterments, or for maintenance, the parties shall be governed by current Interstate Commerce Commission Classification or the lawful rules then in force governing such matters.

12. Other Railway Companies may from time to time be admitted to membership in the Association upon such terms and conditions as shall first have been approved in writing by each of the Proprietary Companies.

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13. If any of the Proprietary Companies shall fail to pay any sum payable by it hereunder on or before the date when the same shall become due, or shall fail to perform or comply with any other covenant or condition by it to be performed or complied with under this agreement, and such default shall continue for a period of sixty (60) days after written demand for such payment, performance or compliance shall have been made upon such Proprietary Company by the Association or by the other Proprietary Companies, then and in any such case the Association or such other Proprietary Companies shall have and hereby are given the right to exclude the defaulting Proprietary Company from the privileges of this agreement until such time as it shall have fully satisfied, performed, or complied with its covenants and agreements herein contained then accrued or to be performed, and in addition thereto shall have paid to the Association, for the account of the other Proprietary Companies, interest at the rate of six (6) percent per annum on any sums such other Proprietary Companies may have been required to advance in payment of the defaulting Company's share.

14. (a) All liability for loss of or damage to the property of any Proprietary Company or property of others in its custody, occurring in any manner (except as provided in paragraph (c) hereof) while such property is in the possession of the Association or upon the Association Tracks, shall be borne solely by such Proprietary Company.

(b) All liability for loss of or damage to the property of third persons not in the custody of any Proprietary Company, and all liability for loss of or damage to the Association Tracks, or to switch engines or other equipment in the service of the Association, and all liability for death of or injury to employees of the Association or to other persons resulting in any manner from the switching operations of the Association, the defective maintenance of the Association Tracks, or from other causes, (except as provided in paragraph (c) hereof) shall be deemed a part of the expense of operating and maintaining the Association, and apportioned to the Proprietary Company on the basis prescribed in Section B hereof.

(c) All liability for loss of or damage to property or injury to or death of persons which shall be caused by or arise solely out of the negligence of any one or more of the Proprietary Companies while operating its or their exclusive engines and cars upon or adjacent to the Association Tracks, including fires set out by sparks or spreading from buildings or structures of such Proprietary Company or Companies, shall be borne solely or in equal shares, as the case may be, by the Proprietary Company or Companies at fault, except that each Proprietary Company so causing or contributing to such loss, damage, injury or death, shall bear and pay the loss resulting to its exclusive engines and cars, including property or persons therein or thereon. When loss, damage, injury or death shall result from the concurrent negligence of the Association and of one or more of the Proprietary Companies, then that part of the loss which partakes of the character described in the foregoing paragraph (b) shall be divided one-half to the Association, to be distributed as prescribed by said paragraph (b) hereof, while the remaining one-half of such loss, together with all other loss resulting from such concurrent negligence, shall be borne by the Proprietary Company or Proprietary Companies at fault, and if more than one Proprietary Company is involved, the loss shall be divided between them in the manner in this paragraph (c) prescribed for the distribution of loss due to the exclusive fault of two or more Proprietary Companies.

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Whenever loss, damage, injury or death shall be properly chargeable to an industry, under the provisions of an industry track agreement, the Association shall take all reasonable steps to collect from such industry the loss so sustained. Any sums so collected shall go to reimburse the party suffering the loss, or as a credit to the cost of operating and maintaining the Association, as the case may be.

The parties hereto shall and will indemnify and save harmless each the other from the payment of any losses or damages, costs, charges or expenses other than such as such party is required to pay under the provisions of this agreement.

If any suit shall be brought against any party hereto and any judgment shall be recovered which such party shall be compelled to pay and any other parties hereto shall, under the provisions of this agreement, be solely liable therefor, then such other party shall on demand promptly repay to the party paying the same, any moneys which it (the party paying the same) may have paid or been required to pay whether in the way of damages, costs, fees or other expenses; and if the liability in any such case or cases is joint between the parties to this agreement, the party defendant therein shall be reimbursed its expenditure pro rata accordingly.

None of the parties shall be concluded by any judgment at law or in equity against any other party or parties unless it has had reasonable notice from such other party or parties requiring it to appear in an action or suit and make defense thereto for its own account or jointly with the other parties. If such notice shall have been given by any party to any other party or parties and the party or parties receiving the same shall have failed to appear and make defense, it or they shall be concluded by the judgment or decree in said suit.

15. In case any disagreement shall arise between any two or more of the parties hereto, touching the construction of any part of this agreement, or concerning the business or manner of transacting business carried on under its provisions or concerning the observance or performance of any of its terms or conditions, such question shall be submitted to the arbitration of disinterested persons experienced in railway operation, to be chosen as follows: If the question in controversy shall concern one or more of the parties hereto on the one hand, and one or more of the parties hereto on the other hand, the party or group of parties hereto desiring arbitration shall select an arbitrator and give written notice thereof to the other party or group, and shall in such notice state precisely the matter or matters which it is proposed to bring before the arbitrators, and only the matter or matters so stated shall be considered or decided by them. If the other party or group shall fail to name a second arbitrator within thirty (30) days after notice as aforesaid has been given to it or them, as aforesaid, the arbitrator named by the party or group giving such notice may and shall name and appoint an arbitrator for and on behalf of the party or group so in default, and the arbitrator so named and appointed shall have the same power and authority as if he had been chosen by such party or group. The two arbitrators thus chosen shall select a third arbitrator, thus completing the board. If in any case as aforesaid the arbitrators so chosen shall fail to agree upon the selection of an additional arbitrator, such

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arbitrator shall be appointed, upon twenty (20) days' written notice by any party or group to the controversy given to each other party or group which shall be interested, of its intention to make application therefor, by any judge of the District Court of the United States for the district which shall then include the City of Wichita, Kansas.

The arbitrators, having taken and subscribed an oath before some person authorized by law to administer oaths, to the effect that they will well and truly try and impartially and justly decide the matter in controversy according to the best of their ability, which oath shall be filed with their award, shall as soon as possible after their selection, meet to hear and decide the question or questions submitted to them and shall give to each party to the controversy reasonable notice of the time and place of such meeting. The hearing of the board of arbitrators shall be conducted in the manner prescribed by the laws of the State of Kansas, and at the time and place designated, as aforesaid, and after hearing all parties interested, and taking such testimony or making such investigation as they may deem necessary, they shall decide the matter in controversy according to the very right of the matters, and shall reduce their decision to writing and serve a copy of such award upon each party interested, and such award, when made and delivered, as aforesaid, shall become and be binding and conclusive upon the parties thereto, and each of such parties agrees to be conclusively bound thereby; and such award, when made, may be filed by the successful party with the Clerk of the District Court of the County in which said hearing was had, as the basis of a judgment, and execution may issue from such Court for the collection or other enforcement of such award. Upon the making of such award, each party shall and will immediately make such changes in the conduct of its business or such payments or restitution, as the case may be, as by such award may be required of it.

The books and papers of all parties hereto, so far as they relate to matters submitted to arbitration, shall be open to the examination of the arbitrators, and the party or parties against whom the award shall be made shall pay all of the fees and expenses of the arbitration, or such fees and expenses may be apportioned by the board of arbitrators as they may determine.

Until the arbitrators shall make their award upon any question submitted to them, the business, settlements, and payments to be transacted and made under this agreement shall continue to be transacted and made in the manner and from existing prior to the rise of such question.

All notices which are hereinbefore provided to be given by any party to any other party or parties may be given by serving the same upon any executive or general officer of such other party or parties within whose jurisdiction said City of Wichita shall be.

16. This agreement shall take effect as of the 1st day of December 1923, and shall continue in effect until terminated by any party giving to each of the others one year's notice in writing of its desire to withdraw from said Association, provided, however, if the remaining parties shall desire to continue said Association, then upon paying to the withdrawing party its pro rata share of the then fair value of all the then present personal and real property of the Association, this agreement, modified, only as to the increased pro rata shares by

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reason of the lessened number of parties, shall continue until terminated by another party giving to the others one year's notice of withdrawal, and so on. Any Association Tracks located on the right of way of the withdrawing Company shall either be removed or shall be covered by an easement, providing for the payment of ground rental.

Upon the termination of this agreement as to one or more of the parties, the party or parties so withdrawing shall be refunded its share of the working fund previously advanced to the Association.

In the event of complete termination of this agreement and consequent dissolution of the Association, such disposition shall be made of the then personal and real property as the parties may agree upon; and in the event of their failure to agree, the matter shall be determined by arbitration as hereinbefore provided.

17. That certain agreement dated September 30, 1889, between the Chicago, Kansas & Nebraska Railway Company (now the Rock Island Company), the Wichita & Southwestern Railway Company (now the Atchison Company), Fort Scott Wichita & Western Railway Company (now the Pacific Company), and the Kansas Midland Railroad Company (now the Frisco Company) relating to the joint ownership and operation of tracks in the stock yards and packing house district of Wichita, is by mutual agreement cancelled as of November 30th, 1923.

18. This agreement shall be binding upon and inure to the benefit of the respective parties, their successors and assigns, but no party shall transfer or assign its interest to or in any personal or real property of the Association to an outside Company or person without the written consent of each of the other Proprietary Companies.

IN WITNESS WHEREOF the parties have caused this agreement to be executed in quadruplicate the day and year first above written.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

(SEAL)

ATTEST:

By L. C. Fritch

W. Vanderpool

Its Vice President

Assistant Secretary

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

(SEAL)

ATTEST:

By W. B. Storey

E. L. Copeland

Its President

Secretary

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

STB Docket FD 35765

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# Exhibit 3

F.Y.G. Investments, Inc. and Treatco, Inc.'s  
Reply to Petition for Declaratory Order

# CIVIL INFORMATION SHEET

This civil information sheet neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form, approved by the 18th Judicial District Court, is required for the use by the Clerk of Court for the purpose of initiating the civil docket sheet. A new case will not be accepted without a completed cover sheet attached. (THIS FORM MUST BE TYPED OR PRINTED LEGIBLY.)

I. K.S.A. CHAPTER

ORIGIN OF CASE:

- CHAPTER 60
- CHAPTER 61

- ORIGINAL PROCEEDINGS
- CHANGE OF VENUE
- TRANSFER CHAPTER 61 TO CHAPTER 60
- SMALL CLAIMS APPEAL

*[Handwritten signature]*  
CLASS ACTION

II. NATURE OF SUIT (Place an X in one box only)

02C 3688

CHAPTER 61

CHAPTER 60

REAL PROPERTY

OTHER STATUTES

- CT CONTRACT
- RP REPLEVIN
- FD FORCIBLE DETAINER
- TV TORT VEHICLE
- TP TORT PREMISES
- TO TORT OTHER
- RM RECOVERY OF MONEY
- ON OTHER

CONTRACT

- CT CONTRACT
- RM RECOVERY OF MONEY

- ED EMINENT DOMAIN
- FC FORECLOSURE
- AD APPEAL OF EMINENT DOMAIN
- RE REAL ESTATE

- HV HABITUAL VIOLATOR
- DJ DECLARATORY JUDGMENT
- CA CONSERVATOR ACTION
- IJ INJUNCTION
- LP LIS PENDENS
- NC NAME CHANGE
- OA OTHER ADMIN. APPEAL
- WC WORKERS COMPENSATION
- TS TRANSCRIPT
- QW QUO WARRANTO
- HC HABEAS CORPUS
- MO MANDAMUS
- GO GO-1507
- ON OTHER

TORTS

- TV TORT VEHICLE
- TP TORT PREMISES
- TO TORT OTHER
- TM TORT PROFESSIONAL MALPRACTICE
- PL PRODUCT LIABILITY
- WD WRONGFUL DEATH

TAX SUITS

- TX SECG. CO. PERS. TAX
- TF TAX FORECLOSURE
- TA TAX APPEAL
- DT CO. DELQ. TAX

CH. 61: \_\_\_\_\_  
JUDGMENT DEMAND  
\$ 110.00  
DOCKET FEE

III. (a) PLAINTIFFS (Please List First One Only)

*Wichita Terminal Association*

DEFENDANTS (Please List First One Only)

*F.Y.G. Investments, Inc.*

(b) 1 Total number of Plaintiffs

3 Total number of Defendants

(c) DEFENDANTS MAY BE SERVED  IN COUNTY *and*  OUT OF COUNTY  OUT OF STATE

ATTORNEYS

ATTORNEYS (if known)

(Firm Name, Address, Telephone Number, and Supreme Court ID Number)  
*Glenn D. Spang, Jr. #5517  
106 W. Douglas, St. 923, Wichita, KS 67202*

IV. JURY DEMAND

- YES (CHECK YES ONLY IF JURY DEMAND IS INCLUDED IN PETITION OR AS SEPARATE PLEADING)
- NO

V. EXHIBITS ATTACHED TO PETITION

- YES
- NO

OTHER DOCUMENTS FILED WITH PETITION (I.E. - bond, discovery, etc.)

PLEASE LIST:

VI. SUMMONS ATTACHED

- YES
- NO

SERVICE BY

- SHERIFF IN STATE
- ATTY TO MAIL
- CDC TO MAIL
- SHERIFF OUT OF STATE (Address)
- ATTY TO MAIL
- CDC TO MAIL

SPS  ATTORNEY *and cert. mail.*

YOUNG, BOGLE, McCAUSLAND,  
WELLS & BLANCHARD, P.A.  
106 West Douglas, Suite 923  
Wichita, Kansas 67202-3392  
Telephone: (316) 265-7841  
Facsimile: (316) 265-3956

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

FILED  
APP. DOCKET NO. *[Signature]*  
NOV 5 11 36 AM '02  
CLERK OF THE DISTRICT COURT  
18TH JUDICIAL DISTRICT  
SEDERICK COUNTY, KANSAS

WICHITA TERMINAL ASSOCIATION )

Plaintiff, )

vs. )

Case No. **02C 3688**

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

Defendants. )

**VERIFIED PETITION**

COMES NOW, Plaintiff, by and through its attorneys, Young, Bogle, McCausland, Wells & Blanchard, P.A., and for its cause of action against defendants F.Y.G. Investments, Inc., TREATCO, Inc. and Margie Thomas, states and alleges as follows:

**Parties**

1. Plaintiff, Wichita Terminal Association (W.T.A.) is a Kansas corporation with its principal place of business at 1537 Barwise, Wichita, Kansas, 67214.

2. F.Y.G. Investments, Inc. is a Texas corporation with its principal place of business at 2305 Mountain Lake Rd., Dallas, Texas, 75224-1651. F.Y.G. Investments, Inc. can be served by serving Barbara Dussex, 2305 Mountain Lake Rd., Dallas, Texas, 75224-1651.

3. TREATCO, Inc. is a Kansas corporation with its principal place of business at 2300 N. Broadway Street, Wichita, Kansas, 67219. TREATCO, Inc. can be served through its resident agent, Margie Thomas, at 2300 N. Broadway Street, Wichita, Kansas, 67219.

4. Margie Thomas is an individual residing in Wichita, Sedgwick County, Kansas, and can be served at 2300 N. Broadway Street, Wichita, Kansas, 67219.

### **Background Allegations**

5. Plaintiff, W.T.A., was formed as a co-partnership sometime on or after September 30, 1889, composed of the Chicago, Kansas & Nebraska Railway Company, the Wichita & Southwestern Company, Fort Scott Wichita & Western Railway Company, and the Kansas Midland Railroad Company relating to the joint ownership and operation of tracks in the stockyards, packing houses, and milling district of Wichita, Sedgwick County, Kansas. The W.T.A. has continued to operate in said area for the purposes of economy and efficiency in the handling of railroad business in said area and to have direct charge over the maintenance of said railroad property and tracks and of the switching thereover.

6. At a time undetermined by search of railroad records, but between the years of 1889 and 1922, two tracks running parallel to each other were constructed east of what is now known as Broadway and within the street confines of 25<sup>th</sup> Street which still exists, but which was vacated in the Session Laws of Kansas of 1895. That attached hereto marked Exhibit "A" and made a part hereof is a 1922 W.T.A. map of the area showing that the two 25<sup>th</sup> street tracks were in place at that time.

7. The two W.T.A. tracks designated by the W.T.A. as tracks numbered 70 and 71, have been utilized by the W.T.A. as interchange or transfer tracks since at least 1922.

8. A search of the Sedgwick County tax and appraisal records reflect that the property to the south of the aforementioned W.T.A. tracks is shown as being owned by F.Y.G. Investments, Inc. 2305 Mountain Lake Rd., Dallas, Texas, 75224-1651, and carrying the legal description:

NW 1/4 SW 1/4 EXC RR & EXC CANAL & EXC BEG 1131.07  
FT S & 593.54 FT E NW COR SW 1/4 S TO S LI NW 1/4 SW  
1/4 E 217.8 FT N TO PT 217.8 FT E OF BEG W TO BEG SEC  
4-27-1E

9. Defendant TREATCO, Inc. is not reflected on the Sedgwick County Real Estate Tax Roles as an owner of record of the aforementioned property but plaintiff asserts that said company maintains a dog food processing plant on such property and its president, Margie Thomas, asserts on behalf of TREATCO, Inc. a right to the property where the W.T.A. railroad tracks are located along 25<sup>th</sup> Street.

10. The South W.T.A. track running along 25<sup>th</sup> Street became unusable as a result of a derailment and was in need of repair. The North W.T.A. track was also in need of repair. When W.T.A. personnel made attempts to make repairs on the tracks in September, 2002, defendant Margie Thomas, presumably acting on behalf of TREATCO, Inc. and the owner of record, F.Y.G. Investments, Inc., notified said railroad personnel that they were trespassing upon her property and were asked to leave the premises. The repair work was terminated by W.T.A. personnel when Margie Thomas objected to the W.T.A. repairing their trackage and she notified the W.T.A. to cease trespassing upon the property or the police would be called to the scene.

11. Prior to the above altercation, the plaintiff W.T.A. had entered into a contractual agreement with a Kansas City area firm, Hulcher Services, Inc. to make repair and upgrading of the W.T.A. tracks along 25<sup>th</sup> Street. Said repairs were scheduled to be commenced on or about October 30, 2002, and Margie Thomas and TREATCO, Inc. were notified that the W.T.A. would commence the upgrade of both of its tracks along 25<sup>th</sup> Street on October 30, 2002.

12. On November 1, 2002, plaintiff W.T.A. was notified that the defendants would place a fence along 25<sup>th</sup> Street to prevent the W.T.A. from repairing and thereafter utilizing said trackage.

13. On November 4, 2002, defendants brought workmen upon the property and installed fencing along the West and North portion of the W.T.A. trackage and along the East side of the W.T.A. trackage which effectively restrained the contractor from completing the repair and upgrading of the two tracks in question.

### **Claims Against Defendants**

#### **COUNT 1: TORTUOUS INTERFERENCE**

14. Plaintiff realleges and incorporates by reference the following allegations as though fully set out herein.

15. With intent to injure plaintiff W.T.A., defendants have interfered with the W.T.A.'s ability to complete the construction on its tracks in order to upgrade both tracks along 25<sup>th</sup> street in order to meet federal railroad administration requirements. Defendant Margie Thomas has continuously and repeatedly ordered plaintiff's personnel to leave the

railroad property and has interfered with their ability to proceed with the repair of the trackage.

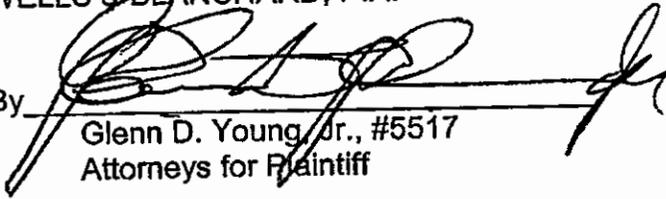
16. Defendant Margie Thomas and others under her direction have ordered the personnel of Hulcher Services, Inc. to remove themselves and their equipment from the trackage being repaired on 25<sup>th</sup> street.

17. That the actions of defendant Margie Thomas on behalf of the defendants constitutes a tortuous interference with the plaintiff W.T.A. being able to complete construction on the upgrade of its tracks along 25<sup>th</sup> street and said actions constitute an interference with interstate commerce. The intentional tortuous acts of Margie Thomas on behalf of the defendants has resulted in delays and damages to the plaintiff and plaintiff has suffered monetary damages and has suffered and will continue to suffer irreparable harm if said defendants' actions are not restrained.

WHEREFORE, plaintiff prays for the following relief: That the defendants, F.Y.G. Investments, Inc., TREATCO, Inc. and Margie Thomas be enjoined from interfering with the ability of plaintiff W.T.A. to complete the repair and restoration of its tracks along 25<sup>th</sup> street so that said trackage may be placed back in interstate commerce; and that defendants F.Y.G. Investments, Inc., TREATCO, Inc. and Margie Thomas be enjoined from interfering with the repair and upgrade work being performed by Hulcher Services, Inc. in repairing and upgrading the W.T.A. tracks along 25<sup>th</sup> street. Plaintiff further prays that it recover its damages, the costs of this action and its attorney's fees and any other relief that the Court deems just and proper.

Respectfully submitted,

YOUNG, BOGLE, McCAUSLAND,  
WELLS & BLANCHARD, P.A.

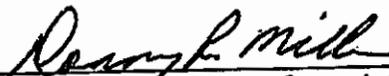
By   
Glenn D. Young, Jr., #5517  
Attorneys for Plaintiff

**VERIFICATION**

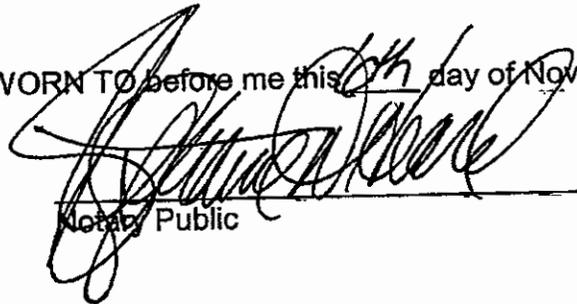
STATE OF KANSAS        )  
                                  ) ss:  
COUNTY OF SEDGWICK )

I, Danny R. Miller, being first duly sworn upon my oath, state: that I am the Superintendent of the Wichita Terminal Association, plaintiff herein; that I have read the above and foregoing Verified Petition; and that the statements and allegations made therein are true and correct.

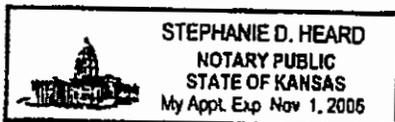
WICHITA TERMINAL ASSOCIATION

By   
Danny R. Miller, Superintendent

SUBSCRIBED AND SWORN TO before me this 20th day of November, 2002,

  
Notary Public

My appointment expires:



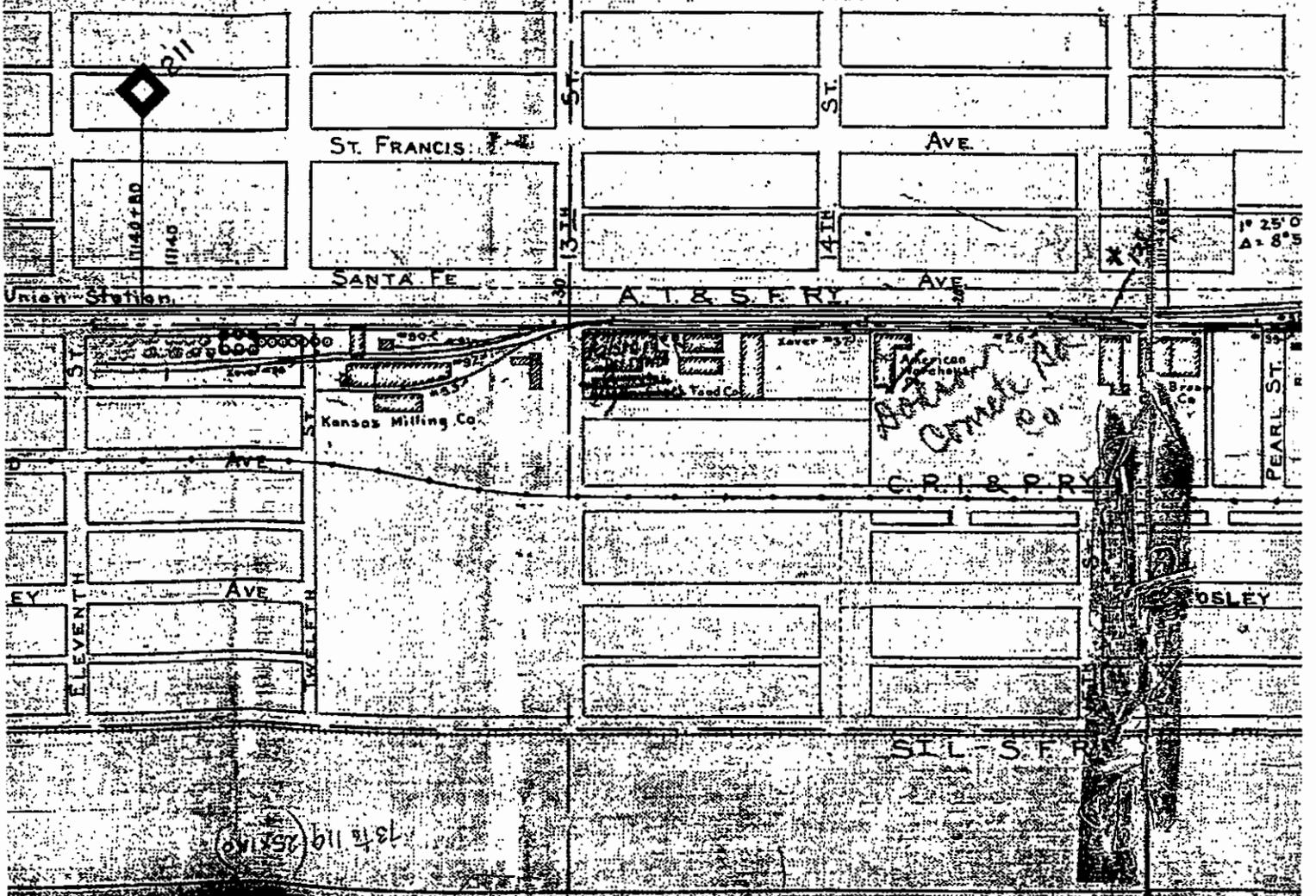
# LIST OF TRACKS

Owned by W.T.A.	No.	Owned by W.T.A.	No.	Owned by W.T.A.	No.	Owned by W.T.A.	Owned by Industries	No.	Owned by W.T.A.	Owned by Industries
2951	15	641	35	994	73	1538		93	666	
930	16	2190	36	157	74	1349		95	562	
607	17	1706	37	167	75	1268		96	746	
652	18	2736	59	363	76	158		97	1112	
563	20	661	60	164	77	769		98	295	
246	21	979	62	195	78	4136		99	471	
1591	22	754	63	776	79	770	138' Golden Rule Refining Co	100	700	
1273	23	961	64	847	80	1081	145'	101	323	
775	24	726	65	774	81	420		102	413	
447	25	864	66	82	82	562		103		
447	26	1714	69	474	83	445		104	68	
336	30	180	70	2838	90	3538		105		
579	32	354	71	1354	91	909				
1303	34	2201	72	1571	92	1063				

Bunk Hou:  
Oil House  
Shed and

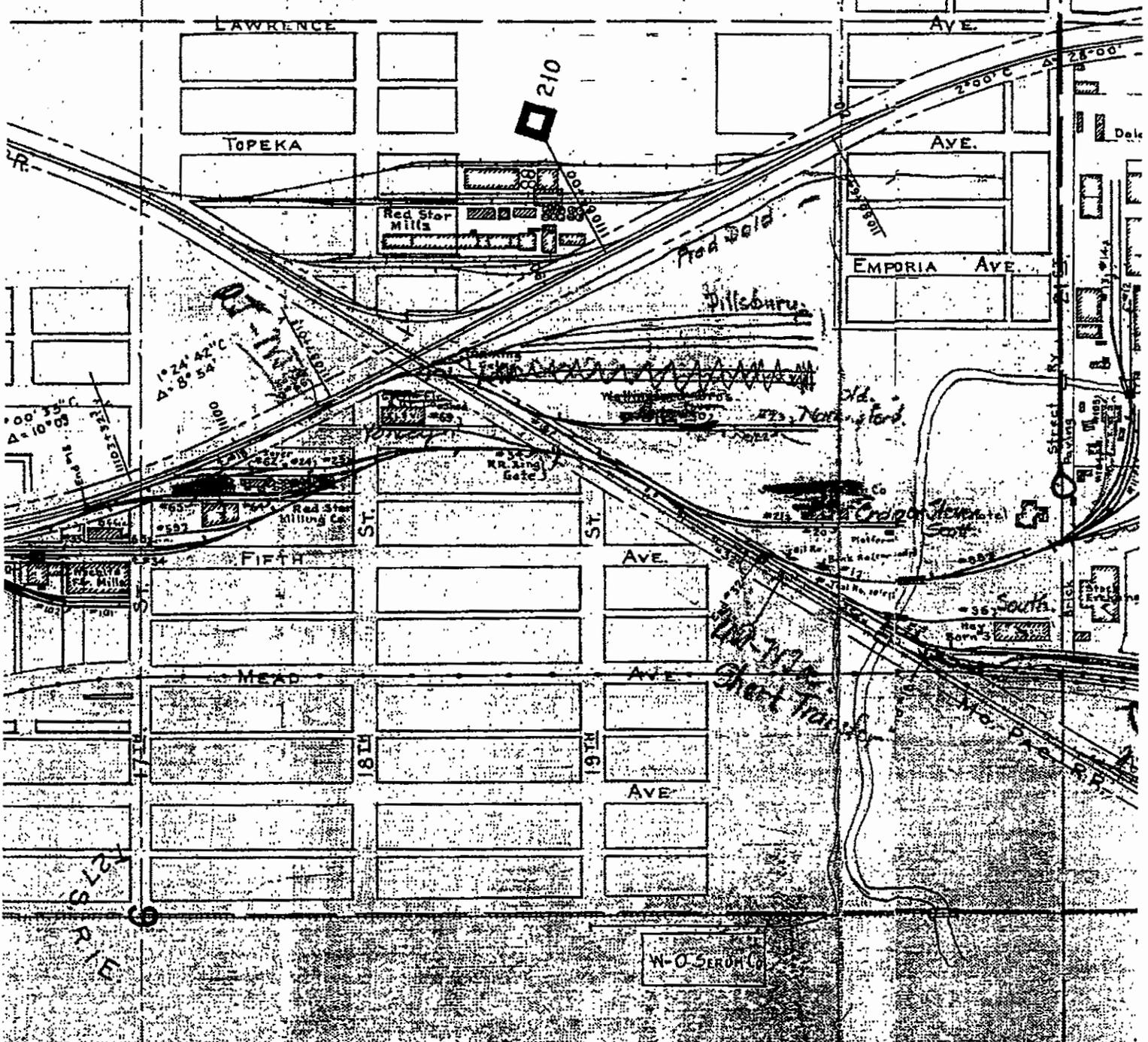
697' Sts. ...  
322' Dold Pack-  
306' ing Co.

Total - 63,55' 1,608' all tracks.  
= 12,324 Mi. = 0.304 Mi.



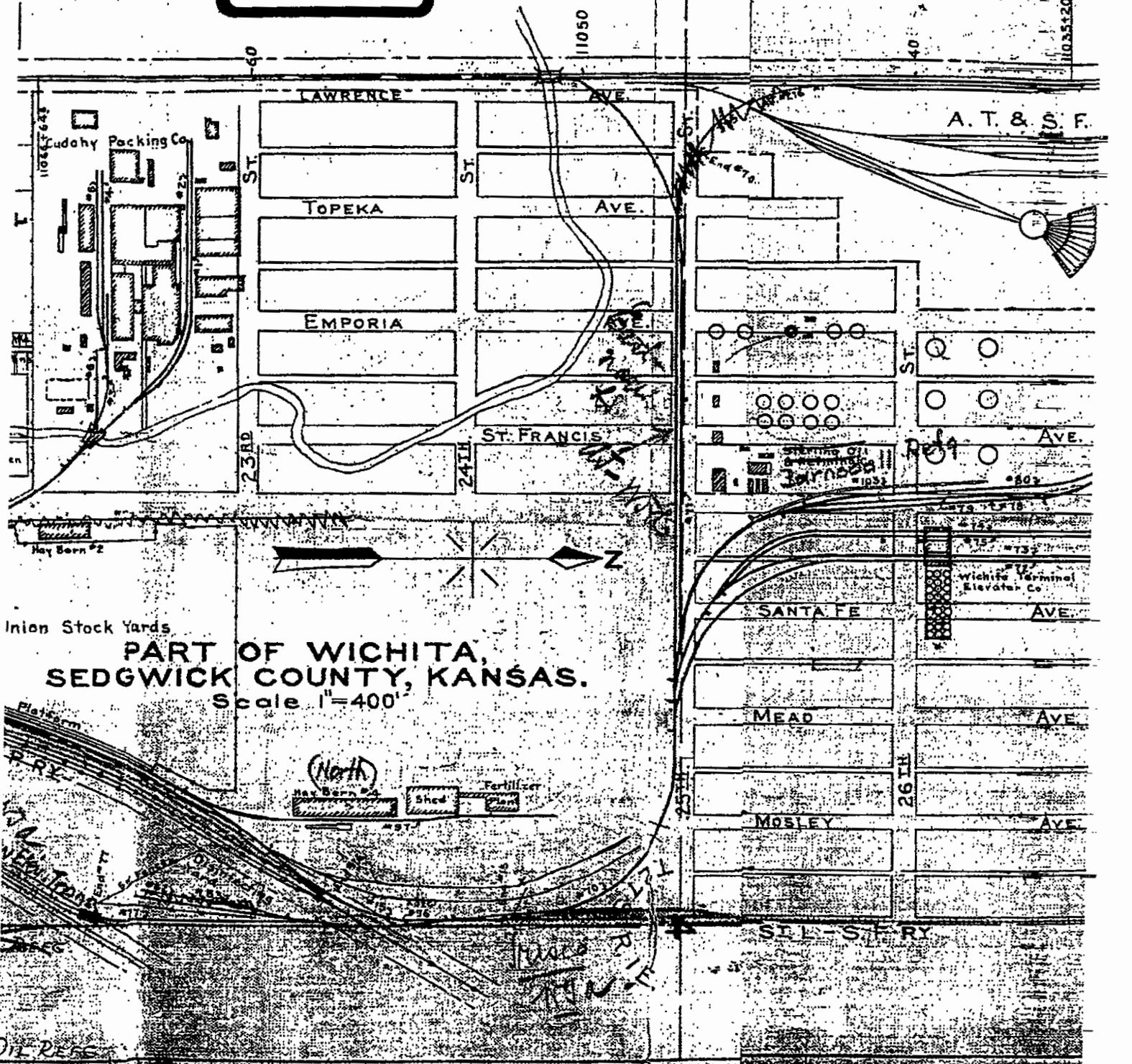
# THE WICHITA TERMINAL ASSOCIATION

'Tracks in red'



PLAINTIFF'S  
EXHIBIT

LL  
A



Union Stock Yards  
PART OF WICHITA,  
SEDGWICK COUNTY, KANSAS.  
Scale 1"=400'



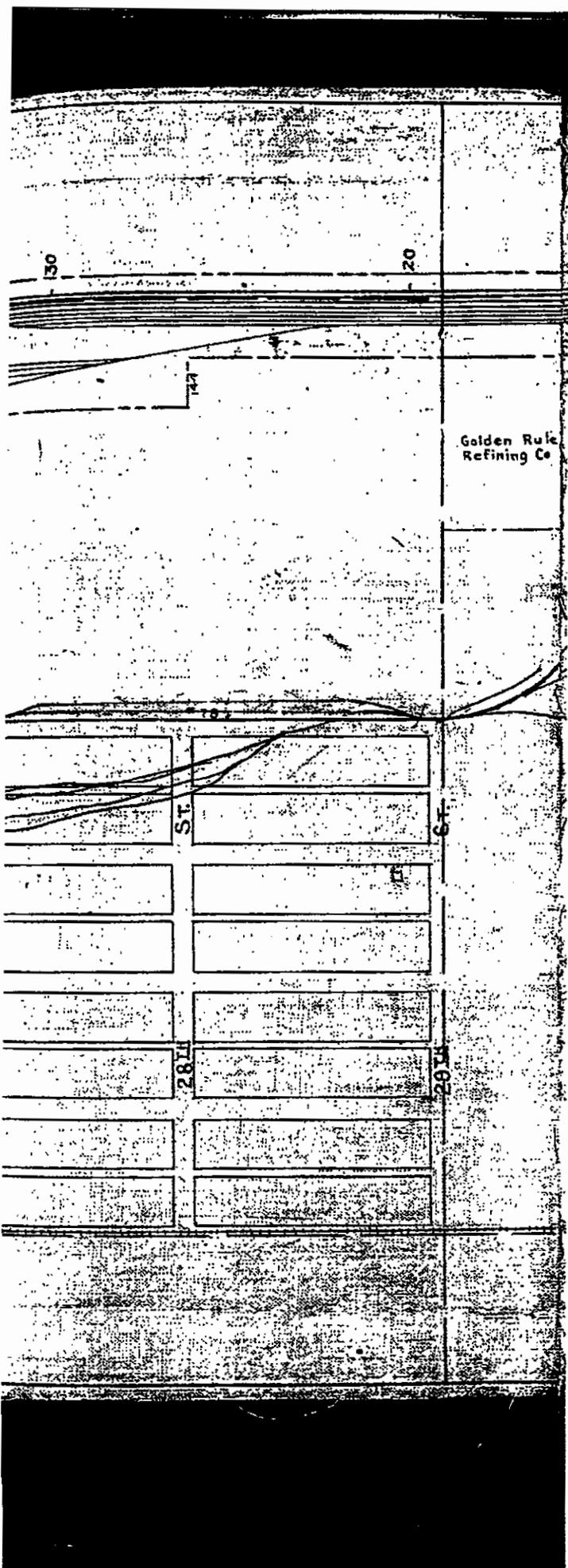


EXHIBIT  
 TO BE ATTACHED TO AGREEMENT  
 BETWEEN KANSAS CITY, TOPEKA AND SAN FRANCISCO  
 CHICAGO, ROCK ISLAND AND MISSOURI PACIFIC RAILROADS  
 AND  
 ST. LOUIS - SAN FRANCISCO RAILROAD  
 COMPRISING  
 WICHITA TERMINAL  
 RELATING TO TRACKS AND FACILITIES  
 ASSOCIATION AT WICHITA  
 IDENTIFIED

*H. W. Wagner*  
 Ind. Engr. CHIEF ENGR. THE A.T. & S.F. Ry. Co.

CHIEF ENGR. THE C.R.I. & P.Ry. Co.

Red = Tracks and facilities owned by Wichita  
 Yellow = Tracks owned by various industries

*Colouring not dependable  
 4/10 revised*

11000

To Newton →

**EXHIBIT 'A'**

*Public Term Elev.*

TO BE ATTACHED TO AGREEMENT BETWEEN  
~~ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY~~  
~~CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY~~  
~~MISSOURI PACIFIC RAILROAD COMPANY~~

AND

**ST. LOUIS - SAN FRANCISCO RAILWAY COMPANY**

COMPRISING THE

**WICHITA TERMINAL ASSOCIATION**

RELATING TO TRACKS AND FACILITIES OWNED BY THE  
ASSOCIATION AT WICHITA, KANSAS.

IDENTIFIED BY

*H. W. Wagner*  
*Ind. Engr.*  
CHIEF ENGR. THE A.T. & S.F. Ry. Co.

CHIEF ENGR. Mo. Pac. RR. Co.

CHIEF ENGR. THE C.R. & P. Ry. Co.

CHIEF ENGR. S.P.L.-S.F. Ry. Co.

□ = Tracks and facilities owned by Wichita Terminal Association.  
○ = Tracks owned by various industries

*Colour not dependable  
if revised*

Made at C.E.D.  
The A.T. & S.F. Ry. Co.  
Topeka, Kans.  
April 15, 1922.  
Draw No. 2465  
E.C.D. F.L.J.

YOUNG, BOGLE, McCAUSLAND,  
WELLS & BLANCHARD, P.A.  
106 West Douglas, Suite 923  
Wichita, Kansas 67202-3392  
Telephone: (316) 265-7841  
Facsimile: (316) 265-3956

FILED  
APP. DOCKET NO. [Signature]  
Nov 6 11 30 AM '02  
CLERK  
18TH  
SECT.  
BY [Signature]

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

WICHITA TERMINAL ASSOCIATION )  
 )  
 ) Plaintiff, )  
 vs. )  
 )  
 F.Y.G. INVESTMENTS, INC., )  
 TREATCO, INC. and MARGIE THOMAS, )  
 )  
 ) Defendants. )

Case No.

020 3688

**VERIFIED APPLICATION FOR RESTRAINING ORDER**

COMES NOW, Plaintiff, Wichita Terminal Association (W.T.A.), by and through its attorneys, Young, Bogle, McCausland, Wells & Blanchard, P.A., and pursuant to K.S.A. 60-902, applies to the Court for a Restraining Order against defendants F.Y.G. Investments, Inc., TREATCO, Inc. and Margie Thomas for the reasons and grounds set forth in Plaintiff's Verified Petition filed herein. Specifically, Plaintiff W.T.A. seeks the following restraining order from the Court until such time as there is a final judgment or hearing and ruling regarding other provisional remedies:

1. That defendant Margie Thomas, for herself and on behalf of defendants F.Y.G. Investments, Inc. and TREATCO, Inc., be restrained from interfering in any way with the

construction, repair and upgrading of the W.T.A. tracks located on or near 25<sup>th</sup> street in Wichita, Sedgwick County, Kansas.

2. That Margie Thomas, for herself and on behalf of said defendants, be restrained from interfering with the personnel of Hulcher Services, Inc. in repairing and upgrading the tracks along 25<sup>th</sup> street.

3. That Margie Thomas, and defendants F.Y.G. Investments, Inc. and TREATCO, Inc., be ordered to immediately remove the fencing installed across the W.T.A. tracks and along the W.T.A. tracks so that work can be recommenced to the repair and upgrade of the W.T.A. trackage.

4. That defendant Margie Thomas and defendants F.Y.G. Investments, Inc. and TREATCO, Inc. be enjoined from interfering with the railroad operations conducted by the W.T.A. along 25<sup>th</sup> street.

5. That defendant Margie Thomas and defendants F.Y.G. Investments, Inc. and TREATCO, Inc. be enjoined from interference with interstate commerce conducted by the plaintiff W.T.A.

**Suggestions in Support of Application for Restraining Order**

The factual basis for the requested Restraining Order is set forth in the Verified Petition filed contemporaneously herewith and those facts will not be repeated unnecessarily herein. It is clearly apparent that the W.T.A. tracks in question may have been laid down as long as 100 years ago and the defendants acquired their property with knowledge that the two W.T.A. tracks were there at the time of the acquisition of the property in 1996.

Although no easement of record appears with respect to the W.T.A. tracks along 25<sup>th</sup> street, the W.T.A. acquired a prescriptive easement for the operation of their trackage along 25<sup>th</sup> street where it has proceeded to operate said trackage for perhaps as long as the last 100 years. The Kansas courts use the K.S.A. 60-503 elements for adverse possession in evaluating whether a prescriptive easement exists. In Allingham v. Nelson, 6 Kan.App.2d 294, 627 P.2d 1179 (1981), Syl. 5, the court said:

"In Kansas, the distinction between adverse possession and prescriptive easements has been somewhat eroded, and the cases on prescriptive easements use the statute on adverse possession K.S.A. 60-503 as a basis for evaluating claims."

K.S.A. 60-503 reads:

"No action shall be maintained against any person for the recovery of real property who has been in open, exclusive and continuous possession of such real property, either under a claim knowingly adverse or under a belief of ownership, for a period of fifteen (15) years."

It would appear that the W.T.A.'s failure to secure an easement when it laid down its tracks at least 80 years ago would be controlled by the United States Supreme Court case of Roberts v. Northern Pacific Railroad, 158 U.S. 1, 15 S.Ct. 756, 39 L.Ed. 873 (1894). The court said,

". . . it has been frequently held that if a landowner knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute, requiring either payment by agreement or proceedings to condemn, remains inactive and permits them to go on and expend large sums in the work, he will be estopped from maintaining either trespass or ejection for the entry, and will be regarded as having acquiesced therein, and be restricted to a suit for damages. . . . p. 11.

The Roberts court was clear that the right to payment belonged to the owner at the time the railroad company took possession rather than a claim raised by subsequent owner

many, many years thereafter. It was held in Roberts that where a railroad company, having the power of eminent domain, entered into actual possession of and necessary for its corporate purpose, whether with or without the consent of the owner of such lands, a subsequent vendee of the latter took the land subject to the burden of the railroad, and the right to payment from the railroad company, if it entered by virtue of an agreement to pay, or to damages, if the entry was unauthorized, belonged to the owner at the time the railroad company took possession. (Emphasis added).

Did the W.T.A. ultimately acquire an easement by prescription when it installed its trackage in the early 1900s? This was answered in Taylor Investment Co. v. Kansas City Power & Light Co., 182 Kan. 51, 322 P.2d 817 (1958) when the court stated:

"It is fundamental that the prescriptive right to an easement is substantially the same in quality and characteristics and would arise in substantially the same manner as would title to land by adverse possession. It must not only be continuous for the requisite period of time, fifteen years under the present statute of limitations, but it must be adverse and under a claim of right, and must be exclusive and uninterrupted; and all this with the knowledge and against the consent of the owner of the estate out of which the easement is claimed, reasonable opportunity for knowledge on his part being accounted to him for such knowledge." p. 518.

See also, Brady Fluid Svc., Inc. v. Jordan, 25 Kan.App.2d 788, 972 P.2d 787 (1998), where it was held in Syl. 5 that in order to prove an easement by prescription a plaintiff must prove by clear, convincing and satisfactory evidence that it has been in open, exclusive, and continuous possession of such easement, either under a claim knowingly adverse or under a belief of ownership for the required period of time.

The defendants primarily through the actions of Margie Thomas as president of TREATCO, Inc. have threatened the plaintiff and its workmen with arrest by police authorities if W.T.A. continued with its attempts to repair and upgrade its 25<sup>th</sup> trackage.

The defendants have further caused to be installed fencing across the tracks of the W.T.A. in order to interfere or stop the repairs being conducted by an independent contractor. The plaintiff W.T.A. is being required to pay and will continue to pay its independent contractor while it is being restrained by the defendants from completing the work on the tracks in question. Plaintiff W.T.A. will be irreparable harmed if it is unable to restore and repair the trackage and return the lines affected to interstate commerce.

K.S.A. 60-902 specifically provides for the issuance of ex parte restraining orders. Ex parte restraining orders can be issued whenever, "it appears that a party is doing or threatens or is about to do . . . some act in violation of a party's rights respecting the subject of the action . . ."

Here, the basis for a restraining order could not be stronger or more clear. Margie Thomas, as President of TREATCO, Inc., and on behalf of the defendants, has effectively by the installation of fencing halted the repair of the 25<sup>th</sup> street tracks and such acts are clearly interfering with the W.T.A.'s operations in interstate commerce. The defendants have blatantly threatened to deny the plaintiff W.T.A. from repairing its trackage and restoring such trackage to normal usage.

The installment of the barbed wire fence by defendants at the West and East end and along the North side of the W.T.A. tracks along 25<sup>th</sup> Street has resulted in the work crew of Hulcher Services, Inc. being unable to complete the track repairs. Every day of down time resulting from the delay will result in significant cost to plaintiff W.T.A. and will cause plaintiff irreparable harm.

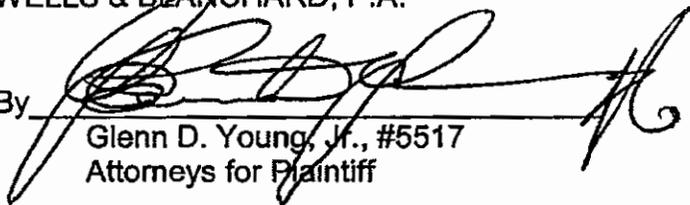
The actions of the defendants in halting the repairs of the 25<sup>th</sup> street tracks threatens to irreparably harm the plaintiff through its failure to restore such tracks to normal usage.

**CONCLUSION**

For the foregoing reasons, plaintiff W.T.A. respectfully requests that the Court sign and enter the proposed order submitted herewith granting Plaintiff's Verified Application for a Restraining Order.

Respectfully submitted,

YOUNG, BOGLE, McCAUSLAND,  
WELLS & BLANCHARD, P.A.

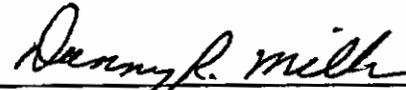
By   
Glenn D. Young, Jr., #5517  
Attorneys for Plaintiff

**VERIFICATION**

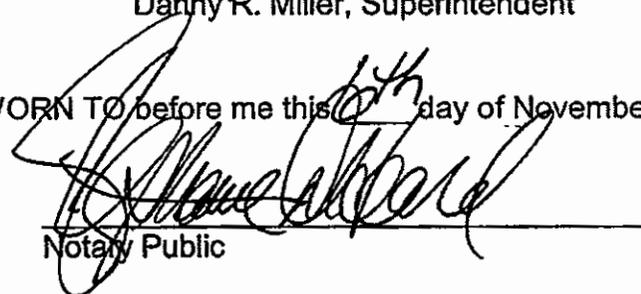
STATE OF KANSAS        )  
                                  ) ss:  
COUNTY OF SEDGWICK )

I, Danny R. Miller, being first duly sworn upon my oath, state: that I am the Superintendent of the Wichita Terminal Association, plaintiff herein; that I have read the above and foregoing Verified Application; and that the statements and allegations made therein are true and correct.

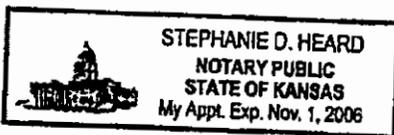
WICHITA TERMINAL ASSOCIATION

By   
Danny R. Miller, Superintendent

SUBSCRIBED AND SWORN TO before me this 10<sup>th</sup> day of November, 2002,

  
Notary Public

My appointment expires:



BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Docket FD 35765

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# Exhibit 4

F.Y.G. Investments, Inc. and Treatco, Inc.'s  
Reply to Petition for Declaratory Order



Railway Company merged into the Burlington Northern Railroad on December 31, 1996, and the Burlington Northern Railroad was renamed Burlington Northern & Santa Fe Railway Company and is a Delaware corporation.

3. Plaintiff Union Pacific Railroad Company merged with the Southern Pacific Transportation Company on February 28, 1998, and is a Delaware corporation.

4. The Burlington Northern & Santa Fe Railway Company and the Union Pacific Railroad Company are the successive proprietary companies who own an equal one-half undivided interest in all real and personal property including tracks of the Wichita Terminal Association which was formed under an Agreement between the Chicago, Rock Island and Pacific Railway Company, the Atchison, Topeka and Santa Fe Railway Company, Missouri Pacific Railway Company and St. Louis-San Francisco Railway Company covering ownership, operation and maintenance of Wichita Terminal Association dated June 29, 1923.

5. Said June 29, 1923, agreement replaced and cancelled a prior agreement dated September 30, 1889, between the Chicago, Kansas and Nebraska Railway Company (the Rock Island and Pacific Railway Company in 1923), the Wichita & Southwestern Railway Company (the Santa Fe in 1923), Ft. Scott, Wichita & Western Railway Company (the Missouri Pacific in 1923) and the Kansas Midland Railroad Company (the St. Louis-San Francisco Railway Company in 1923) relating to the joint ownership and operation of the tracks of the Wichita Terminal Association.

6. The Wichita Terminal Association has its principal place of business at 1537 Barwise, Wichita, Kansas, 67214.

7. FYG Investments, Inc. is a Texas corporation with its principal place of business at 2305 Mountain Lake Rd., Dallas, Texas, 75224-1651. FYG Investments, Inc. can be served by serving Barbara Dussex, 2305 Mountain Lake Rd., Dallas, Texas, 75224-1651.

8. TREATCO, Inc. is a Kansas corporation with its principal place of business at 2300 N. Broadway Street, Wichita, Kansas, 67219. TREATCO, Inc. can be served through its resident agent, Margie Thomas, at 2300 N. Broadway Street, Wichita, Kansas, 67219.

9. Margie Thomas is an individual residing in Wichita, Sedgwick County, Kansas, and can be served at 2300 N. Broadway Street, Wichita, Kansas, 67219.

#### **Background Allegations**

10. Plaintiff, W.T.A., was formed as a co-partnership sometime on or after September 30, 1889, composed of the Chicago, Kansas & Nebraska Railway Company, the Wichita & Southwestern Company, Fort Scott Wichita & Western Railway Company, and the Kansas Midland Railroad Company relating to the joint ownership and operation of tracks in the stockyards, packing houses, and milling district of Wichita, Sedgwick County, Kansas. The W.T.A. has continued to operate in said area for the purposes of economy and efficiency in the handling of railroad business in said area and to have direct charge over the maintenance of said railroad property and tracks and of the switching thereover.

11. The agreement forming the association or co-partnership in 1889 was cancelled and replaced by the agreement entered into on June 29, 1923, and referenced in paragraph 4 and 5 above.

12. At a time undetermined by search of railroad records, but between the years of 1889 and 1916, two tracks running parallel to each other were constructed east of what is now known as Broadway and within the street confines of 25<sup>th</sup> Street which still exists, but which was vacated in the Session Laws of Kansas of 1895. That attached hereto marked Exhibit "A" and made a part hereof is a 1922 W.T.A. map of the area showing that the two 25<sup>th</sup> street tracks were in place at that time.

13. The two W.T.A. tracks designated by the W.T.A. as tracks numbered 70 and 71, have been utilized by the W.T.A. as interchange or transfer tracks since at least 1922.

14. A search of the Sedgwick County tax and appraisal records reflect that the property to the south of the aforementioned W.T.A. tracks is shown as being owned by FYG Investments, Inc. 2305 Mountain Lake Rd., Dallas, Texas, 75224-1651, and carrying the legal description:

NW 1/4 SW 1/4 EXC RR & EXC CANAL & EXC BEG 1131.07  
FT S & 593.54 FT E NW COR SW 1/4 S TO S LI NW 1/4 SW  
1/4 E 217.8 FT N TO PT 217.8 FT E OF BEG W TO BEG SEC  
4-27-1E

15. Defendant TREATCO, Inc. is not reflected on the Sedgwick County Real Estate Tax Roles as an owner of record of the aforementioned property but plaintiff asserts that said company maintains a dog food processing plant on such property and its president, Margie Thomas, asserts on behalf of TREATCO, Inc. a right to the property where the W.T.A. railroad tracks are located along 25<sup>th</sup> Street.

16. The South W.T.A. track running along 25<sup>th</sup> Street became unusable as a result of a derailment and was in need of repair. The North W.T.A. track was also in need of repair. When W.T.A. personnel made attempts to make minor repairs on the tracks in

September, 2002, defendant Margie Thomas, presumably acting on behalf of TREATCO, Inc. and the owner of record, FYG Investments, Inc., notified said railroad personnel that they were trespassing upon her property and were asked to leave the premises. The repair work was terminated by W.T.A. personnel when Margie Thomas objected to the W.T.A. repairing their trackage and she notified the W.T.A. to cease trespassing upon the property or the police would be called to the scene.

17. Prior to the above altercation, the plaintiff W.T.A. had entered into a contractual agreement with a Kansas City area firm, Hulcher Services, Inc. to make repair and upgrading of the W.T.A. tracks along 25<sup>th</sup> Street. Said repairs were scheduled to be commenced on or about October 30, 2002, and Margie Thomas and TREATCO, Inc. were notified that the W.T.A. would commence the upgrade of both of its tracks along 25<sup>th</sup> Street on October 30, 2002. Exhibit B attached and made a part hereof.

18. After W.T.A. gave notice to defendants that its contractor would commence repair of the track, Hulcher Services, Inc. moved on to the tracks and started removing track on October 28, 2002. Defendants' counsel notified the W.T.A. that it was to understand that all improvements being made by Hulcher are with notice of termination of W.T.A.'s licensed use of the property effective December 31, 2002. See Exhibit C attached and made a part hereof.

19. A day later, on October 29, 2002, defendants' counsel changed the termination date from December 31, 2002, to the date when the tracks and ties were removed. See Exhibit D attached and made a part hereof.

20. On November 1, 2002, plaintiff W.T.A. was notified that the defendants would place a fence along 25<sup>th</sup> Street to prevent the W.T.A. from repairing and thereafter utilizing said trackage. See Exhibit E attached and made a part hereof.

21. On November 4, 2002, defendants brought workmen upon the property and installed fencing along the West and North portion of the W.T.A. trackage and along the East side of the W.T.A. trackage which effectively restrained the contractor from completing the repair and upgrading of the two tracks in question. On November 5, 2002, defendants' counsel approved the removal of tracks and ties and notified of the closing off of the fencing. See Exhibit F attached and made a part hereof.

### **Claims Against Defendants**

#### **COUNT 1: TORTUOUS INTERFERENCE**

22. Plaintiff realleges and incorporates by reference the following allegations as though fully set out herein.

23. With intent to injure plaintiff W.T.A., defendants have interfered with the W.T.A.'s ability to complete the construction on its tracks in order to upgrade both tracks along 25<sup>th</sup> street in order to meet federal railroad administration requirements. Defendant Margie Thomas has continuously and repeatedly ordered plaintiff's personnel to leave the railroad property and has interfered with their ability to proceed with the repair of the trackage.

24. Defendant Margie Thomas and others under her direction have ordered the personnel of Hulcher Services, Inc. to remove themselves and their equipment from the trackage being repaired on 25<sup>th</sup> street.

25. That the actions of defendant Margie Thomas on behalf of the defendants constitutes a tortuous interference with the plaintiff W.T.A. being able to complete construction on the upgrade of its tracks along 25<sup>th</sup> street and said actions constitute an interference with interstate commerce. The intentional tortuous acts of Margie Thomas on behalf of the defendants has resulted in delays and damages to the plaintiff and plaintiff has suffered monetary damages and has suffered and will continue to suffer irreparable harm if said defendants' actions are not restrained.

COUNT 2: QUIET TITLE

26. Plaintiff realleges and incorporates by reference the following allegations as though fully set out herein.

27. Plaintiffs, W.T.A., Burlington Northern & Santa Fe Railway Company and Union Pacific Railroad Company for cause of action against the above named defendants and each of them state and allege:

28. That between the years of 1889 and 1916 the W.T.A. constructed two tracks running parallel to each other east of what is now known as Broadway Street and within the then street confines of 25<sup>th</sup> Street which still exists but which street was vacated in the Session Laws of 1895.

29. Said railroad tracks which were constructed at least 86 years ago run along the north side of the following described property owned by FYG Investments, Inc. and described as follows:

The North Half of the Southwest Quarter of the Southwest Quarter and the Northwest Quarter of the Southwest Quarter all in Section 4, Township 27 South, Range 1 East of the Sixth Principal Meridian, Sedgwick County, Kansas, except a strip of land 50 feet in width along the entire west side the same being a portion of the right of way of the Atchison, Topeka & Santa Fe

Railway Co.; and except a tract of land located in the Northwest Corner of the Northwest Quarter of the Southwest Quarter which was conveyed to the Atchison, Topeka & Santa Fe Railway Co. on August 4, 1925 as reflected in Deed Book 379, Page 78, and except a tract described as commencing at the Northwest Corner of said Southwest Quarter of said Section 4, thence N 90 degrees 00' E along the North line of said Northwest Quarter of said Southwest Quarter, 473.04 feet; thence S 00 degrees 09'45" W, 1131.07 feet, thence S 89 degrees 50'15" E 120 feet to a point of beginning; thence S 00 degrees 09'45"W, 200 feet; thence S 89 degrees 50'15" E, 217.8 feet; thence N 00 degrees 09'45" E 200 feet; thence N 89 degrees 50'15" W, 217.8 feet to the point of beginning.

30. That plaintiff W.T.A. and its present proprietary companies, namely plaintiffs Burlington Northern & Santa Fe Railway Company and Union Pacific Railway Company, have acquired a prescriptive easement for said tracks running along 25<sup>th</sup> street since said tracks have been in continuous usage by the W.T.A. since at least 1916 and such usage of the prescriptive easement for said tracks has been uninterrupted, open, notorious, quiet, peaceable, exclusive and adverse to the claim of any adjoining property owners of real estate since the construction of said tracks.

31. That FYG Investments, Inc. acquired title to the above described real estate on June 28, 1996, or some 6 ½ years ago with clear and apparent notice of the existence of the W.T.A. tracks running along the north boundary of the FYG Investments, Inc. property and defendants' interest is inferior to Plaintiffs' prescriptive easement and defendants are barred by laches, estoppel, collateral estoppel, statute of limitations, statute of frauds and waiver.

32. That after F&G Investments, Inc. acquired title to the aforescribed real estate on June 28, 1996, defendants obtained a boundary survey by Municipal Engineers, 254 Laura, Suite 201, Wichita, Kansas, 67111, on September 3, 1998, of said real estate which reflected "there are existing railroad tracks along South side 25<sup>th</sup> Street North and at the

Southeast Corner of this property. Surveyor has not found any records concerning these railroad tracks." That defendants are further barred by the statute of limitations from making any claim by virtue of notice under said survey.

33. That notwithstanding the premises, the defendants are claiming some interest, title or estate in the prescriptive easement acquired for the use of plaintiffs' tracks along 25<sup>th</sup> Street, which claims cast a cloud upon the prescriptive right of easement acquired by the W.T.A. over at least the last 86 years usage of the trackage. Plaintiffs allege that whatever claim or right of interest the defendants have are void and inferior and junior to the rights of plaintiffs under their prescriptive easement and plaintiffs are entitled to have their title to a prescriptive easement for the reasonable and customary use of the tracks in their normal railroad operations quieted against these defendants or anyone claiming through or under them.

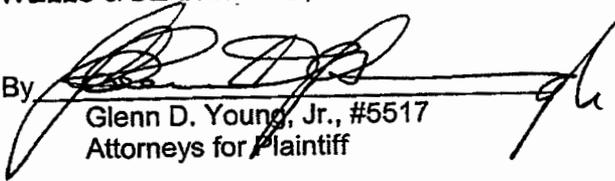
WHEREFORE, plaintiffs pray that their title to a prescriptive easement for the reasonable and customary use of the tracks in question for normal railroad operations be quieted against the claims of defendants and all persons claiming any right, title, interest or estate, by, through or under them, and enjoining said defendants from further claiming any title, interest or estate in said prescriptive easement, and further, that the defendants, FYG Investments, Inc., TREATCO, Inc. and Margie Thomas be enjoined from interfering with the ability of plaintiff W.T.A. to complete the repair and restoration of its tracks along 25<sup>th</sup> street so that said trackage may be placed back in interstate commerce; and that defendants FYG Investments, Inc., TREATCO, Inc. and Margie Thomas be enjoined from interfering with the repair and upgrade work being performed by Hulcher Services, Inc. in repairing and upgrading the W.T.A. tracks along 25<sup>th</sup> street. Plaintiff further prays that it

recover its damages, the costs of this action and its attorney's fees and any other relief that  
the Court deems just and proper.

Respectfully submitted,

YOUNG, BOGLE, McCAUSLAND,  
WELLS & BLANCHARD, P.A.

By

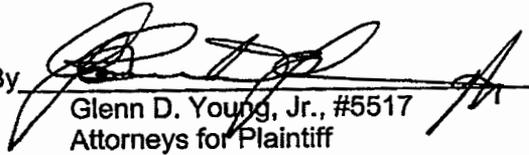


Glenn D. Young, Jr., #5517  
Attorneys for Plaintiff

recover its damages, the costs of this action and its attorney's fees and any other relief that the Court deems just and proper.

Respectfully submitted,

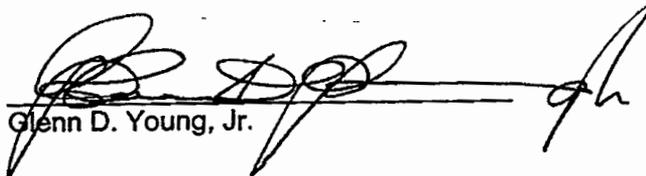
YOUNG, BOGLE, McCAUSLAND,  
WELLS & BLANCHARD, P.A.

By   
Glenn D. Young, Jr., #5517  
Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he served a true and correct copy of the above and foregoing Second Amended Petition by depositing the same in the United States Mail, postage prepaid, and properly address, this 6th day of December, 2002, to the following:

Edgar W. Dwire  
Malone, Dwire & Jones  
305 W. Central  
P.O. Box 2082  
Wichita, Kansas 67201-2082

  
Glenn D. Young, Jr.

October 24, 2002

**VIA FACSIMILE**  
**265-2432**

Edgar W. Dwire  
Malone, Dwire & Jones  
305 W. Central  
P.O. Box 2082  
Wichita, Kansas 67201-2082

Re: Wichita Terminal Association  
25<sup>th</sup> Street Trackage

Dear Mr. Dwire:

I have been instructed by my client to notify you as attorney for Treat Co., Inc. that the Wichita Terminal Association will commence the upgrade of both of its tracks along 25<sup>th</sup> Street in order to meet Federal Railroad Administration requirements and that a crew will be on the ground to start construction of the upgrade on the morning of October 30, 2002. We are advised that the job should be completed within a week to ten days.

Very truly yours,

Glenn D. Young, Jr.  
Of YOUNG, BOGLE, McCAUSLAND,  
WELLS & BLANCHARD, P.A.

GDY:sdh

cc: Mrs. M. Thomas  
Danny R. Miller



OCT-28-02 04:19 PM MALONE, DWIRE, & JONES

2652432

P. 01

MALONE, DWIRE & JONES  
ATTORNEYS AT LAW  
BOX 2082  
305 WEST CENTRAL  
WICHITA, KANSAS 67201  
TELE. 316-265-4248  
FAX 316-265-2432

FAX COVER SHEET

DATE: 10-28-02

TIME: 3:30 p.m.

TO: Glenn Young  
Darrel Tisor  
Nancy Lewis  
Mike Hamey

Fax No.: 316 265-3956  
Fax No.: 816 329-3840  
Fax No.: 202 493-6068  
Fax No.: 785 271-3354

FROM: Edgar Wm. Dwire

TOTAL NUMBER OF PAGES: 1 (Includes Fax Cover Sheet)

Please contact Sharon at 265-4248 if you do not receive all pages of this transmission.

Description of transmitted materials:

Re: SW/4, Twp. 27, R1E, Sedgwick County; Tracks East of Broadway on 25<sup>th</sup>

I am advised your client's personnel showed up this morning and started working on the 25<sup>th</sup> street tracks, in advance of the date stated in your fax and letter of October 24, with the apparent intent to install all new track. Please understand that all improvements are with a notice of termination of your clients licensed use of the property, December 31, 2002.

Please provide our office with what you intend to do on the tracks and property and any documents you have justifying your position.

The your client's personnel did move off the property when Ms. Thomas requested documentation and directed them to do leave the property when they had none.

Sincerely



Edgar Wm. Dwire



*Malone, Dwire and Jones*

*Attorneys at Law*

P.O. BOX 2082 • 305 WEST CENTRAL

WICHITA, KANSAS 67201

(316) 265-4248

FAX: (316) 265-2432

EDGAR WM. DWIRE  
ewdmdj@swbell.net

WARREN G. JONES  
wgjmdj@swbell.net

E.L. (PAT) MALONE  
1927 - 1998

October 29, 2002

Glenn Young Fax 316 265 3956  
Young, Bogle, McCausland, Wells & Blanchard  
106 West Douglas, Suite 923  
Wichita, Kansas 67202-3392

Re: SW/4, Twp.27, R1E, Sedgwick County; Tracks east of Broadway on 25<sup>th</sup>.

Mr. Young:

I have had no response to my correspondence.

Your clients are removing the tracks and ties of the 25<sup>th</sup> Street tracks. It is apparent that your clients' license to use my client's property should be terminated with the removal of the tracks and ties.

I have been directed to advise you that your clients' use of my client's property along 25<sup>th</sup> Street is terminated with the removal of the ties and rails. Do not install new rail or ties.

Sincerely,

  
Edgar Wm. Dwire

c/cM. Thomas

Darrel Tisor, Fax 816 329 3840

Nancy Lewis Fax 202 493 6068

Mike Hamey Fax 785-271-3354



*Malone, Dwire and Jones*

*Attorneys at Law*

P.O. BOX 2082 • 305 WEST CENTRAL

WICHITA, KANSAS 67201

(316) 265-4248

FAX: (316) 265-2432

EDGAR WM. DWIRE  
ewdmdj@swbell.net

WARREN G. JONES  
wgjrmcj@swbell.net

E.L. (PAT) MALONE

1927 - 1998

November 1, 2002

Glenn Young Fax 316 265 3956  
Young, Bogle, McCausland, Wells & Blanchard  
106 West Douglas, Suite 923  
Wichita, Kansas 67202-3392

Re: SW/4, Twp.27, R1E, Sedgwick County; Tracks east of Broadway on 25<sup>th</sup>.

Mr. Young:

I understood or expected to receive documents after your call of October 30, and stayed till 6:45 p.m. but have received nothing.

My clients appreciate your clients removing the tracks and ties of the 25<sup>th</sup> Street tracks on their property.

As the tracks and ties are removed they will place a fence along 25<sup>th</sup> street to prevent 4-wheelers, etc., from entering on the property.

Sincerely,



Edgar Wm. Dwire

c/M. Thomas



*Malone, Dwire and Jones*  
*Attorneys at Law*

P.O. BOX 2082 • 305 WEST CENTRAL

WICHITA, KANSAS 67201

(316) 265-4248

FAX: (316) 265-2432

EDGAR WM. DWIRE  
ewdmdj@swbell.net

WARREN G. JONES  
wgjmdj@swbell.net

E.L. (PAT) MALONE  
1927 - 1998

November 5, 2002

Glenn Young Fax 265 3956  
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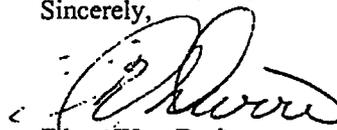
Re: SW/4, Twp.27, R1E, Sedgwick County; Tracks east of Broadway on 25<sup>th</sup>.

Mr. Young:

I am advised that the railroad contractor's have completed removing the tracks and rails.

Ms. Thomas appreciates that and will complete the fencing to prevent the 4-wheeler's and trash dumpers off the property.

Sincerely,



Edgar Wm. Dwire

c/cM. Thomas





1 Edgar Wm. Dwire and Mr. Warren G. Jones, III, of Malone,  
2 Dwire & Jones, 305 W. Central, P.O. Box 2082, Wichita,  
3 Kansas 67201.  
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1 THE COURT: Are the parties ready?

2 MR. YOUNG: We are.

3 MR. DWIRE: Ready, Your Honor.

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

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

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

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

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

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

2 DANNY MILLER: Superintendent.

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

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

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

1 Mr. Young?

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

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

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

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

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

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

25 MR. YOUNG: I --

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

3 MR. YOUNG: Well, I will.

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

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

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

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

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

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

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

6                           **DIRECT EXAMINATION**

7           **BY MR. DWIRE:**

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

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

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

14          A.    Thirty years.

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

17          A.    Yes, I am.

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

19          A.    Yes, it is.

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

22          A.    Yes, it is.

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

25          A.    Yes, it does.

1 Q. Does the City of Wichita maintain signage on 25th  
2 Street North designating it as 25th Street?

3 A. Yes. The only sign that's designated as 25th is the  
4 east portion at 26th Street. There -- the other  
5 street name sign that says 25th is on the west side of  
6 the street, south -- south -- southwest corner.

7 Q. All right.

8 A. But we do maintain the sign that's on the east end  
9 that says 25th and 26th.

10 Q. Okay. And 26th joins in to 25th --

11 A. That is correct.

12 Q. -- correct?

13 A. That is correct.

14 Q. And is that located in front of Pearson Excavating?

15 A. Yes, it is.

16 Q. Are there two businesses located along 25th Street?

17 A. Yes, there are.

18 Q. And could you tell us what those businesses are,  
19 please.

20 A. All I can recollect is just one. I know it's  
21 Glickman. It's one of the business there. And I  
22 think further to the east is some kind of maybe grain  
23 elevator or some kind of elevator.

24 Q. All right. And is Pearson Excavating designated as  
25 821 East 25th Street?

1 A. Yes, it is.

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

4 A. That is correct.

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

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

10 Q. Thank you.

11 THE COURT: Cross?

12 MR. YOUNG: Just briefly, Your Honor.

13 **CROSS-EXAMINATION**

14 **BY MR. YOUNG:**

15 Q. Good morning, Mr. Pruitt.

16 A. Good morning. How ya doing today?

17 Q. Great.

18 A. That's good.

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

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

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

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

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

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

7                       MR. DWIRE: Okay.

8                       THE COURT: Well, refrain from testifying.

9                       MR. YOUNG: I'll try.

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

12                      MR. JONES: Don't want that.

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

15 A.    Okay.

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

19 A.    Okay.

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

23 A.    November 28th of '06.

24 Q.    Okay. How do you maintain it?

25 A.    With motor graders.

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

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

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

11 A. I'm not --

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

13 A. I'm not for sure.

14 Q. -- street maintenance?

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

17 THE COURT: Redirect?

18 MR. DWIRE: No, Your Honor.

19 THE COURT: All right.

20 MR. DWIRE: May this witness be excused?

21 THE COURT: Mr. Young?

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

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

25 THE WITNESS: Thank you.

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

3 THE WITNESS: Everybody have a good day.

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

6 MR. YOUNG: I am, Your Honor.

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

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

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

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

15 **DIRECT EXAMINATION**

16 **BY MR. YOUNG:**

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

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

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

1 THE COURT: That's correct.

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

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

7 A. Yes, I am.

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

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

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

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

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

24 A. Yes, it was.

25 Q. About when did that occur?

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

3 Q. And where was that private crossing?

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

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

9 A. Yes, it is.

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

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

14 Q. Okay.

15 A. -- have the crossing installed.

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

17 A. No.

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

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

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

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

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

2 A. It's a limestone crushed dirt.

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

4 A. Yes, it did.

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

9 A. Yes.

10 Q. Okay.

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

12 Q. Okay. BNSF Santa Fe?

13 A. Right.

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

18 A. Not to me directly.

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

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

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

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

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

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

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

23    A.    Yes.

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

25    A.    Yes, I am.

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

3 A. Yes.

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

6 A. Yes.

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

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

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

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

8 Q. Railroad cars?

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

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

19 A. 30 to 40 cars a day.

20 Q. Would be moved?

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

1 as 100, 150 a day.

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

5 A. That's correct.

6 Q. What is that equipment?

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

8 Q. Yes.

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

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

17 A. That's correct.

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

19 A. That's one of them.

20 Q. -- is that correct?

21 A. That's correct.

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

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

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

6 A. Yes, it would.

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

10 A. Yes, it would.

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

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

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

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

24 Q. All right. And --

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

1 major concern.

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

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

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

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

12 MR. YOUNG: Sure.

13 (Off-the-record.)

14 THE COURT: Go ahead, Mr. Young.

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

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

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

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

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

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

4        A.    Concrete.

5        Q.    Concrete.    Okay.

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

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

14      A.    That's my understanding.

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

19      A.    That would be my preference.

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

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

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

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

12   A.   Yes, it is.

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

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

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

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

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

4 Q. Is there any federal agency involved?

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

8 Q. Okay. And --

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

11 Q. The Federal --

12 A. Railroad --

13 Q. -- Railroad --

14 A. -- Administration?

15 Q. -- Railroad Administration?

16 A. Yes.

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

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

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

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

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

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

25 Q. Okay.

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

3 Q. All right. And --

4 A. -- 2600 feet, approximately.

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

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

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

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

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

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

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

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

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

14 A. Yes, it will.

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

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

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

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

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

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

14 A. Yes, I have.

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

17 A. The most efficient way --

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

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

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

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

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

7                   MR. YOUNG: Okay.

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

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

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

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

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

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

21                   THE COURT: Answer my question.

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

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

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

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

8 THE WITNESS: Yes.

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

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

22 THE COURT: Who owns that property?

23 THE WITNESS: Pardon me?

24 THE COURT: Who owns the property?

25 THE WITNESS: March Oil, Johnny Stephens.

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

3 THE WITNESS: No.

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

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

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

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

14 Q. Straight east?

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

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

24 A. Yes. There is a dirt road.

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

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

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

13 Q. Okay.

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

17 Q. To the north?

18 A. To the north, correct.

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

23 A. Yes, I do.

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

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

1 A. Correct.

2 Q. Okay.

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

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

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

12 Q. Okay.

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

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

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

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

24 THE COURT: So --

25 THE WITNESS: So I presented nothing, no

1 plat, nothing official.

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

5 THE WITNESS: I fully understand that.

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

10 Go ahead, Mr. Dwire.

11 **CROSS-EXAMINATION**

12 **BY MR. DWIRE:**

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

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

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

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

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

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

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

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

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

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

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

10 Q. Okay. Now --

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

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

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

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

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

20 Q. And --

21 A. Don't disagree.

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

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

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

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

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

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

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

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

3 A. Santa Fe property.

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

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

9 Q. Okay.

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

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

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

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

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

1 the 30's.

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

4 A. I have no idea what it is.

5 Q. Do not?

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

7 Q. Yes.

8 A. Yes, I am.

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

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

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

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

23 A. Yes, we have.

24 Q. Okay.

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

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

3 Q. Okay.

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

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

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

10 **REDIRECT EXAMINATION**

11 **BY MR. YOUNG:**

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

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

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

1 the Pearson Excavating operation?

2 A. Yes, it is.

3 Q. Okay. And it was your testimony that -- that a better  
4 solution for an access road would be to join up with  
5 the -- that private road on the right, is that  
6 correct?

7 A. That's correct.

8 Q. Okay. And that would of necessity require Treatco or  
9 FYG to build a road over to that private road, is that  
10 correct, in order to get access?

11 A. That's correct, or negotiate with the City. I don't  
12 know how they --

13 Q. Okay. And -- and in your dealing with the City, are  
14 you stating that you're aware that the City has  
15 considered that particular solution to the problem?

16 A. The City was there when the recommendation was made,  
17 so I assume --

18 Q. Right.

19 A. -- they have discussed it.

20 Q. All right. Now, I hand you what has been marked as  
21 Plaintiff's Exhibit 2-2, which is a higher aerial view  
22 of the entire area. Would that be a fair --

23 A. That's correct.

24 Q. -- explanation? Does that particular exhibit show  
25 where that private road that we've been talking about,

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

2 A. Yes, 21st Street.

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

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

6 Q. All right.

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

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

12 A. That's correct.

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

15 A. 29th, yes.

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

18 THE COURT: Any objection?

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

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

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

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

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

8 MR. YOUNG: Right.

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

11 MR. YOUNG: Okay.

12 THE WITNESS: Sorry.

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

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

17 THE COURT: All right.

18 MR. DWIRE: Nothing further, Your Honor.

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

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

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

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

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

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

8 Parties care to argue? Mr. Young?

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

11 THE COURT: Fine. That's fine.

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

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

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

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

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

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

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

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

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

17               THE COURT: Thank you, Mr. Young.

18               MR. YOUNG: Thank you.

19               THE COURT: Mr. Dwire?

20               MR. DWIRE: Thank you, Your Honor.

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

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

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

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

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

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

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

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

20              MR. YOUNG: Not that elder now.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 find that 25th Street is a public street.

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

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

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

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

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

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

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

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

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

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

1           that this impacts.

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

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

12           Now, do the parties have any questions?

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

25           THE COURT: Well, I think based on the

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

8 MR. DWIRE: Thank you, Your Honor.

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

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

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

22 MR. YOUNG: Thank you, Your Honor.

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

25 (Off-the-record discussion.)

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

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

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

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

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

1 now. I appreciate it. Thank you.

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

4 MR. JONES: Thank you, Your Honor.

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FILED  
APP DOCKET NO. \_\_\_\_\_

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

2008 AUG -1 A 11:54

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

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

Plaintiffs, )

v. )

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

Defendants. )

**COPY**

Case No. 02 C 3688

Pursuant to K.S.A. Chapter 60

**JOURNAL ENTRY ON REMAND  
and PERMANENT INJUCTION**

NOW, on this 25th day July, 2008, this matter comes on for remand pursuant to the Kansas Court of Appeals Order of Remand. Glenn D. Young, Jr., of Young, Bogle, McCausland, Wells & Blanchard, P.A., appears on behalf of the Plaintiffs. Wyatt A. Hoch of Foulston Siefkin LLP appears on behalf of the Defendants. There are no other appearances.

WHEREUPON, this Court considers its findings of fact and conclusions of law made at the hearing before this Court of February 20, 2007, when the Court, in reviewing the opinion of the Court of Appeals in its unpublished memorandum of April 8, 2005, in Case No. 92,132, determined the following issues on remand:

1. Is 25<sup>th</sup> Street a public street?
2. If so, does F.Y.G. Investments, Inc., have a right of ingress and egress over the tracks to 25<sup>th</sup> Street based on Section 2 of the City of Wichita Ordinance No. 5436 adopted in 1916?
3. Does F.Y.G. Investments, Inc., have a right to ingress and egress to and from 25<sup>th</sup>

Street, based upon the common law right of access?

4. If so, is an injunction appropriate to provide ingress and egress to and from 25<sup>th</sup>

Street?

WHEREUPON, the Court, in its hearing on February 20, 2007, made the following findings of fact:

FINDINGS OF FACT

1. Twenty-fifth (25<sup>th</sup>) Street, East of Broadway, in Wichita, Kansas, is a public road and thoroughfare maintained by the City of Wichita.
2. The City of Wichita permitted WTA, by Ordinance No. 5436, to construct railroad tracks on 25<sup>th</sup> Street, in Wichita, subject to specified conditions as set forth in Section 2 of said Ordinance.
3. Pursuant to Ordinance No. 5436, as amended, WTA did construct its tracks on 25<sup>th</sup> Street as 25<sup>th</sup> Street was designated in the Ordinance, but 25<sup>th</sup> Street was never constructed as so designated.
4. Wichita City Ordinance No. 5436 provides that the said Association (WTA) shall construct and maintain in good order the portion of sidewalks and railway crossings and shall keep said track in good repair and in such condition that teams and vehicles on such street can safely pass over tracks at any point on said street.
5. WTA has an obligation to provide FYG ingress and egress over the tracks based on Section 2 of the Wichita Ordinance 5436, as amended.
6. FYG's land abuts the railroad tracks and right-of-way which, in turn, abuts a gravel road designated 25<sup>th</sup> Street. FYG does not currently have access to 25<sup>th</sup> Street as ingress and egress are blocked by WTA's railroad tracks.
7. To achieve the intent of Ordinance 5436 and/or the Kansas common law right of access, with present conditions, F.Y.G. Investments, Inc., gave to the public an

Access Dedication, Exhibit M-1, a Dedication for right-of-way purposes, Exhibit M-2, and Access Control Dedication, Exhibit M-3, to establish a location for the crossing installation, pursuant to the Wichita City Code, Title 12, Railroads.

8. The City of Wichita accepted the Dedications on September 19, 2006, Exhibit M-4.

WHEREUPON, the Court, in its hearing on February 20, 2007, made the following

**Conclusions of Law:**

- A. F.Y.G. Investments, Inc.'s land abuts the Plaintiff's tracks and right-of-way, which abuts 25<sup>th</sup> Street.
- B. The Kansas common law right of access to public streets obligates Plaintiffs to provide, construct and maintain ingress and egress over the 25<sup>th</sup> Street tracks, which abuts 25<sup>th</sup> Street, a public roadway, and F.Y.G. Investments, Inc.'s abutting property.
- C. The language of City of Wichita Ordinance 5436 requires WTA to construct an ingress and egress crossing over WTA's tracks to FYG's abutting property, following the language of Section 2 Ordinance 5436, in accordance with Wichita City Code Title 12, Railroads.
- D. Pursuant to City of Wichita Ordinance 5436, WTA had the privilege of running its tracks on 25<sup>th</sup> Street, which mandated that WTA provide the public and the abutting land owner the ability to cross the tracks at any point.
- E. This Court, as a Court of equity, takes cognizance that the parties to this action seek to enforce Wichita City Ordinance No. 5436, which granted rights to and imposed restrictions on land use, which are clear and reasonable, and in compliance with Kansas common law rights of ingress and egress to abutting landowners of roadways and not adverse to the public interest, making an injunction appropriate to provide ingress and egress from 25<sup>th</sup> Street to FYG's property.

WHEREUPON, the Court, at the hearing on February 20, 2007, made the following orders:

**IT IS, THEREFORE, BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED THAT:**

1. An injunction is hereby entered for WTA and its principal Plaintiffs to construct a crossing to allow ingress and egress to FYG's abutting property and directing Plaintiffs to keep the crossing clear in accordance with the Wichita City Code 12.04.080.
2. The parties are instructed to work out the issue of FYG's right of ingress and egress so as to reach the best economic alternative with the least impact on interstate commerce.
3. The Court cannot order an absolute solution to FYG's right of ingress and egress at this point and the parties are ordered to renew discussions with the City of Wichita to determine where a crossing shall be constructed as a best economic alternative with the least impact on interstate commerce.

**IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that findings of fact numbered 1-8 should be and the same are hereby incorporated by reference as though fully set forth and made the Order of the Court.**

On July 25, 2008, this Court finds that the Plaintiffs, in order to meet the requirements of paragraph 1 above, have temporarily provided F.Y.G. Investments, Inc., with ingress and egress from 25<sup>th</sup> Street to FYG's property as required by the Court's order by installing a thirty-two (32) foot timber crossing which will remain open for the benefit and use of FYG.

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

WHEREUPON, upon the completion of the required railroad crossing and railroad crossing protection, said injunction shall be lifted and terminated.

IT IS SO ORDERED.

**JAMES R. FLEETWOOD**

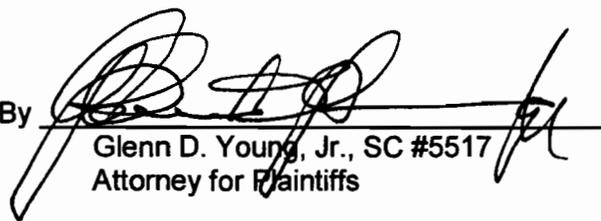
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Hon. Joseph Briescia  
District Court Judge

APPROVED:

YOUNG, BOGLE, McCAUSLAND,  
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Wichita, Kansas 67202-3392  
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By

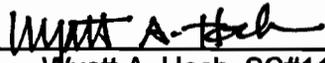


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By



---

Wyatt A. Hoch, SC#11747  
Attorney for Defendants

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

STB Docket FD 35765

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# Exhibit 7

F.Y.G. Investments, Inc. and Treatco, Inc.'s  
Reply to Petition for Declaratory Order

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

APP DOCKET NO.                     

WICHITA TERMINAL ASSOCIATION )

CLERK OF DIST. COURT )  
18th JUDICIAL DISTRICT )  
SEDGWICK COUNTY, KS )

vs. BY                      )  
FYG INVESTMENTS, INC, )  
Defendant. )

Case No. 02 CV 3688

TRANSCRIPT OF MOTIONS

PROCEEDINGS had before the Honorable  
Timothy Henderson, Judge of Division 24, of the  
District Court of Sedgwick County, Kansas, at  
Wichita, Kansas, on the 9th day of June, 2009.

**APPEARANCES:**

The Plaintiffs, Wichita Terminal  
Association, appeared by and through Mr.  
Mr. K. Paul Day, Attorney at Law, 2345 Grand  
Boulevard, Suite 2200, Kansas City, Missouri  
64108.

The Defendants, FYG Investments, Inc.,  
appeared in person and by and through Mr. Wyatt  
Hoch, Attorney at Law, 1551 North Waterfront,  
Parkway #100, Wichita, Kansas 67206.

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I-N-D-E-X

PLAINTIFFS WITNESSES

JASON H. MOYER

DIRECT EXAMINATION BY MR. DAY: 16

CROSS EXAMINATION BY MR. HOCH: 43

REDIRECT EXAMINATION BY MR. DAY: 62

BRUCE E. CHINN

DIRECT EXAMINATION BY MR. DAY: 67

CROSS EXAMINATION BY MR. HOCH: 99

EXAMINATION BY THE COURT: 102

RESPONDENT'S WITNESS

MARGIE THOMAS COLLINS

DIRECT EXAMINATION BY MR. HOCH: 117

CROSS EXAMINATION BY MR. DAY: 129

REDIRECT EXAMINATION BY MR. HOCH: 150

EXAMINATION BY THE COURT: 153

REDIRECT EXAMINATION BY MR. HOCH: 154

E-X-H-I-B-I-T-S

PLAINTIFF'S EXHIBITS                      OFFERED                      ADMITTED

PLAINTIFF'S EXHIBIT NO. 7-16:              30                      30

PLAINTIFF'S EXHIBIT NO. 5-6:              40                      40

PLAINTIFF'S EXHIBIT NO. 3:                40                      40

PLAINTIFF'S EXHIBIT NO. 2:                40                      41

PLAINTIFF'S EXHIBIT NO. 17:              91                      91

	<u>RESPONDENT'S EXHIBITS</u>	<u>OFFERED</u>	<u>ADMITTED</u>
1			
2	RESPONDENT'S EXHIBIT A8:	60	60
3	RESPONDENT'S EXHIBIT A2-A12:	123	123
4			
5			
6	CERTIFIED SHORTHAND REPORTER'S CERTIFICATE:		190
7			
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1 THE COURT: The court calls the case  
2 of Wichita Terminal Associations, et al. vs. FYG  
3 Investments and TreatCo, Incorporated. 02 C  
4 3688.

5 Counsel, please state your  
6 appearances.

7 MR. DAY: Paul Day appearing on behalf  
8 of the railroads, Judge.

9 MR. HOCH: Wyatt Hoch and Charles Kern  
10 appearing on behalf the FYG and TreatCo. And  
11 with us is Margie Collins, the president of FYG.

12 THE COURT: Thank you, counsel.

13 We have two matters before the court  
14 this morning. We have the plaintiffs request  
15 for from relief from judgment as well as the  
16 defendants motion in contempt. It would seem,  
17 gentlemen, to make most logic sense to address  
18 the relief for judgment first since that would  
19 obviously interplay with whether contempt is  
20 appropriate or not.

21 Any objection to proceeding in that  
22 manner?

23 MR. HOCH: No, sir.

24 MR. DAY: No, Your Honor.

25 THE COURT: Very good.

1                   Mr. Day, let's take up your motion  
2 first, sir.

3                   Go right ahead.

4                   MR. DAY: Judge, if you will recall,  
5 we did argue this motion the last time we  
6 appeared.

7                   THE COURT: And I believe you also --  
8 We set this over for today so you could present  
9 evidence as well.

10                   If you want to make an opening remark  
11 and then begin to present your evidence, I think  
12 that would be appropriate.

13                   MR. DAY: Fine, Judge.

14                   The basis of the motion essentially  
15 was that the prior order that was entered in  
16 August of 2008 instructed the railroads to  
17 install warning devices at the subject crossing  
18 in compliance with FRA requirements.

19                   As we have briefed, there are no FRA  
20 requirements for crossing protection devices,  
21 those requirements were standards are covered by  
22 FHWA, Federal Highway Administration Manual on  
23 Uniform Traffic Control Devices which I believe  
24 has been adopted in Kansas.

25                   So, from a practical standpoint, the

1 prior order could not be complied with because  
2 it ordered compliance with requirements that do  
3 not exist.

4 The proper requirements, the proper  
5 standard to apply, is found in the manual on  
6 uniform traffic control devices. And I intend  
7 to present evidence today as to what that manual  
8 says with respect to clearance issues at grade  
9 crossing for warning devices and how those  
10 clearance issues play into this particular  
11 location.

12 My intention is to call two or  
13 possibly three witnesses. First witness being  
14 Mr. Moyer, Jason Moyer, who was the  
15 superintendent of the Wichita Terminal  
16 Association. He will explain the general  
17 geographic area, the layout of the tracks in  
18 this area, and problems that this general area  
19 provide with regard to railroad crossings.

20 The next person I intend to call is  
21 Bruce Chinn. Mr. Chinn is an employee of the  
22 Burlington Northern Santa Fe. His area of  
23 testimony will be the specifics of the manual on  
24 uniform traffic control devices, how those  
25 standards would apply at this particular

1 location, and the safety issues involved with  
2 putting a grade crossing in what essentially is  
3 a public right-of-way.

4 Just one more brief bit of background,  
5 Judge, and then I'll call my first witness.

6 This is probably difficult to see  
7 (indicating), but this is an aerial photograph  
8 of the area in question.

9 This is, in the lower portion of  
10 Exhibit 6, is the TreatCo facility where, I  
11 think, they produce dog treats.

12 This street is North Broadway Street,  
13 of course, in Wichita. Running parallel to  
14 that, to Broadway, are BNSF mainline tracks,  
15 Burlington Northern mainline tracks. There is  
16 also a yard track here that comes out of BNSF  
17 yard that sits right here (indicating)

18 The connection track, or the  
19 interchange track, which is owned by the  
20 terminal is this section of track here  
21 (indicating). There is a switch at this end,  
22 and there is a switch at this end, a railroad  
23 switch if you don't --

24 THE COURT: I grew up on a farm, I  
25 loaded a few grain cars, so I have some

1 familiarity.

2 MR. DAY: Okay. I don't know how  
3 familiar you are, but.

4 THE COURT: I appreciate that.

5 MR. DAY: But there is a switch at  
6 each end. There is a single track that comes  
7 off BNSF property. The switch is here  
8 (indicating). The switch is basically about  
9 right here (indicating). And there are two  
10 interchange tracks running parallel to each  
11 other.

12 And then of course there is a switch  
13 at this end (indicating) where the track goes  
14 back down to one single track and leads into  
15 various industry tracks that lead into the area.

16 The unique -- and this is a proposed  
17 development, as I understand it, that TreatCo is  
18 involved in. This is of course the general  
19 location of where Emporia court would be  
20 (indicating). It might not be precise, but it's  
21 the general area. And of course this is 25th  
22 Street (indicating).

23 The very unique part of all this, is  
24 that the interchange track, the IT track is  
25 actually in the public right-of-way of 25th

1 Street. It runs down the street, for lack of a  
2 better way to explain it, I have some  
3 photographs I'll show you as well.

4 But what that means is that, if there  
5 is a public railroad crossing place here  
6 (indicating), roughly in the middle of the  
7 interchange, there is no place, or no place in  
8 compliance with appropriate standards, to place  
9 the warning device signals that would be on the  
10 north side of the signal, of the crossing.

11 Judge, I have a series of photographs,  
12 and I apologize, I have not had any of them  
13 blown up, I've provided a copy to Mr. Hoch, and  
14 what I would propose doing for purposes of the  
15 testimony, is simply providing you copies of  
16 those photographs so you will have them on the  
17 bench during the testimony if that's  
18 permissible.

19 Any objection?

20 MR. HOCH: None.

21 THE COURT: All right.

22 MR. DAY: Now, I'll conclude my  
23 remarks here very shortly.

24 But if the court would look at the top  
25 photograph, which I have marked as Exhibit 7,

1           you will see the unique, rather unique situation  
2           involved here.

3                       Those are the interchange tracks which  
4           run down 25th Street. And you can see the  
5           public right-of-way is that runs parallel to the  
6           tracks.

7                       THE COURT: Which way are we facing,  
8           are we facing towards Broadway on Exhibit 7?

9                       MR. DAY: Judge, that would be  
10          generally toward the west, toward Broadway.

11                      And if you see the brief case, that is  
12          sitting in the photograph.

13                      THE COURT: Uh-huh.

14                      MR. DAY: That is where the signal  
15          post or the crossbuck post for the warning  
16          devices would have to be placed to be in  
17          complies with the MUTCD. In other words, it's  
18          in the middle of the public street.

19                      If the court would look at Exhibit 8,  
20          that shows a point of view with the train on the  
21          track, which is the north interchange track, and  
22          a vehicle approaching what would be general area  
23          of the crossing.

24                      Judge, I think the evidence is going  
25          to show that the proposed location of the

1           Emporia Court crossing is unworkable from the  
2           point of view of the standards of the MUTCD and  
3           will cause serious safety problems, not only for  
4           the motoring public, but for the railroads as  
5           well.

6                         THE COURT: Looking at 7 again, I see,  
7           on the left side of the track, a bit of dirt  
8           behind one the post there. I assume, from your  
9           earlier diagram, that's where the crossing,  
10          temporary crossing is now, a little bit of it.

11                        MR. DAY: I'm shot not sure you can  
12          see it on any of those photographs, Judge.

13                        MR. HOCH: Down in the curb.

14                        It's in the curb.

15                        MR. DAY: It's in the curb.

16                        THE COURT: I think I am seeing it,  
17          but you tell me if I'm wrong, that little bit of  
18          dirt.

19                        MR. DAY: I think that's general area.

20                        THE COURT: Okay.

21                        MR. DAY: Yes, sir.

22                        On Exhibit 6, you can see the general  
23          area.

24                        THE COURT: Right.

25                        MR. DAY: The key, on the temporary

1 crossing, is that there is more room between  
2 what extensively is the edge of the road.

3 THE COURT: It's on the curb.

4 MR. DAY: It's on the curb, and it's  
5 on the other side of the switch.

6 So, Judge, with that, I think I'll  
7 conclude my opening comments and call my first  
8 witness.

9 THE COURT: Let me give Mr. Hoch an  
10 opportunity to give opening comments if he  
11 wishes to do so as well.

12 MR. HOCH: Thank you, Judge. And good  
13 morning.

14 THE COURT: Good morning, sir.

15 MR. HOCH: My client has, clients have  
16 26 acres that's landlocked by a railroad on the  
17 west along Broadway, by railroad on the north  
18 along 25th street, by a neighbor on the east,  
19 and by a creek on the south.

20 They've been arguing since 2002 about  
21 the effect of a license granted by the city to  
22 the railroad in 1916. And in April of 2005, the  
23 Court of Appeals ruled that my clients are  
24 entitled to a crossing if 25th Street is a  
25 public street.

1                    Judge Bribiesca held, and it is not  
2                    challenged, that 25th Street is a public street.

3                    In 2006, as part of a public process,  
4                    the city accepted the dedication of the street  
5                    easement for Emporia Court at the location that  
6                    is shown on the drawings that are part of the  
7                    order to show cause.

8                    Judge Bribiesca's order of August 1st  
9                    ordered the railroads to keep the temporary  
10                    crossing open so that our clients could have  
11                    access to that 26 acres without bumping over the  
12                    tracks. And he ordered the railroads to build a  
13                    crossing at Emporia Court within 90 days after  
14                    FYG presented sealed engineering drawings for  
15                    the street. The journal entry was signed by  
16                    Mr. Young on behalf of the WTA, the railroads.  
17                    And the plaintiffs didn't appeal, they didn't  
18                    request clarification.

19                    In December of 2008, we delivered on  
20                    the drawings. A crossing should have been built  
21                    by March 22nd this spring. A spade of dirt  
22                    still hasn't been turned. There was one  
23                    question after we sent the drawings to Mr. Young  
24                    about the precise location of the crossing.  
25                    That question arose because someone didn't read

1 the drawings, it answer was apparent on the  
2 drawings. And I responded within four or five  
3 days, I think, over the Christmas holiday, back  
4 to Mr. Young, pointing to the point on the  
5 drawings where that crossing was located.

6 There were no other questions,  
7 protests, statements that they were not going to  
8 comply, until we filed the motion for relief.  
9 Nothing. Silence.

10 The only thing they did was block the  
11 temporary crossing a number times. And we've  
12 put the railroads and WTA on notice when those  
13 happened in violation of the court's order.  
14 Only after they did nothing, and we moved to  
15 have them held in contempt when they start to  
16 squeal.

17 The question is, what do we have to do  
18 to get them to do what Judge Bribiesca ordered?  
19 That's the question.

20 FYG is continuing to lose the value of  
21 its investment in those 26 acres because it  
22 can't be developed without access across the  
23 railroad tracks. That's why we're here.

24 Now, specifically as to the motion for  
25 relief, in the brief that we filed, on Friday

1           afternoon we delivered to you, there is an  
2           extensive quotation from the testimony on the  
3           trial on remand back in February of 2007 to  
4           Judge Bribiesca where the WTA superintendent at  
5           the time Mr. Miller testified in response to  
6           Mr. Young's questions about what had to be done  
7           by the way of signalling at this Emporia Court  
8           location. The street had already been dedicated  
9           by that point.

10                        As you hear this evidence, I just ask  
11           you to keep in mind the context, in the context,  
12           that bit of testimony. They knew what was going  
13           on.

14                        The other thing I would ask you to  
15           keep in mind, and I'll try to brings it out on  
16           my cross examination of witnesses, is the fact  
17           that the improvement of 25th Street is in the  
18           City of Wichita's capital improvement program  
19           budget. 2009 at \$100,000 for 2010, 2011 and  
20           2012 at a total of 1.4 million dollars to  
21           improve the street, to make it something other  
22           than the dirt road that you've seen in the  
23           photographs that Mr. Day presented a little bit  
24           ago. There is another side to the story of this  
25           deal. And the railroad has participated in the

1 process with the city, both as part of the  
2 capital improvement program, and as part of the  
3 21st Street revitalization program. They've  
4 known for a long time what's going on up there.  
5 And they come to you today asking for relief  
6 from this order 10 months after that order was  
7 entered, or nearly 10 months after that order  
8 was entered, nine months after it became final  
9 and say, now we can't do it.

10 I just ask you to keep that in mind,  
11 to place this discussion in the proper context  
12 as we go forward.

13 THE COURT: Thank you, sir.

14 Mr. Day, you may call your first  
15 witness.

16 MR. DAY: Judge, we would call Jason  
17 Moyer.

18 JASON H. MOYER,  
19 called as a witness on behalf of the Plaintiff,  
20 having been first duly sworn, testified  
21 as follows:

22 DIRECT EXAMINATION

23 BY MR. DAY:

24 Q. Would you go ahead and tell the court your name,  
25 please.

1 A. My name is Jason Moyer.

2 Q. And, Mr. Moyer, what is your current occupation?

3 A. I'm the superintendent of Wichita Terminal  
4 Association.

5 Q. And what does it mean to be the superintendent  
6 of the Wichita Terminal Association?

7 What are your duties?

8 A. I manage the daily operations of the switch  
9 crews, the maintenance gangs, and clerical and  
10 office staff.

11 Q. Are you located here in Wichita, Kansas?

12 A. Yes, I am.

13 Q. What is your business address?

14 A. 1537 Barwise Street (ph).

15 Q. Now, are you actually employed by the Wichita  
16 Terminal Association?

17 A. No, I'm employed by BNSF railroad.

18 Q. BNSF signs your paychecks?

19 A. That is correct.

20 Q. And how is it that you would have the title of  
21 the superintendent of operations for the  
22 terminal when you are a BNSF employee?

23 A. Wichita Terminal is owned by the BNSF railway  
24 and Union Pacific railroad equally.

25 Q. All right.

1                   And do you know the business structure  
2                   of the terminal, is it a corporation?

3           A.   It is an association.

4           Q.   Association.

5                   What is its purpose?

6           A.   The Wichita Terminal serves as the switching  
7                   agent for both the UP and the BNSF, all traffic  
8                   that enters Wichita is served or is directed  
9                   towards customers in Wichita goes through the  
10                  Wichita Terminal. The terminal is the switching  
11                  agent for the shipping roads.

12          Q.   So if I understand it, rail shipments would come  
13                  in either on the Union Pacific or the Burlington  
14                  Northern. And to get those shipments to  
15                  customers in Wichita, those rail cars would be  
16                  transported over the terminal.

17                   Is that right?

18          A.   Yes, they're interchanged both from the UP and  
19                  the BNSF to the terminal. The terminal will  
20                  serve the railroads customers, and either give  
21                  the traffic back in loaded form or empty form;  
22                  correct. Multiple commodities.

23          Q.   Excuse me?

24          A.   Multiple commodities.

25          Q.   Does the terminal have its own employees?

1 A. Yes.

2 The employees of the terminal are  
3 Wichita Terminal employees; correct.

4 Q. For instance, do they have their own train crew?  
5 Does the terminal have their own train  
6 crew?

7 A. Yes.

8 Q. Does it have its own switch crew?

9 A. Yes.

10 Q. All right.

11 You might have to step down from the  
12 witness box to do this.

13 A. (Witness complied).

14 Q. But utilizing Exhibit No. 6, would you explain  
15 to the court the general geographic layout of  
16 the terminal relative to the Union Pacific and  
17 Burlington Northern.

18 And there is a higher photograph that  
19 may help here, Exhibit 5, use either one that  
20 can assist you.

21 A. I'll use the exploded view of Exhibit No. 5  
22 first.

23 We've got Broadway on the west side  
24 which has BNSF main one, two, an independent  
25 track.

1                   This small track here connects to the  
2                   Wichita Terminal Association with the BNSF.  
3                   This side here is the Union Pacific.

4                   As you can see, we tie into the Union  
5                   Pacific on this side (indicating).

6                   So this connection, these two  
7                   connection tracks here, between Broadway and  
8                   what is now 26th Street, is where all the  
9                   interchanging takes place between the BNSF. And  
10                  where we interchange bridge track from the UP to  
11                  the BNSF and back and forth.

12                 Q. Now, is that --

13                                 I'm sorry, go ahead.

14                 A. This is just the larger more expanded view with,  
15                         you know, actually cars on the track to  
16                         demonstrate how that's done.

17                 Q. And, for the record, your referring to Exhibit  
18                         6?

19                 A. Exhibit 6, correct.

20                 Q. And on Exhibit 6 is a notation where you've  
21                         indicated a temporary crossing.

22                                 What is that?

23                 A. The temporary crossing was constructed prior to  
24                         my employment on the terminal. But this is, was  
25                         placed in the curb to the west of the switch so

1           that it is in single track verses double track  
2           on the connection.

3           Q.   Why was it placed at that location?

4           A.   I can't give the specific history, but this is  
5           the most ideal location if one was to be placed  
6           here due to the fact that it does not impact  
7           storage capacity on double track and it's offset  
8           from the public roadway.

9           Q.   All right.

10                                 Maybe I should back up just a minute.

11                                 How long have you been the  
12           superintendent of operations for the terminal?

13           A.   April, 2008.

14           Q.   And what did you do prior to becoming the  
15           superintendent for the WTA?

16           A.   I was in operations on the BNSF.

17           Q.   How long did you work for the BNSF?

18           A.   Since April, 2006 here in Wichita, Newton and  
19           Western Kansas.

20           Q.   And what were your duties -- I'm sorry I've  
21           already forgotten the title you just gave me --  
22           but your duties for BNSF; what were they?

23           A.   My main focus was operations. I performed the  
24           train master function, handling the daily  
25           operations of train movement across the tracks.

1 Q. Okay.

2 You can sit down.

3 A. (Witness complied).

4 Q. We've been talking about the interchange track.  
5 And I'd like you to give the court a little bit  
6 more detailed explanation of the purpose or  
7 function of that track.

8 What is it for?

9 A. The interchange track in question here, these  
10 two tracks (indicating), are what ties the BNSF  
11 and the UP to the WTA. All traffic, both again  
12 multiple commodities, grain, all customer  
13 traffic that is served in Wichita Central goes  
14 across these two interchange tracks.

15 All bridge, we call it bridge move  
16 traffic, between BNSF and UP interchange traffic  
17 that goes, disperses all across the United  
18 States, also goes over these two tracks.

19 Q. You know the approximate length of those two  
20 tracks, either in feet or car storage?

21 A. Between the switches, on average, depending on  
22 the car size, we'll store at least 40 cars.

23 Q. That's 40 cars total on both tracks?

24 A. Between the switches; correct.

25 Q. All right.

1                   And give us an idea about the amount  
2                   of train traffic that occurs over these  
3                   interchange tracks on a daily basis?

4           A.   During offpeak season, and we -- in Wichita, we  
5               define peak by harvest or nonharvest traffic  
6               volumes.

7                   In non peak season, anywhere from 30  
8                   to 40 cars per day. During peak season, it  
9                   could be anywhere from 80 to 100 cars a day.

10          Q.   What is the -- is there a FRA speed limit on  
11               this particular section of track, interchange  
12               track?

13          A.   WTA tracks all 10 miles per hour track.

14          Q.   10 miles per hour?

15          A.   Uh-huh.

16          Q.   Is that a yes?

17          A.   That is correct, yes.

18          Q.   Do trains occupy both tracks simultaneously?

19          A.   Yes.

20          Q.   All right.

21                   Do trains move in opposite directions  
22                   on both tracks simultaneously?

23          A.   They can, yes.

24          Q.   All right.

25                   Explain for the court, if you would,

1           how the cars that are switched onto the  
2           interchange enter those tracks.

3       A.   The way the tracks are set up, both sides of  
4           these tracks are served by what we call a shove  
5           move on the railroad.  It's a rear-end movement.

6                       When traffic is pulled out of the BNSF  
7           yard, the engine will pull engine first south  
8           and shove the cars into the connection from the  
9           BNSF side.  The WTA will capture the Union  
10          Pacific traffic, draw it sought from the UP yard  
11          and again shove it onto the connection.  So it's  
12          primarily served by what we call shove moves.

13       Q.   And a shove move, if I understand it, is a move  
14           whereby the locomotives are on what I call the  
15           end of train as opposed to the front the train.

16                       Is that right?

17       A.   The engines would be on the front of the train.  
18           But a shove move is a movement to the rear.

19       Q.   All right.

20                       THE COURT:  You're pushing instead of  
21           pulling.

22       A.   That is correct.

23                       MR. DAY:  Thank you, Judge.

24       A.   That is correct.

25       BY MR. DAY:

1 Q. So, understand those circumstances, if there a  
2 shove move off the BNSF main lane, which are the  
3 tracks to the west on Exhibit 6, and there's a  
4 public grade crossing across the interchange,  
5 the train is approaching that grade crossing  
6 backwards?

7 A. Correct.

8 Q. All right.

9 Explain for us what that means.

10 MR. HOCH: Excuse me.

11 Judge, at this point, based on our  
12 discussions three weeks ago, when we were first  
13 here, I want to make my objection to relevance  
14 of this testimony given the order that's in  
15 place and has become final.

16 THE COURT: Mr. Day, your response.

17 MR. DAY: Well, it's my understanding  
18 from the court's previous ruling on this matter  
19 is that the focus the testimony today would have  
20 to be limited to the safety aspects of placing a  
21 crossing in the center of this interchange.

22 The purpose of the testimony of course  
23 is to address the safety aspects of the reverse  
24 shove move or a shove move toward a public grade  
25 crossing.

1 THE COURT: The gist of what I'm  
2 hearing so far can, and you can correct me if  
3 I'm wrong, feels a whole lot like this spur is  
4 far too busy for any sort of crossing. Is that  
5 not the message you're wishing to imply to me at  
6 this point?

7 MR. DAY: Well, I think that that is  
8 one of the messages.

9 Obviously the location of the crossing  
10 has a significant impact on how safe it might  
11 be.

12 THE COURT: Well, I agree with  
13 Mr. Hoch that it's not relevant as to whether  
14 there is going to be a crossing or not, because  
15 that decision has been made. But I will allow  
16 you to get it in, I'll give you in leeway here,  
17 as to how to do that crossing in a safe manner  
18 and consistent with what Judge Bribiesca  
19 ordered.

20 MR. DAY: All right.

21 THE COURT: So for that limited  
22 purpose I'll let you go forward.

23 BY MR. DAY:

24 Q. Do you recall the question?

25 A. I do. How does the shove move -- when handling



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THE COURT'S RULING: 3

CERTIFIED SHORTHAND REPORTER'S CERTIFICATE: 12

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

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

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

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

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

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

25 That being said, all parties had their

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16                    This court is adding the following  
17                    language:

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

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

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

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

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

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

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

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

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

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

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

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

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

13 Mr. Hoch, is there --

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

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

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

21 THE COURT: Mr. Day.

22 MR. DAY: No, Your Honor.

23 THE COURT: Thank you, Gentlemen.

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

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

6 If nothing further, we'll be in  
7 recess.

8 MR. DAY: I guess, thank you.

9  
10 MR. HOCH: Appreciate it, Judge.

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

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

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

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

25 \_\_\_\_\_  
BELINDA K. WESTERFIELD, CSR

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Docket FD 35765

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# Exhibit 9

F.Y.G. Investments, Inc. and Treatco, Inc.'s  
Reply to Petition for Declaratory Order

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

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

Case No. 02 CV 3688

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**TRANSCRIPT OF BENCH TRIAL**

Proceedings had and entered of record before the  
Honorable Joseph Bribiesca, Judge of Division 22 of the  
18th Judicial District, Sedgwick County, Kansas, at  
Wichita, Kansas on November 21, 2011.

**APPEARANCES:**

The Plaintiffs, Wichita Terminal Association,  
Burlington Northern & Santa Fe Railway Company and Union  
Pacific Railroad Company, appeared by and through its  
attorneys, Mr. K. Paul Day and Mr. Jeffrey R. King, of  
Lathrop & Gage, LLP, 2345 Grand Boulevard, Suite 2200,  
Kansas City, Missouri 64108-2618.

The Defendant, FYG Investments, Inc. and  
TreatCo, Inc., appeared by and through its attorney, Mr.  
Wyatt Hoch, of Foulston Siefkin, LLP, 1551 N. Waterfront  
Parkway, Suite 100, Wichita, Kansas 678206-4466.

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**RONALD WILLIAM DAME**

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**TIMOTHY R. AUSTIN**

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**CERTIFICATE PAGE:**

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1 THE COURT: Good morning.

2 MR. HOCH: Good morning.

3 MR. DAY: Good morning, Judge.

4 THE COURT: Parties ready?

5 MR. HOCH: Yes, sir.

6 MR. DAY: Yes, Your Honor.

7 THE COURT: All right. This is WTA, et al  
8 vs. FYG Investments, et al, 02 C 3688. Appearances,  
9 please.

10 MR. DAY: Paul Day and Jeff King on behalf  
11 of the plaintiff railroads, Your Honor.

12 MR. HOCH: Wyatt Hoch here on behalf of FYG  
13 Investments and Treatco, Inc. With me is Margie  
14 Collins and Ken Thomas.

15 THE COURT: For the record, we're here to  
16 have a trial following a remand from the Court of  
17 Appeals. Would either party care to make an Opening  
18 Statement?

19 MR. DAY: Judge, based upon our discussions  
20 in chambers, I don't think that's necessary at this  
21 point, and I'm willing just to proceed with my  
22 evidence today.

23 THE COURT: All right. So you're waiving.  
24 Mr. Hoch, are you waiving?

25 MR. HOCH: I will. Thank you.

1 THE COURT: All right. Call your witness.

2 MR. DAY: Thank you, Your Honor. Your  
3 Honor, the railroads call Mr. Richard Mooney.

4 THE COURT: Mr. Mooney, please come forward,  
5 be sworn.

6 **RICHARD T. MOONEY,**  
7 called as a witness on behalf of the Plaintiffs, having  
8 first been duly sworn, testified as follows:

9 MR. DAY: Judge, what I've done on exhibits,  
10 I've marked all my photographs, I have copies for my  
11 witness, I have copies for Mr. Hoch and copies for the  
12 Court. I have a few blow-ups, but what I intended to  
13 do as I go through the examination, just get everybody  
14 copies of the exhibits that I'll be utilizing.

15 THE COURT: All right.

16 MR. DAY: Would you like me to lay the  
17 foundation and get them into evidence before you look  
18 at them or --

19 THE COURT: Well, it depends. Did you --  
20 did the -- the two of you get together and --

21 MR. DAY: No.

22 THE COURT: Are you -- you're not in a  
23 position to stipulate to exhibits?

24 MR. DAY: We haven't done that yet.

25 THE COURT: All right. You'll just have to

1 under industry standards, 25th Street has to be moved  
2 some distance to the north?

3 A. Yes.

4 Q. How far?

5 A. It's approximately 20 feet.

6 Q. Okay. Do you know what the 250-foot rule is under in  
7 the railroad industry?

8 A. Yes. It's a site distance obstruction rule that  
9 requires railroads to keep vegetation and any debris,  
10 material back 250 feet from the crossing as well as  
11 any stored railroad cars from the edge of the crossing  
12 back 250 feet in each direction.

13 Q. All right. Did you measure the length of the IT  
14 tracks --

15 A. Yes.

16 Q. -- along 25th Street?

17 A. Yes.

18 Q. How did you measure 'em?

19 A. I had a roller wheel.

20 Q. A what?

21 A. Roller wheel. Measuring wheel.

22 Q. How does that work?

23 A. It's -- you -- just has a little wheel, and you roll  
24 it, and it measures the feet by actually inches and  
25 records it in footage.

1 Q. All right. And how long is the interchange?

2 A. Well, from switch to switch, it's probably close to a  
3 thousand feet, from the west switch to the east  
4 switch. What I was looking at were the -- kind of  
5 the -- the clearance areas where the -- the -- the  
6 track -- where the two tracks come together, they  
7 would be fouling each other, so that you couldn't set  
8 a car closer on one track to that close enough to the  
9 switch, because it would interfere with -- get too  
10 close to the second track as it angles in towards it.

11 Q. Utilizing Plaintiffs' 3-A, can you illustrate that for  
12 the Court?

13 A. Well, at this -- let's just say at the west end where  
14 the switch comes off, you can't put these cars up real  
15 close to the switch, because they'll hit each other.  
16 And it was about -- probably a distance of, I'm just  
17 guessing from there, maybe 125 feet from the switch  
18 before the first clearance would be obtained where you  
19 could set that car. So to answer your first question,  
20 from the clearance point there on the west end to the  
21 east end was right at 850 feet.

22 Q. All right. And if there is a crossing, Emporia Court  
23 crossing as shown on Exhibit 3-A, if that's  
24 constructed, how does the 250-foot rule work?

25 A. Well, anything from this edge of the crossing in each

1 direction, 250 feet back here and 250 feet to the  
2 east, will have to be kept clear when they come in and  
3 store cars.

4 Q. And that's so motorists who could be making a right or  
5 left onto Emporia Court can see down the tracks and  
6 make sure a train is not coming?

7 A. That's correct.

8 Q. The law in Kansas is that the distance must be  
9 reasonable --

10 A. Yes.

11 Q. -- by Kansas statute. Do you have an opinion, based  
12 on your training and experience, work history, what is  
13 a reasonable distance that cars should be moved back  
14 from the crossing?

15 A. Well, it's going to vary on your speed of your trains,  
16 but 250 is a good minimum distance for the crossing  
17 such as this and speeds that would be a good distance  
18 to have it cleared. If you're at a higher speed, then  
19 you're going to need more of a visibility.

20 Q. Okay. If the train speeds at this location, 250 feet,  
21 you think, is reasonable?

22 A. Is adequate, yes.

23 Q. All right. Is that the law in other states?

24 A. Yeah -- mostly it's 250. There's some exceptions  
25 where it's -- some states have a little bit longer.

1 Q. All right. When you measured the length of the  
2 interchange track at clearance points at 850 feet,  
3 were you able to make a calculation as to the storage  
4 capacity of those two tracks with regard to rail cars?

5 A. Yes.

6 Q. And how did you do that?

7 A. Well, really went from the center of the roadway,  
8 which the roadway is going to be 41 feet wide, so it  
9 went to the middle, and the crossing service would  
10 have to be two feet outside of that roadway, so it's  
11 roughly -- I took 25 feet from the center of the  
12 roadway, added that to 250 feet, so you got 275 feet,  
13 both east and west down the tracks.

14 Q. And what -- what did you come up with -- well, what  
15 did you assume to be the car length?

16 A. The rail cars that are generally used on their grain  
17 and hoppers would be tank cars, would be roughly 60  
18 feet long.

19 Q. Are you familiar with the various industries that are  
20 served by the interchange track?

21 A. Well, there were mostly grain and -- and then there's  
22 scrap metal and different types of -- mostly grain  
23 elevators.

24 Q. What kind of rail car service, those types of things?

25 A. Those would be hopper cars and tank and --

1 Q. Sixty-footers?

2 A. Yes, generally.

3 Q. What was the car capacity of the entire interchange,  
4 based on your calculation --

5 A. About --

6 Q. -- both tracks?

7 A. About 30 cars.

8 Q. Thirty cars in total, so 15 cars on each track?

9 A. Well, 13 on the north, 15 on the south.

10 Q. And that's because of the clearance --

11 A. Yes.

12 Q. -- point issue we talked about earlier where the  
13 tracks come together?

14 A. Yes.

15 Q. And assuming the Emporia Court crossing is installed  
16 at the location proposed by the defendants, how does  
17 that impact the rail car storage capacity of those  
18 tracks?

19 A. That basically wipes out 18 storage cars, cars that  
20 would be stored there, can only have room for 12.

21 Q. About a 60 percent reduction?

22 A. Yes.

23 Q. And how would such a loss of storage capacity impact  
24 switching operations on the BNSF and WTA?

25 MR. HOCH: Excuse me. Objection,

1 foundation.

2 THE COURT: Sustained.

3 Q. (By Mr. Day) You're familiar with the location of the  
4 temporary crossing?

5 A. Yes.

6 Q. Spoke about that earlier. Assuming that is made the  
7 permanent rail crossing for access to the land where  
8 Emporia Court is proposed, how does the 250-foot rule  
9 work there? Do you understand my question?

10 A. Yeah. It applies the same. You need 250 feet  
11 clearance from the edge of the crossing, and the car  
12 storage, then, the switch is just to the west there,  
13 and on the north track, I think you'd lose maybe  
14 one -- one car, and on the south one probably three,  
15 maybe, maybe four. So if the crossing were there,  
16 instead of having 30, they would have either 25 or 26  
17 spots for storage.

18 Q. Okay. We lose some space, but not near as bad if it's  
19 in the middle?

20 A. My opinion, they could live with that.

21 Q. Okay. Now, last thing I want to talk to you about,  
22 Mr. Mooney, is track removal. Based on your analysis,  
23 would removal of a section of the north track solve  
24 the clearance issues we've talked about under the  
25 MUTCD and industry standards?

1 A. No.

2 Q. Why?

3 A. You'd still have the same for the south track.

4 Q. Okay. And would you still have, based on the 15 foot  
5 and the 17-foot rule, warning devices in the public  
6 thoroughfare of 25th Street, if it's not realigned?

7 A. Yes.

8 Q. Is that a safe situation?

9 A. No. It would not be.

10 Q. Is it hazardous?

11 A. Yes.

12 (Mr. Day confers with Mr. King.)

13 MR. DAY: Judge, I think that concludes my  
14 examination. I'll pass the witness to Mr. Hoch.

15 THE COURT: All right. Cross?

16 MR. HOCH: Thank you, Judge.

17 **CROSS-EXAMINATION**

18 **BY MR. HOCH:**

19 Q. Good morning, Mr. Mooney.

20 A. Good morning.

21 Q. Want to make sure that I understand what your  
22 understanding is of how these two tracks along the  
23 south side of 25th Street are used by the railroads.  
24 Are these two tracks used as an interchange between  
25 the Burlington Northern main line, which runs up and

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

WICHITA TERMINAL ASSOCIATION, )  
BURLINGTON NORTHERN & SANTA FE )  
RAILWAY COMPANY and UNION )  
PACIFIC RAILROAD COMPANY, )  
Plaintiffs, )  
vs. ) Case No. 02 CV 3688  
FYG INVESTMENTS, INC. and )  
TREATCO, INC., )  
Defendants. )

10 **TRANSCRIPT OF COURT'S RULING ONLY REGARDING BENCH TRIAL**

11 Proceedings had and entered of record before the  
12 Honorable Joseph Bribiesca, Judge of Division 22 of the  
13 18th Judicial District, Sedgwick County, Kansas, at  
14 Wichita, Kansas on December 12, 2011.

15 **APPEARANCES:**

16 The Plaintiffs, Wichita Terminal Association,  
17 Burlington Northern & Santa Fe Railway Company and Union  
18 Pacific Railroad Company, appeared by and through its  
19 attorney, Mr. K. Paul Day, of Lathrop & Gage, LLP, 2345  
20 Grand Boulevard, Suite 2200, Kansas City, Missouri  
21 64108-2618.

22 The Defendant, FYG Investments, Inc. and  
23 TreatCo, Inc., appeared by and through its attorney, Mr.  
24 Wyatt Hoch, of Foulston Siefkin, LLP, 1551 N. Waterfront  
25 Parkway, Suite 100, Wichita, Kansas 67206-4466.

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(The following is the Court's ruling only.)

THE COURT: Well, first of all, let me say that I've had plenty of time to think about this. And frankly, I haven't -- I did not hear any argument that's any different than what I heard at the -- at the evidentiary hearing in terms of what was presented to me. Obviously, you just put it together in argument form, with the exception of the argument about not having subject matter jurisdiction.

And let me just say for the record, I'm duty-bound to follow the dictates of the Court of Appeals. The Court of Appeals has told me that I need to consider the removal of the north track. And so I'm going to do that.

Well, as I stated at the beginning, I'm a hundred percent sure my decision is going to be appealed, so this matter is not going to come to any conclusion by my decision. And it's unfortunate the parties can't agree on a mutually-advantageous way to settle this matter.

Well, for the record, pursuant to the Court of Appeals' remand directives of February 11th of this year, the district court is ordered to decide the best option for implementing the injunction in compliance

1 with the Manual on Uniform Traffic Control Devices.  
2 In other words, FYG is legally entitled to ingress and  
3 egress. This Court is simply ordered to decide the  
4 most viable option for implementing the injunction.

5 The WTA is of the opinion that the most viable  
6 option is to build a crossing at the location that was  
7 referred to in the course of the evidentiary hearing  
8 as the pinch point location. On the other hand, FYG  
9 is of the opinion that the most viable option for the  
10 crossing is at -- is at their proposed Emporia Court  
11 location. The evidence shows that the pinch point  
12 location -- and I'm going to make this finding, I  
13 disagree with plaintiffs' counsel. I'm of the opinion  
14 that the evidence showed that the pinch point location  
15 is located in an area that is a low point and a  
16 virtual swamp with a creek running through it. In the  
17 Court's opinion, the pinch point location is not the  
18 most viable access point, because of the grade and  
19 swampy nature of the land at that location.

20 The evidence further shows there are two sets of  
21 tracks running alongside 25th Street on the south side  
22 of the road. The evidence shows that south of the  
23 existing tracks, there are no businesses that would be  
24 impacted if a rail line were laid south of the  
25 existing tracks. The evidence shows that on the north

1 side of 25th Street, there are businesses and utility  
2 poles. The Court of Appeals, in its remand order,  
3 specifically stated that the trial court was to  
4 consider removal of the north track at the Emporia  
5 Court location.

6 Based on the evidence presented, the Court is of  
7 the opinion that the removal of the north track,  
8 coupled with the lane of a track south of the existing  
9 tracks, is the most viable option. The removal of the  
10 north track line would allow the Emporia Court  
11 location to be built in compliance with the Manual on  
12 Uniform Traffic Control Device, which is what this  
13 Court was called upon to decide.

14 The pinch point location is not a feasible option  
15 for reasons I already stated. Widening of the street  
16 is not the best viable option, because of its impact  
17 on the existing business owners.

18 In this Court's opinion, the new southern track  
19 line could be laid prior to the removal of the north  
20 track line. If done in that sequential manner, WTA's  
21 concern of losing parking lot spaces, I believe that  
22 was the language that was utilized at the -- in the  
23 course of the evidentiary hearing, should be  
24 alleviated to a great degree.

25 To summarize, the Court is ordering the crossing

1 to be located at the proposed Emporia Court location.  
2 The Court is also ordering the removal of the north  
3 track and the laying of a new line south of the  
4 existing line.

5 Mr. Hoch is ordered to prepare an order reflecting  
6 the Court's decision and circulate it for signature.

7 Now, although I believe my decision is going to be  
8 appealed, Mr. Day, I want to be fair with you. How  
9 quickly can this be done?

10 MR. DAY: Judge, I -- I don't know. I have  
11 to confer with my clients. The construction of a new  
12 set of tracks is a new wrinkle in all of this. I have  
13 no idea at this point.

14 THE COURT: Well, all right. Since you  
15 didn't give me a date, I'm going to order that it be  
16 done by April 1st of 2012, and -- unless -- obviously,  
17 unless you appeal my decision. If you don't appeal  
18 it, then I assume the matter will be brought back to  
19 the Court if it hasn't been done by April 1 of 2012.

20 Now, I will tell you this, I'm going to criminal  
21 come January 1. I frankly don't know if I'm keeping  
22 the case after January 1. It may land in another  
23 judge's lap. I don't know. And that was -- that  
24 happened previously. I mean, I had it initially.  
25 Then it went to Judge Henderson, and then -- I don't

1 know. We'll see. I'll talk to the chief judge or the  
2 administrative civil judge, or we'll see what happens,  
3 but -- and you can put your two cents in. If you want  
4 to go talk to them, that's up to you. I'm not asking  
5 you to, but I'm sure you might want to. Of course, as  
6 I sit here, I'm just using good old common horse  
7 sense, I imagine Mr. Day would want a different judge,  
8 and Mr. Hoch would want me to preside over it, but  
9 that's for another day.

10 In any event, that's my order. Go ahead and draw  
11 up the order, circulate it for signature. And if  
12 there was any way the two of you could put your heads  
13 together and come up with a mutually-advantageous way  
14 to settle it without a third appeal, in my humble  
15 opinion, that would be very wise.

16 We're adjourned.

17 MR. DAY: Thank you, Judge.

18 MR. HOCH: Thank you, Judge.

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FYG Investments, Inc.  
2300 North Broadway  
Wichita, KS 67204

June 13, 2013

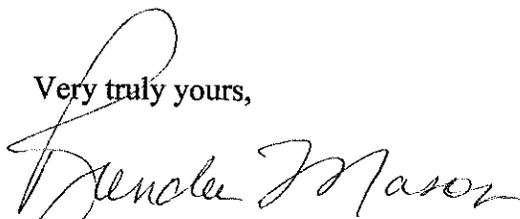
Ronald W. Dame, Superintendent  
Wichita Terminal Association  
1537 Barwise Street  
Wichita, Kansas 67214

Dear Mr. Dame:

Our companies have been locked in a court battle for more than 10 years over the issue of access across the WTA parallel railroad tracks along 25<sup>th</sup> Street just east of Broadway. FYG's lawyer says the evidence at court hearings in 2009 and 2011 confirmed that WTA, BNSF, and UP could promptly resolve the conflict by relocating your northern-most track to the south of the existing tracks and then building a crossing at Emporia Court. Your current right-of-way isn't wide enough to build another track to the south.

Although in the past WTA has shown no interest in acquiring the right-of-way or complying with our access rights, FYG Investments, Inc. is willing to sell to the WTA the right-of-way necessary to relocate the track. We will entertain an offer for a right-of-way not exceeding 60 feet in width at a fair market value, subject to the right of access at Emporia Court, if you act within 60 days.

Very truly yours,



Brenda Mason  
President

# LATHROP & GAGE<sub>LLP</sub>

K. PAUL DAY  
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2345 GRAND BOULEVARD, SUITE 2200  
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PHONE: 816.292.2000  
FAX: 816.292.2001

July 15, 2013

**VIA EMAIL: [woch@foulston.com](mailto:woch@foulston.com)**

Wyatt A. Hoch  
Foulston Siefkin LLP  
1551 N. Waterfront Parkway,  
Suite 100  
Wichita, KS 67206

Re: *Wichita Terminal Association, et al. v. F.Y.G. Investments, Inc., et al.*

Dear Wyatt:

This letter is in response to your client's letter dated June 13, 2013 (copy attached) addressed to my client, the Wichita Terminal Association ("WTA"). The WTA declines your client's offer contained within the attached letter. The WTA is not interested in acquiring property from your client at "fair market value" so that the interchange tracks can be relocated to accommodate your client's demand for a public road crossing at what is basically the center of two very busy interchange tracks. As has been WTA's position from the beginning, the proposed location of the Emporia Court crossing places an undue burden on interstate commerce, is an unsafe location for a crossing, and would interfere with the efficient and safe operation of trains over the interchange tracks.

As stated before, the WTA is still willing to discuss converting the location of the temporary crossing at the west end of the interchange tracks to a more permanent private crossing that would continue to provide access to your client's property.

Very truly yours,  
Lathrop & Gage LLP

*/s/ K. Paul Day*

K. Paul Day

KPD/kb

Attachment