

209736

LAW OFFICE
THOMAS F. McFARLAND, PC.
208 SOUTH LASALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1112
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mcfarland@aol.com



THOMAS F. McFARLAND

December 26, 2003

By UPS overnight mail
(Monday delivery)

ENTERED
Office of Proceedings

DEC 29 2003

Part of
Public Record

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Finance Docket No. 34425, *City of Lincoln - Petition for Declaratory Order*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Reply in Partial Opposition to Petition For Declaratory Order, for filing with the Board in the above referenced matter.

Kindly acknowledge receipt by date stamping the enclosed duplicate copy of this letter and return in the self-addressed stamped envelope.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Lincoln Lumber Company

TMcF:kl:enc:wp11\977\lstrsb5

209736
ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

CITY OF LINCOLN -- PETITION FOR) FINANCE DOCKET
DECLARATORY ORDER) NO. 34425



REPLY IN PARTIAL OPPOSITION TO
PETITION FOR DECLARATORY ORDER

ENTERED
Office of Proceedings

DEC 29 2003

Part of
Public Record

LINCOLN LUMBER COMPANY
P.O. Box 30373
Station A
Lincoln, NE 68503

Protestant

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204

Attorney for Protestant

Date Filed: December 29, 2003

TABLE OF CONTENTS

FOREWORD 1

NATURE OF THE PETITION 2

STATEMENT OF POSITION 3

LLC’S STATUS AS A CLASS III RAIL COMMON CARRIER SUBJECT
TO BOARD JURISDICTION IS INDISPUTABLE 4

LEGAL BASES FOR DECLARING THAT FEDERAL LAW PRECLUDES
THE PROPOSED STATE LAW CONDEMNATION FOR A TRAIL 5

1. Federal Law Precludes The Proposed State Law Condemnation Because
Condemnation Of LLC’s ROW For Trail Use Under State Law Would
Unjustifiably Undermine The Board’s Prior Determination Under
Federal Law That LLC’s ROW Is Not Subject To Trail Use 6

2. Federal Law Precludes The Proposed State Law Condemnation Because
Condemnation Of LLC’s Railroad ROW For Trail Use Under State Law
Would Unlawfully Impinge On The Right Of LLC Under Federal Law
To Exclusive Use Of The Full Width Of Its ROW 8

3. Federal Law Precludes The Proposed State Law Condemnation Because
Condemnation Of LLC’s ROW Land For Trail Use Under State Law Is
Federally Preempted Under 49 U.S.C. § 10501(b) 12

THE CITY HAS NOT PROVIDED LEGAL SUPPORT FOR THE PROPOSED
STATE LAW CONDEMNATION 19

CONCLUSION AND REQUESTED RELIEF 21

CERTIFICATE OF SERVICE 23

APPENDIX 1 - cover page and pages 397-402 from article entitled
“Pipes, Wires and Bicycles,” Wright and Hester,
27 Ecol. Law Quart. 351 (2000) Tab 1

APPENDIX 2 - *Riverview Trenton R. Co. v. County of Wayne*,
2001 U.S. Dist. LEXIS _____ (USDC, E.D., Mich.,
No. 01-70078, order filed April 10, 2001) Tab 2

APPENDIX 3 - Verified Statement of Thomas F. McFarland Tab 3

APPENDIX 4 - Verified Statement of Donald L. Hamill Tab 4

BEFORE THE
SURFACE TRANSPORTATION BOARD

CITY OF LINCOLN -- PETITION FOR) FINANCE DOCKET
DECLARATORY ORDER) NO. 34425

**REPLY IN PARTIAL OPPOSITION TO
PETITION FOR DECLARATORY ORDER**

Pursuant to the procedural decision served December 9, 2003, LINCOLN LUMBER COMPANY (LLC), a Class III rail carrier, hereby replies in partial opposition to a Petition for Declaratory Order (Petition) filed by the City of Lincoln, Nebraska (the City) on November 6, 2003.

FOREWORD

Consistently, for over 100 years to the present, the 100-foot railroad operating right-of-way has received special protection in the law. The highest Courts in the land -- the United States Supreme Court, and the United States Court of Appeals -- have held unequivocally that railroad companies are entitled to exclusive use of the full width of their rights-of-way, including, specifically, portions of the right-of-way not currently in active rail use.

The Petition is an attempt to administratively reverse that fundamental legal principle. Although it has been filed nominally by a municipality, there is little doubt that the national trail organization is in back of it. Rails-to-Trails has not been successful legislatively in accomplishing forced trail use of railroad rights-of-way. Now trail interests want this Board to help them accomplish that goal through the back door -- by means of condemnation under state law. The Board ought to emphatically decline that invitation to thwart the will of the United States Congress.

The lion invariably attacks the smallest animal in the herd. That explains the trail interests' choice of Lincoln Lumber Company's five-block rail line for their attempted forced taking, rather than property of a major Class I rail carrier. But make no mistake: if Rails-to-Trails gets the Board's permission to carve out 20 feet of this shortline railroad's operating right-of-way, trail interests could and would use condemnation to shrink numerous additional railroad rights-of-way from 100 feet to 80 feet or less. That is a direct challenge to the Board's statutory duty to preserve and promote continued rail service.

Lincoln Lumber Company expended a substantial sum in good faith to acquire its rail line for continued rail service. It has expended significant additional sums for improvement of its right-of-way and trackage for more efficient and economical provision of rail service. It has explicit plans for continuing improvements to further increase rail efficiency and economy. When making those important investment decisions, Lincoln Lumber Company relied heavily on the Board's explicit statement in the course of the acquisition proceeding that a right-of-way acquired for rail use is not subject to trail use. Trail interests ought not to be permitted years later to collaterally attack that Board determination. If trail interests want forced use of railroad rights-of-way, they are required to seek it prospectively before the United States Congress.

NATURE OF THE PETITION

The Petition in effect seeks a declaration that federal law would not preclude the City from using eminent domain under Nebraska law to condemn a 20-foot width of LLC's railroad right-of-way (ROW) for a pedestrian and bicycle trail (trail).

The City says at page 1 of the Petition that it seeks a declaration that its proposed condemnation of ROW would not constitute acquisition of a rail line under 49 U.S.C. § 10901 or

abandonment of a rail line under 49 U.S.C. § 10903. But if the Board were to so declare, it would not follow that condemnation of railroad ROW for a trail under state law is permissible under federal law. Fundamental questions of federal law that have not been addressed by the City are determinative of that issue, i.e.:

- (1) whether such condemnation would constitute an impermissible collateral attack on the Board's prior determination that LLC's ROW is not subject to trail use;
- (2) whether such condemnation would unduly burden interstate commerce by impinging on LLC's right to exclusive use of the full width of its operating ROW;
and
- (3) whether such condemnation would be federally preempted under 49 U.S.C. § 10501(b) as state regulation of rail transportation.

STATEMENT OF POSITION

LLC is not opposed to the City's proposal for improvements to the storm sewer, assuming adequate compensation is paid for taking of land. While the project would be temporarily disruptive during construction, the sewer, being underground, would have minimal effect on safety and rail utilization of the surface of the ROW.

LLC is opposed to the proposal for a trail in any segment of the rail line ROW. Initially, LLC stated that it would not oppose a trail in the north edge of the ROW between 19th and 22nd Streets. In light of that concession involving three blocks, LLC asked the City to concede only one block by routing the trail around the ROW between 22nd and 23rd Streets. The City refused to do so. In light of the City's refusal to compromise, LLC hereby withdraws its agreement to a

trail between 19th and 22nd Streets. LLC opposes a trail in any part of its rail line between 19th and 24th Streets.

LLC'S STATUS AS A CLASS III RAIL COMMON CARRIER SUBJECT TO BOARD JURISDICTION IS INDISPUTABLE

LLC is a Class III common carrier by rail subject to the jurisdiction of the Board under 49 U.S.C. § 10101 *et seq.* By virtue of a Board decision in *Union Pacific R. Co. -- Aband. Exempt. -- in Lancaster County, NE*, 1998 STB LEXIS 1503 (STB Docket No. AB-33 [Sub-No. 112X], decision served Jan. 16, 1998), LLC was authorized to acquire a segment of rail line between 19th and 24th Streets in Lincoln, Nebraska from Union Pacific Railroad Company (UP) for continuation of rail service. That rail line connects at 19th Street with a rail line owned by Omaha, Lincoln & Beatrice Railway Company (OLB). The rail line is used for delivery and receipt of freight in interstate commerce.

LLC's acquisition of that line segment from UP was consummated on November 8, 2000. OLB provides rail service over that segment pursuant to an operating agreement with LLC. LLC has used that rail service to receive shipments of lumber and building materials on a regular and increasing basis.

LLC acquired the line segment pursuant to the offer-of-financial-assistance (OFA) provisions of 49 U.S.C. § 10904. Those provisions allow financially responsible persons to acquire rail lines for continued rail service that otherwise would be abandoned.^{1/} A rail line so

^{1/} The statement of the City's Assistant City Attorney Joel D. Pedersen that LLC's attorney stated to him that LLC acquired the rail line in a deliberate attempt to block trail use is flatly untrue. (Petition, Appdx. E at 2, ¶8). In response to an inquiry by Mr. Pedersen, LLC's attorney told him that acquisition of the line for continued rail use under an OFA would preclude trail use. That is a true statement, but Mr. Pedersen was not told that LLC's purpose in acquiring (continued...)

acquired is a line of railroad rather than exempt trackage, and the owner of such a rail line, as well as its operator, thereby become rail carriers subject to the jurisdiction of the Board. *See Railroad Ventures, Inc. v. STB*, 299 F.3d 523, 561 (6th Cir. 2002).

**LEGAL BASES FOR DECLARING THAT FEDERAL LAW PRECLUDES
THE PROPOSED STATE LAW CONDEMNATION FOR A TRAIL**

Contrary to the declaration sought in the City's Petition, there are three distinct legal bases for the Board to declare that federal law precludes the proposed state law condemnation for trail use, viz.:

1. The Board has already determined that under federal law LLC's railroad ROW is not subject to trail use. Condemnation of that ROW for trail use under state law would unjustifiably undermine that determination, upon which LLC has reasonably relied. The City's attempt to condemn part of this ROW for a trail constitutes an impermissible collateral attack on the Board's prior determination.
2. Rail carriers subject to Board jurisdiction are entitled to exclusive use of the full width of their operating ROWs as a matter of federal law, including portions of such ROW not currently in active rail use. Condemnation of any part of LLC's railroad operating ROW for trail use under state law would burden interstate commerce because it would unlawfully impinge on that right to exclusive use.
3. State regulation of rail transportation is federally preempted under 49 U.S.C. § 10501(b). Condemnation under state law is "regulation" within the meaning of § 10501(b). Land

^{1/}(...continued)

the line was to block trail use (*see* Appendix 3). LLC's purpose was to continue rail service, and it has done so.

within a rail carrier's operating ROW, especially such land in a terminal area that is used and required for delivery and receipt of rail freight for shippers or receivers, constitutes "rail transportation" within the meaning of § 10501(b), as defined in 49 U.S.C. §§ 10102(9)(A) and (B). Consequently, condemnation of any part of such ROW land for trail use under state law is federally preempted under § 10501(b).

Application of each of those legal bases is explained below.

1. Federal Law Precludes The Proposed State Law Condemnation Because Condemnation Of LLC's ROW For Trail Use Under State Law Would Unjustifiably Undermine The Board's Prior Determination Under Federal Law That LLC's ROW Is Not Subject To Trail Use

The City is attempting to use state condemnation law to achieve trail use of LLC's ROW in defiance of the Board's prior determination under federal law that LLC's ROW is not subject to trail use. The Board has often paid heed to the intent of Congress that rail use of ROW land takes precedence over trail use. When LLC acquired this rail line, the Board determined that such acquisition for continued rail service required a finding that the ROW is not subject to trail use. That determination was fully in accord with Congressional intent. LLC has reasonably relied on that determination in acquiring and making improvements to its rail line. The Board should not permit the City to subvert that Congressional intent, and to undermine the Board's prior determination under federal law, by means of resort to state condemnation law.

In the same proceeding in which LLC acquired the line segment at issue under OFA provisions, the City attempted to acquire the segment from UP for trail use. The City asked that the Board issue a notice of interim trail use (NITU) under the National Trails System Act, 16

U.S.C. § 1247(d). When a NITU is issued, a trail user and a rail carrier negotiate for railbanking of the rail line ROW land, and for trail use of the ROW land in the interim.

The STB issued the requested NITU, but cautioned that trail use would be foreclosed if the segment were to be acquired under the OFA provisions for continued rail use. *Union Pacific R. Co. -- Aban. Exempt. -- in Lancaster County, NE*, 1997 STB LEXIS 241 (STB Docket No. AB-33 [Sub-No. 112X], decision served Sept. 24, 1997), at *35-36. The Board said (*id.*, emphasis added):

The parties should note that operation of the trail use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in *Rail Abandonments - Use of Rights-of-Way as Trails*, 2 I.C.C.2d 591 (1986) (*Trails*), offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 U.S.C. 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. *See* 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. *See* 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use precluded. Alternatively, if a sale under the OFA procedures does not occur, trail use may proceed.

The principle that acquisition of a rail line pursuant to OFA provisions takes precedence over trail use of the rail line ROW is well settled. *See, e.g., 1411 Corporation -- Aband. Exempt. -- in Lancaster County, PA*, 2001 STB LEXIS 712 at * 12 (STB Docket No. AB-581X, decision served Sept. 6, 2001) (“... (I)t is well settled that an OFA should take priority over a trail use proposal because of the strong Congressional intent to preserve rail service wherever possible [footnote omitted].”), citing 49 C.F.R. § 1152.29(d) and *Rail Abandonments - Use of Rights-of-Way as Trails*, 2 I.C.C.2d 591, 608 (1986).

Congress could not have intended that trail interests be permitted to use state law to circumvent the effect of the settled federal principle that an OFA acquisition for continued rail use takes precedence over trail use. Consequently, the Board should decline to make the declaration requested by the City inasmuch as condemnation of LLC's rail ROW land for trail use under state law would unjustifiably undermine the Board's prior determination under federal law that LLC's ROW is not subject to trail use. The City's Petition should be denied on that basis.^{2/}

2. Federal Law Precludes The Proposed State Law Condemnation Because Condemnation Of LLC's Railroad ROW For Trail Use Under State Law Would Unlawfully Impinge On The Right Of LLC Under Federal Law To Exclusive Use Of The Full Width Of Its ROW

Rail carriers subject to Board jurisdiction are entitled to exclusive use of the full width of the land in their ROWs, including land that is not in active rail use. The Board should decline to make the declaration requested by the City because condemnation of a portion of the width of LLC's ROW land for a trail under state law would unlawfully impinge on that right.

The leading case is *Midland Valley R. Co. v. Sutter*, 28 F.2d 163 (1928). In that case, the Midland Valley Railroad Company had been granted an easement for railroad purposes over land that was 195 feet wide. Descendants of the owner of the fee interest in that land entered onto that land to drill for oil and gas. Midland Valley brought an action to enjoin them from doing so. The lower court held that the descendants were entitled to drill at points 50 feet or more from the center of Midland Valley's main track, but not within the 100-foot width normally considered to

^{2/} It is not material that the City here seeks 20 feet of the 100-foot width for trail use. The Board's prior determination encompassed the full width of LLC's rail ROW, i.e., the Board found that the ROW land as a whole is not subject to trail use. That determination *ipso facto* encompassed the lesser 20-foot width that would be condemned by the City.

constitute a rail carrier's operating ROW. The Court of Appeals reversed, holding that as a matter of federal law, Midland Valley is entitled to exclusive use of the full width of its ROW land. (*Id.* at 167-168). The Court of Appeals said (*id.*, emphasis added):

... The basic reason for the majority rule is that exclusive possession is necessary to enable the railroad company to safely conduct its business and meet the duty of exercising that high degree of care which the general law and administrative rules enjoin upon it. In the performance of these duties, imposed by general law and a national administrative tribunal for the public welfare, it should not be hampered by interference through the use of its right of way by the owners of the servient estate, although such use might be justified under the principles announced in local decisions. The character, nature and extent of the right of way granted in general terms depends upon the use to which it is to be devoted. It depends upon what the railroad company requires in order to properly operate its railroad over such right of way. The requirements of the railroad company in this respect are largely determined by the duties imposed upon it by general law. These duties require it to have the exclusive possession of its right of way . . .

That principle goes back to *Northern Pacific Railroad Company v. Smith*, 171 U.S. 260 (1898), in which the United States Supreme Court held that a railroad company was entitled to exclusive use of its ROW land that was 400 feet wide, notwithstanding that only about 25 feet of that width was being actively used in rail service. The Supreme Court said (at 275, emphasis added):

Upon principle and authority we therefore conclude that neither the city of Bismarck, as owners of the town site, nor its grantee Smith, can, under the facts and circumstances shown in this record, disturb the possession of the Northern Pacific Railroad Company in its rights of way extending two hundred feet on each side of its said road. The finding of the trial court, that only twenty-five feet in width has ever been occupied for railroad purposes, is immaterial. By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance, and it was not competent for a court, at the suit of a private party, to adjudge that only twenty-five feet thereof were occupied for railroad purposes in the face of the grant and of the finding that the entire land in dispute

was within two hundred feet of the track of the railroad as actually constructed, and that the railroad company was in actual possession thereof by its tenants . . .

To the same effect is *New Mexico v. United States Trust Company*, 172 U.S. 171 (1898), where the United States Supreme Court quoted favorably from *Southern Pacific v. Burr*, 86 California 279, to the effect that the absence of active railroad use of the ROW land at issue is not material where the carrier had potential for use of the land in the future for side tracks or other purposes, viz. (at 184, emphasis added):

. . . It is true the strip of land now actually occupied by the roadbed and telegraph line may be only a small part of the four hundred feet granted, but this fact is of no consequence. The company may at some time want to use more land for side tracks, and other purposes, and it is entitled to have the land clear and unobstructed whenever it shall have occasion to do so . . .

The decision in *Northern Pacific Ry. Co. v. Townsend*, 190 U.S. 267 (1903), is in accord. In that case, the Supreme Court held that a portion of a railroad ROW not currently in active use for train operations was not subject to a claim of adverse possession under state law. (*Id.* at 273). The Supreme Court cited its prior decisions on the issue, and said (at 272, emphasis added):

. . . Neither courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad and title to it has vested in whomsoever chooses to occupy the same. The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes.

The Supreme Court cases involved land grants from government, but the principle is not limited to land grant ROW. The ROW easement in *Midland Valley R. Co. v. Sutter*, *supra*, was acquired by private grant.

This time-honored legal principle is every bit as valid and binding at the present time. The subject is covered ably in a recent article entitled "Pipes, Wires and Bicycles," Wright and

Hester, 27 Ecol. Law. Quart. 351 (2000). The authors there point out that the most important feature of a railroad easement over ROW land is exclusivity (at 397). The authors emphasize that since the decision in *Midland Valley R. Co. v. Sutter, supra*, there is virtually no authority for the proposition that landowners can lawfully use unused portions of land over which a railroad company has an easement (*id.* at 399-402). The authors conclude as follows (*id.* at 402, emphasis added):

. . . (T)he courts are unanimous that a railroad easement . . . entails exclusive control over the surface of the easement, and extends to include possible future use even when the railroad is using only a portion of the easement (footnote omitted).

For ease of reference, a copy of the cover page and pages 397-402 of that article on a rail carrier's right to exclusive use of its ROW land under federal law are attached as Appendix 1 to this Reply.

LLC has a fee ownership interest in its ROW land, rather than an easement for railroad purposes. It is apparent that a rail carrier's right to exclusive use of the full width of its ROW land has even greater application when the railroad company owns the fee than when the company has an easement.

The upshot of the foregoing is that as a common carrier by rail in interstate commerce, LLC has the right to exclusive use of the full width of its ROW land, regardless of whether less than the full width of that land is actually being used in rail operations. That being the case, condemnation of any portion of LLC's ROW land for trail use under state law would impinge on that federal right, and, for that reason, would unduly burden interstate commerce in violation of the United States Constitution. The City's Petition should be denied on that basis.

3. Federal Law Precludes The Proposed State Law Condemnation Because Condemnation Of LLC's ROW Land For Trail Use Under State Law Is Federally Preempted Under 49 U.S.C. § 10501(b)

Inasmuch as LLC has a right under federal law to exclusive use of the full width of its railroad ROW land, state or municipal regulation of any width of that land would be federally preempted, regardless of whether such width is located on the edge of the ROW or is not in active rail use.

The United States Court of Appeals for the Seventh Circuit recently so held in *Michigan Southern R. Co. v. City of Kendallville*, 251 F.3d 1152 (7th Cir. 2001). In that case, the City of Kendallville sought to enforce a municipal ordinance against Michigan Southern that required that weeds be cut on the full 100-foot width of railroad ROW. A regulation implementing the Federal Railroad Safety Act required that vegetation be controlled on railroad property “on or immediately adjacent to the roadbed.” The parties stipulated that “immediately adjacent to the roadbed” means 15 feet in both directions from the center of the main track, i.e., a 30-foot width. The lower court held that in light of the federal regulation, enforcement of the municipal ordinance was federally preempted as to the portion of the ROW within that 30 feet, but not as to the remaining 70 feet on the edges of the ROW. The Court of Appeals reversed, holding that federal preemption also applied to the land on the edges of the ROW. The Court stated that “we cannot find that local municipalities can enforce local weed control ordinances on railroad rights-of-way” (*id.* at 1154-1155). The Court treated the 100-foot-wide operating ROW as a whole, notwithstanding the more limited application of the federal regulation.

The Court's ruling in that respect is consistent with the Board's treatment of the entire 100-foot width of rail carriers' operating ROWs as “used and required” for rail service under 49

C.F.R. § 1152.34(c), notwithstanding contentions that rail service can be provided with as little as a 30-foot-wide ROW. *See, e.g., Burlington N. R. Co. -- Aband. Exempt. -- in Snohomish County, WA*, 1996 STB LEXIS 73 at *10-12 (STB Docket No. AB-6 [Sub-No. 375X], decision served March 11, 1996); and *Boston & M. Corp. -- Aband. & Discon. of Serv. in Hartford County, CT*, 1991 ICC LEXIS 178 at *13-16 (ICC Docket No. AB-32 [Sub-No. 43], decision Aug. 7, 1991).

Where a federal statute contains a specific preemption clause, the language of that clause is the focus for determination of whether federal preemption applies. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Railroad Ventures, Inc. v. STB, supra*, 299 F.3d at 562; *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 442 (5th Cir. 2001). The statute providing for federal preemption of state regulation of rail transportation is 49 U.S.C. § 10501(b). That statute has a specific preemption clause, as follows:

. . . (T)he remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under . . . State law.

The statute was enacted as part of the ICC Termination Act of 1995, effective Jan. 1, 1996. A court has observed in reference to that statute that “it is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.” *CSX Transp. v. Georgia Public Serv. Comm.*, 944 F.Supp. 1573, 1581 (ND, Ga. 1996). All of the cases interpreting that statute find a broad reading of Congress’s preemption intent, not a narrow one. *City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998).

The federal preemption issue here can thus be framed as follows:

Is the use of eminent domain under Nebraska law to condemn a 20-foot width from LLC's 100-foot-wide railroad ROW land for use as a trail "regulation of rail transportation" within the meaning of 49 U.S.C. § 10501(b)?

If that issue is resolved in the affirmative, the proposed use of eminent domain would be federally preempted by virtue of 49 U.S.C. § 10501(b).

It already has been determined in *Wisconsin Central, Ltd. v. City of Marshfield*, 160 F.Supp.2d 1009 (W.D., Wisc. 2000), at 1013, that condemnation under state law is "regulation" within the meaning of § 10501(b). ("The Court holds that condemnation is regulation").

The remaining issue is whether or not the 20-foot-width of railroad operating ROW land sought to be condemned constitutes "rail transportation" under § 10501(b).

Inasmuch as rail carriers are entitled to exclusive use of the full width of their ROWs, that issue is required to be answered in the affirmative. If the 20-foot width of land sought to be condemned is located within the rail carrier's operating ROW, the rail carrier is entitled to exclusive use of that land. By definition, that land would constitute part of the rail carrier's provision of "rail transportation" within the meaning of 49 U.S.C. § 10501(b).

There have been two cases of attempted state law condemnation of railroad ROW since enactment of 49 U.S.C. § 10501(b) in its present form by virtue of the ICCTA. It was held in both cases that the attempted condemnation was federally preempted. One of the cases was *Wisconsin Central, Ltd. v. City of Marshfield, supra*. The Court there held that ROW land on which a passing track was located constituted "transportation" under § 10501(b). (160 F.Supp.2d at 1015, "... the passing track is ... transportation ...").

The other case is *Riverview Trenton R. Co. v. County of Wayne*, 2001 U.S. Dist. LEXIS

_____ (USDC, E.D., Mich., No. 01-70078, order filed April 10, 2001). Inasmuch as that order does not currently appear in LEXIS, a copy thereof is attached to this reply as Appendix 2. In that case, the County took steps to begin condemnation of a 76-acre parcel of land for economic development. The railroad company which owned that land proposed to build a rail terminal and establish cargo transfer operations along an existing rail line on the property. In granting the railroad company's motion to restrain the state law condemnation, the Court held that the County's proposed condemnation was preempted by virtue of 49 U.S.C. § 10501(b). (Appdx. 2 at 6).^{3/}

The term "transportation" is defined at 49 U.S.C. §§ 10102(9)(A) and (B). As here pertinent, "transportation" is there defined to include "property . . . of any kind related to the movement of . . . property . . . by rail" and "services related to that movement, including receipt (and) delivery . . . of property."

The pertinent inquiries, therefore, are (1) whether the 20-foot-width of land sought to be condemned is "related to the movement of property by rail"; and (2) whether "services related to that movement," namely "receipt and delivery of property," are performed on that land. Both of those issues should be resolved in the affirmative.

^{3/} In *Dakota, M. & E. R. Corp. v. South Dakota*, 236 F.Supp.2d 989 (D, S.D., S.Div. 2002), the Court considered whether provisions of South Dakota eminent domain law, as amended, were federally preempted by virtue of 49 U.S.C. § 10501(b) or otherwise. Several of such provisions were determined to be preempted as insurmountable barriers to a rail carrier's use of eminent domain. That decision does not bear on the preemption issue involved in the present case. As the Court there observed (*id.* at 1006):

The statutes at issue in the instant case do not involve South Dakota's attempt to exercise its eminent domain power over railroad property but rather new statutory requirements that a railroad must meet before it may exercise eminent domain power delegated by the State of South Dakota . . .

The facts asserted in this Reply in regard to the relationship of the 20-foot width of land to the movement of freight by rail, and in regard to the rail delivery and receipt services performed on that land, are supported by the verified statement of Donald L. Hamill, President of LLC, which is attached to this Reply as Appendix 4.

Reference is directed to Appendix A of the Petition, and in particular to the overview of the trail route in green at the top of the appendix. The trail is there shown as literally abutting the south rail of the main track from 19th Street east halfway to 20th Street. A trail in that proximity to the main track would be inherently unsafe. A 73-foot center-beam flatcar heavily loaded with lumber would land directly atop the trail if it were to derail in a southerly direction. The resulting loss of life, limb and property would be disastrous. The proposed trail location violates the minimum 10-foot setback for rails-with-trails recommended by the United States Department of Transportation. *See Rails-with-Trails: Lessons Learned*, US Dept. of Transp., Final Report dated Aug. 1, 2002 at Exec. Summ., vi: “The minimum setback distance ranges from 3 m. (10 ft.) to 7.6 m. (25 ft.), depending on the circumstances.”

Where the 20-foot trail would abut the main track, there would not be sufficient access along the track for motor vehicles and equipment used for ordinary track maintenance and for clearing derailments. Obviously, ROW land adjacent to the main track that is used and required for track maintenance and to clear wrecks is “property related to the movement of property by rail” within the definition of “transportation” in 49 U.S.C. § 10102(9)(A). That being the case, condemnation of that ROW land would be state regulation of rail transportation federally preempted by virtue of 49 U.S.C. § 10501(b).

Reference is again made to the overview of trail route in Appendix A of the Petition. From halfway between 19th and 20th Streets east to Whittier Street, the trail is shown as being as close or closer to the closest main track rail than to the ROW boundary line. Mr. Hamill's measurement shows that there would be only 7.5 feet between the edge of the trail and the nearest main track rail. That, too, would violate the USDOT-recommended minimum trail setback. It would result in the same disastrous loss of life, limb and property in the event of a locomotive and/or freight car derailment. It would not allow sufficient access for vehicles and equipment for track maintenance or dealing with derailments. ROW land that close to the main track is used and required for track maintenance and clearing wrecks. It is thus property related to the movement of freight by rail within the definition of "transportation" in § 10102(9)(A). As such, it is immune from state law condemnation by virtue of § 10501(b).

Appendix A of the Petition shows the trail abutting the north boundary of the ROW between Whittier and 23rd Streets, but the 20 feet of ROW there, too, is used and required for rail operations. I-Joists and dimension lumber in lengths between 24 feet and 44 feet are unloaded by forklift trucks from center-beam flatcars at that segment of the rail line. The full 50-foot width on each side of the main track is required for a forklift carrying those lengthy articles to back away from the freight car, to turn east or west, and to position those articles for staging and shipping. Those articles would be directly above the proposed trail while the forklift turned and positioned them for unloading. An accidental drop of those heavy and lengthy articles would subject trail users to loss of life, limb and property.

The foregoing demonstrates that the full width of LLC's ROW between Whittier and 23rd Streets is used and required for "services related to the movement of freight," namely "receipt

and delivery of freight” within the definition of “transportation” in 49 U.S.C. § 10102(9)(B). Consequently, condemnation of any part of that ROW land would constitute state regulation of rail transportation that is federally preempted by virtue of 49 U.S.C. § 10501(b).

The proposed trail would be inconsistent with LLC’s commitment to develop and redevelop the railroad ROW as a railroad terminal area to increase efficiency in the provision of rail service. LLC is well on the way to accomplishing that goal between 22nd and 23rd Streets, where it has rehabilitated the main track and completely rebuilt the sidetrack on the south half of the ROW. But the trail would occupy the same space as the existing sidetrack in the north half of the ROW between Whittier and 22nd Streets, thereby preventing LLC from rebuilding and using that sidetrack as part of its rail terminal. LLC has partially removed the portion of that sidetrack most in need of repair in preparation for completely rebuilding that track. Mr. Hamill’s photographs show that the same procedure was followed when the south sidetrack was rebuilt. Development of the segment between 22nd and 19th Streets with sidetracks and a rail-related building would follow upon Textron’s buyout of its lease, which is under negotiation, or upon expiration of that lease.

Use of railroad ROW as a terminal for unloading freight cars is clearly a use related to the movement of freight by rail. Land devoted to that use is thus part of a rail carrier’s “transportation” within the meaning of 49 U.S.C. § 10102(9)(A). Condemnation of such land would thus be state regulation of rail transportation that is federally preempted by virtue of 49 U.S.C. § 10501(b).

Reference is made to Mr. Hamill’s statement for additional evidence which shows that the proposed trail would create a severe threat to safety and a huge increase in liability for death,

injury and property damage. Those injured or harmed would be likely to bring legal action against LLC, rather than the City, regardless of fault. The City has not provided for indemnity nor insurance to offset that substantial increase in liability. That is not just and reasonable.

Mr. Hamill has demonstrated that there are reasonable alternatives to the trail going through LLC's rail ROW. The trail goes around other nearby businesses. In fact, the trail goes through city streets to get to the east campus of the University of Nebraska. There is no good reason that it cannot bypass LLC's ROW, as well.

THE CITY HAS NOT PROVIDED LEGAL SUPPORT FOR THE PROPOSED STATE LAW CONDEMNATION

The decisions filed by the City in Appendix B of the Petition do not provide support for a declaration that federal law does not preclude the City's condemnation of a 20-foot width of LLC's railroad ROW for a trail.

The State of Texas, DOT -- Pet. for Declar. Order re Hwy. Const. in Tarrant County, TX, 1995 ICC LEXIS 14 (ICC Finance Docket No. 32589, decision served Feb. 7, 1995) ("TXDOT"), does not bear on any of the issues of federal law involved in the present case, i.e.:

- (1) there was no proposal for trail use in *TXDOT*, nor any prior ICC determination that the railroad land is not subject to trail use. The State wanted the railroad land for highway use. No issue was thus presented as to whether the proposed track relocation constituted a collateral attack on a prior agency determination that acquisition of land for continued rail use precluded trail use.
- (2) the proposal in *TXDOT* would not result in a reduction of the width of a rail carrier's ROW. On the contrary, the State provided funding for the rail carrier to

acquire 4.7 acres of land, whereas the State proposed to take only 3.414 acres from the rail carrier, a net gain of 1.286 acres for the rail carrier. (1995 ICC LEXIS 14 at *2-3). *TXDOT* involved a land swap and track relocation, not a taking of ROW width. No issue was thus presented regarding a rail carrier's right to exclusive use of the full width of its operating ROW.

(3) *TXDOT* does not constitute authority for nonapplication of federal preemption under the current preemption statute. *TXDOT* was decided prior to enactment of 49 U.S.C. § 10501(b) by virtue of the ICCTA. That statute substantially broadened and strengthened federal preemption of state and local laws. *See City of Auburn v. United States, supra*, 154 F.3d at 1030. Prior to ICCTA, federal preemption was largely confined to state economic regulation, but under 49 U.S.C. § 10501(b) all state regulation of rail carrier transportation is preempted except for legitimate police powers. It is not surprising, therefore, that the ICC in *TXDOT* would have taken a narrow view of federal preemption of state action in a context other than economic regulation.

(4) *TXDOT* is materially different factually from the present case because whereas that case involved a relocation of trackage with a net gain in land by the rail carrier, the present case involves a net loss of land that is used and required for the provision of rail transportation.

Sacramento Regional Transit Dist. -- Pet. for Declar. Order re Carrier Status, 2000 STB LEXIS 369 (STB Finance Docket No. 33796, decision served July 5, 2000), has even less application to the present case than *TXDOT*. The petition in that case sought a declaration that a

transit district's voluntary acquisition of a portion of a rail carrier's ROW to provide commuter passenger service does not require Board approval, nor make the transit district a carrier subject to Board jurisdiction. The decision did not involve either condemnation or trail use of railroad ROW. It has absolutely no bearing on the proper resolution of the City's Petition in the present case.

In contrast, LLC's legal position is supported by extensive judicial and administrative authority as cited herein, including decisions issued by the Supreme Court of the United States.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, condemnation of a 20-foot width of LLC's railroad ROW for a trail under state law:

- (1) would constitute an impermissible collateral attack on the Board's prior determination that upon acquisition by LLC, the ROW would not be subject to trail use;
- (2) would unduly burden interstate commerce by impinging on LLC's right to exclusive use of the full width of its ROW; and
- (3) would be federally preempted under 49 U.S.C. § 10501(b) as state regulation of rail transportation.

On any one of those grounds, or on all of them, the Board should decline to issue the declaratory order sought by the City.

Respectfully submitted,

LINCOLN LUMBER COMPANY
P.O. Box 30373
Station A
Lincoln, NE 68503

Protestant

Thomas F. McFarland

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204

Attorney for Protestant

Date Filed: December 29, 2003

CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2003, I served the foregoing document, Reply In Partial Opposition To Petition For Declaratory Order, on Charles H. Montange, 426 NW 162nd Street, Seattle, WA 98177, and Daniel A. LaKemper, Pioneer Railcorp, 1318 S. Johanson Rd., Peoria, IL 61607, by UPS overnight mail (Monday delivery).

Thomas F. McFarland

Thomas F. McFarland

APPENDIX 1

Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries

Danaya C. Wright* and Jeffrey M. Hester**

This Article responds to a series of class action suits filed against railroads, telecommunication companies, and the federal government claiming that once railroads abandon their corridors, all property rights shift to adjacent landowners. This Article reviews the state law on this matter and offers a theory of how courts should handle these cases. After discussing the history of nineteenth-century railroad land acquisition practices, we analyze the scope of the easement limited for railroad purposes. We then discuss the role abandonment plays in affecting the rights of third-party users of these corridors as well as successor trail owners. We conclude with a theory of railroad easements that interprets the railroad's powers based on the public participation that helped create and establish these corridors and the tenuous claims of adjacent landowners.

CONTENTS

Introduction	352
I. The Class Action Challenges to Corridor Conversion	356
A. Rails-to-Trails	356
B. Utility Licenses	359
C. The Legal Arguments Against Multiple Use and Conversion of Rail Corridors	360

Copyright © 2000 by The Regents of the University of California

* Assistant Professor of Law, University of Florida Fredric Levin College of Law.

The authors would like to thank the Fredric Levin College of Law for its generous support of this research as well as the Rails-to-Trails Conservancy and the Indiana Trails Action Group for their unceasing support.

** Associate, William J. Tucker & Associates, Indianapolis, Indiana.

an easement would be recognized because of statutory or grant limitations on the property interests the railroads could acquire by condemnation or grant.¹⁸⁷

In any event, the modern trend is to call a "right-of-way" an "easement," and to construe railroad property rights as easements whenever there are limitations on the grant or purposes to which the land may be put. Even though the courts call the "right-of-way" an "easement," however, they recognize that it is a special easement, unique to the railroad context, which gives exclusive use and possession to the railroad.

B. Exclusivity

In outlining the scope, burden, uses, duration, and general parameters of the railroad easement, the most important feature seems to be its exclusive character. Unlike all other private easements and most commercial easements, the railroad easement is exclusive as against the fee owner. In non-railroad cases, the fee owner can use the easement located on her land; she may drive on the driveway or have a picnic under the power line poles of a utility easement. The only restraint on the fee owner's use of her own fee is non-interference with the easement owner's use rights in the encumbered land. But this is not the case with a railroad easement or certain other easements in gross for commercial purposes.¹⁸⁸ Exclusivity, one court explained, "refers to the exclusion of the owner and possessor of the servient tenement from participation in the rights granted, not to the number of different easements in and over the same land."¹⁸⁹ Thus, an exclusive railroad easement allows for exclusion of the fee owner, though the easement owner may permit multiple uses on the land so long as those uses do not exceed the reasonable limitations on scope or burden of the use.

For the federal railroad grants, the easements are deemed to be "a right in perpetuity to exclusive use and possession."¹⁹⁰ The reasons for the exclusivity of the railroad easement are many. As the Eighth Circuit explained:

The railroad, charged with the performance of public duties which it cannot evade, and with liabilities which it cannot limit, should, for its own protection as well as in the interest

187. *Davis*, 606 So. 2d at 738.

188. See *Henley v. Continental Cablevision, Inc.*, 692 S.W.2d 825 (Mo. Ct. App. 1985).

189. *Davis*, 606 So. 2d at 828.

190. *Wyoming v. Udall*, 379 F.2d 635, 640 (10th Cir. 1967).

of the public, be accorded the free use of its right of way, undisturbed by the claims of adjoining owners to a partial occupancy or use. . . . An easement granted to a railway is essentially different from any other. The nature of railway service requires exclusive occupancy. A railroad company is held to the highest degree of care, and the exercise of this care necessarily requires that it should have complete dominion over its right of way. It is bound to prevent obstructions from being placed on its tracks, and is required to keep them fenced in, and free from rubbish or other combustible materials. The duties of a railway company are due to the public as well as to individuals, and these duties it must perform at its peril. The rules which apply to the use of streets or highways fail, when applied to railroads, because the necessities of their use are different. The railroad must have the exclusive possession and control of the land within the lines of its location, and the right to remove everything placed or growing thereon, which it may deem necessary to remove to insure the safe management of its road.¹⁹¹

To give security to their passengers and workmen and to discharge their duties as public carriers, railroads are held to the highest accountability in the performance of their duties and therefore require unquestioned exclusivity with regard to physical control over the corridor.¹⁹² Consequently, a railroad company may bring an action in ejectment, which is unique among easement holders.¹⁹³ Moreover, because the easement is exclusive, servient landowners who desire private grade crossings must seek approval from the railroad even though they own the underlying fee.¹⁹⁴ Even unauthorized use of the grade crossing over a period of time will not entitle the servient landowner to prescriptive rights; the railroad does not own the fee, and it is only the fee owner against whom adverse possession can be acquired.¹⁹⁵ So long as the railroad continues to maintain the road, the owner of the servient estate has no right to use or occupy the surface of the land burdened by the easement without the railroad company's consent.

191. *Midland Valley R.R. Co. v. Sutter*, 28 F.2d 163, 166 (8th Cir. 1928) (citations omitted).

192. See C. CLARKE, *REAL COVENANTS AND OTHER INTERESTS WHICH 'RUN WITH LAND' INCLUDING LICENSES, EASEMENTS, PROFITS, EQUITABLE RESTRICTIONS AND RENTS* 83-84 (2d ed. 1947).

193. See Comment, *Railroad Right of Way—Nature of the Interest—Easements—Ejectment*, 30 OR. L. REV. 380, 380-84 (1951); see also BRUCE & ELY, *supra* note 126, § 1.06[3].

194. See *Puett v. Western Pac. R.R. Co.*, 752 P.2d 213, 217 (Nev. 1988).

195. See *id.* at 215.

It follows that, if the servient estate owner has no right to use or occupy the railroad's easement, she may not authorize a third party to do so. Exclusivity is equally strict as against the servient owner as against assignees, licensees, lessees, or secondary easement holders. Ironically, while the courts are consistent in stating that a railroad easement is exclusive as against the servient estate owner, a small handful of states have allowed very limited landowner use of *unused* portions of a railroad easement, a doctrine we call the "landowner-use rule."¹⁹⁶ But even in these states, landowners are not permitted to construct permanent structures in the unused portions of the easement,¹⁹⁷ drill for oil or gas in the easement,¹⁹⁸ or even enclose pasture land by a fence in a way that might give rise to a claim against the railroad for adverse possession.¹⁹⁹ Furthermore, in the states applying the landowner-use rule, landowners were permitted to use or occupy portions of railroad corridors only when the railroads had abandoned those portions under state law,²⁰⁰ when the railroads had essentially waived their rights to complain about trespasses by allowing continuing infringement by others,²⁰¹ when the railroads had maintained private grade crossings and therefore would be liable for injury caused thereon,²⁰² or when the deeds to the railroads reserved for landowners certain uses on the easement.²⁰³ Hence, even in the states that purport to follow the landowner-use rule, the uses are usually limited to agricultural uses or uses that do not interfere with the railroads.²⁰⁴ Moreover, later cases diminish the strength

196. These states—North Carolina, South Carolina, Kansas, and Tennessee—often recite a rule that sounds relatively broad, but the cases do not bear out the full extent of the rule. The rule is often articulated as "the owner of the fee in a railroad right of way has the right to use so much thereof as is not in the actual use and occupancy of the railroad company, provided the use be not inconsistent with the claim of right of way for the railroad purposes." *Atlanta & Charlotte AirLine Ry. Co. v. Limestone-Globe Land Co.*, 96 S.E. 188, 190 (S.C. 1918); *see also, e.g.*, *Midland Valley R.R. Co. v. Corn*, 21 F.2d 96 (D. Kan. 1927); *Harvey v. Missouri Pac. R.R. Co.*, 207 P. 761 (Kan. 1922); *Atlantic Coast Line R.R. v. Bunting*, 84 S.E. 1009 (N.C. 1915); *Mobile & Ohio R.R. Co. v. Donovan*, 58 S.W. 309, 312 (Tenn. 1900).

197. *Southern Ry. Co. v. Vannet*, 216 S.W. 727 (Tenn. 1919).

198. *See Kansas City So. Ry. Co. v. Marietta Oil Corp.*, 102 F.2d 603 (5th Cir. 1939); *Midland Valley R.R. Co. v. Jarvis*, 29 F.2d 539, 541 (8th Cir. 1928); *Consumers Gas Trust Co. v. American Plate Glass Co.*, 68 N.E. 1020 (Ind. 1903).

199. *See Southern Ry. v. Beaudrot*, 41 S.E. 299, 299 (S.C. 1902).

200. *See Midland Valley R.R. Co. v. Corn*, 21 F.2d 96 (D. Kan. 1927).

201. *See Atlantic Coast Line R.R. v. Bunting*, 84 S.E. 1009 (N.C. 1915).

202. *See Miller v. Seaboard Airline Ry.*, 77 S.E. 748, 748-49 (S.C. 1913).

203. *See Mobile & Ohio R.R. Co. v. Donovan*, 58 S.W. 309, 313 (Tenn. 1900).

204. Even where agricultural uses were allowed in the easement, the railroad was not held liable for damages to crops within the easement caused by spraying of weed

of the landowner-use rule, and even those states that had adhered to it at the beginning of the century had shifted to the strict exclusivity rule by mid-century.²⁰⁵ Under the strict

control chemicals by the railroad. See *Bivins v. Southern Railway Co.*, 102 S.E.2d 128, 133 (N.C. 1958).

205. See *Bivins v. Southern Ry. Co.*, 102 S.E.2d 128 (N.C. 1958). The only recent cases that purport to follow the landowner-use rule are two questionable decisions from the late 1970s regarding the rights of servient estate owners to authorize location of coal slurry pipelines across railroad easements. See *Energy Transp. Sys., Inc. v. Union Pac. R.R. Co.*, 606 F.2d 934 (10th Cir. 1979) (*ETSI XI*); *Energy Transp. Sys., Inc. v. Union Pac. R.R. Co.*, 619 F.2d 696 (8th Cir. 1980) (*ETSI VIII*). Although the courts allowed the servient landowners to authorize use by the coal company against the railroad's wishes, the discussion focused not on the issue of exclusivity but entirely on surface versus subsurface rights in a railroad easement and ownership of the minerals underlying the easement, an issue not particularly contentious. The fee owner is always held to have retained the mineral rights under railroad easements. See, e.g., *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 120 (1957). It was primarily the mineral rights issue that caused the federal courts to adjust their interpretation of federally granted rights-of-way as limited fees or easements. For a thorough analysis of the law governing federally granted rights-of-way, see generally ROOT, *supra* note 57.

In the *ETSI* cases, it seems important that the pipeline's interference with the railroad easement would be minimal, as it merely transversed the easement and did not lie parallel to it. One motivation for the decision may be that Union Pacific had routinely allowed other pipelines to cross the corridor and merely objected to this one because it directly competed with Union Pacific.

Notably, the courts did not engage the question of how the surface owner might be able to restrict access to the subsurface until abandonment, even though it could not authorize removal of minerals itself. That issue was extensively discussed by the Supreme Court of Indiana in *Consumers Gas Trust Co. v. American Plate Glass Co.*, 68 N.E. 1020 (Ind. 1903). In *Consumers Gas Trust Co.*, the court acknowledged that even though the railroad did not own the mineral estate, it could prevent a lessee of the servient owner from tapping into it by virtue of its exclusive control over the surface. See *id.* at 1021; see also *Midland Valley R.R. v. Sutter*, 28 F.2d 163 (10th Cir. 1928); Plattner & Johannson, *Railroad, Grants, and Condemnation: Title and Interest Acquired in Railroad Rights-of-Way*, 37 N.D. L. REV. 266 (1961). The servient owner would simply have to wait to extract the minerals until the railroad abandoned or gave a license to allow the access.

Because the *ETSI* cases are of questionable logic and authority, and because they rely on the 1875 Act railroad grants rather than private grants, they have not been followed in any later cases. Moreover, the vitality of these cases is questioned in the Tenth Circuit decision in *Missouri-Kansas-Texas R.R. Co. v. Early*, 641 F.2d 856 (10th Cir. 1981), in which the court held that Union Pacific had acquired a fee interest in the land, therefore including the mineral rights, in a situation indistinguishable from the grants in *ETSI VIII* and *ETSI X*. The only deviation from the rule announced in *Consumers Gas Trust*, that the mineral estate holder must wait until abandonment if the surface easement holder denies access, was in *Missouri-Kansas-Texas R.R. Co. v. Freer*, 321 S.W.2d 731 (Mo. Ct. App. 1958), in which the grantor had reserved in the deed the right to mine on the railroad's easement.

Arguably, this is what happened in the *ETSI* cases. The landowner-use language was a readily available rule which the court used to justify punishing the railroad for its anti-competitive and discriminatory behavior. The court turned to a short-hand rule of very limited application which conceivably was not intended to apply to such a case rather than decide against the railroad on the grounds that its

exclusivity rule, even growing crops or permitting livestock to graze along the easement is strictly forbidden.²⁰⁶

It is unclear whether the landowner-use rule still has any vitality in light of the 1928 Eighth Circuit decision in *Midland Valley R.R. Co. v. Sutter*.²⁰⁷ That decision was one in a lengthy series of disputes between the railroad, which had leased certain portions of its easement to a company that was drilling for gas and had placed a gas pipeline along the railroad corridor, and the servient landowner, who had granted mineral rights to another gas company who sought to drill on the railroad easement as well. In deciding the issue, the Eighth Circuit went through a lengthy discussion of the landowner-use rule, noting that the

decisions of the national courts and of a majority of the state jurisdictions . . . are to the effect that the railroad company is entitled to the exclusive use and possession of its right of way, and that the owner of the servient estate has no right to occupy the surface of the land conveyed for right of way, in any mode, or for any purpose, without the railroad company's consent.²⁰⁸

Besides being the majority view, and more in line with the nature of the railroad easement in light of its public carrier duties, the court in *Sutter* effectively nullified the minority rule with regard to interstate carriers, at least, under a theory of federal preemption.²⁰⁹

denial of permission to cross its track was because the coal slurry pipeline directly competed with the railroad and was not based on legitimate reasons, since it allowed other pipelines to traverse its tracks. See Randall Napier, *Coal Slurry Pipelines and Railroad Crossings: Court Decisions Favor the Pipeline Sponsors*, 18 HOUS. L. REV. 1075 (1981).

206. See *Chicago Great Western R.R. Co. v. Zahner*, 177 N.W. 350, 351-52 (Minn. 1920); *Wilmot v. Yazoo & Miss. Valley R.R. Co.*, 24 So. 701, 702 (Miss. 1899).

207. 25 F.2d 163 (8th Cir. 1928).

208. *Id.* at 165 (citing cases that follow the strict exclusivity rule from Minnesota, Mississippi, Vermont, Pennsylvania, Indiana, New York, Connecticut, Illinois, and Alabama).

209. As the court noted:

We are inclined to the view that the question is one of general jurisprudence, and that we are not bound to follow the Kansas decisions. An interstate commerce railway system adequate to the country's needs is today recognized to be a national necessity. . . . In order to provide such a system, recognized safety measures must be followed in the maintenance of the roadbed and right of way. The railroad company is engaged in interstate commerce. It serves, not only residents of Kansas, but people generally throughout the country. It is enjoined to exercise a high degree of care by general law. In addition to this, it is subject to certain regulations and requirements by the Interstate Commerce Commission with reference to safety in the maintenance of its right of way and the operation of its trains.

The landowner-use cases are not only in the minority because they contravene the exclusivity rule, but also because they have virtually disappeared through the preemption of *Sutter* and general disuse. The few cases that allowed the servient landowner some limited access to the surface of the easement arose in special circumstances such as waiver, reservation of the right in the grantor, or limited agricultural uses.²¹⁰ But although most courts have seen clearly that the issue is one of exclusivity, and that possession of the mineral estate, for example, simply has to wait until the railroad use ceases, a few recent cases articulated the issue in terms of ownership of certain quantitative physical dimensions of the land rather than the qualitative rights to engage in particular uses.²¹¹ This view of a railroad easement is unsatisfactory. Railroad easement use simply cannot be viably limited by physical dimension, and simplistic legal analysis muddies the area further.²¹² At the very least, however, the courts are unanimous that a railroad easement, even though it is the weakest property interest available to the railroads, entails exclusive control over the surface of the easement, and extends to include possible future use even when the railroad is using only a portion of the easement.²¹³

The basic reason for the majority rule is that exclusive possession is necessary to enable the railroad company to safely conduct its business and meet the duty of exercising that high degree of care which the general law and administrative rules enjoin upon it. In the performance of those duties, imposed by general law and a national administrative tribunal for the public welfare, it should not be hampered by interference through the use of its right of way by the owners of the servient estate, although such use might be justified under the principles announced in local decisions. . . . It follows, therefore, that the principles of general law rather than local decision should determine the character of the rights of way granted in the instant case. Regard for the welfare of the public, the patrons, and the employees of the railroad company, in our opinion, compels such a conclusion.

Id. at 167-68. This case effectively reversed the earlier decision in *Midland Valley R.R. Co. v. Corn*, 21 F.2d 96 (D. Kan. 1927). That same year, in another case involving the same set of players, the Eighth Circuit followed *Sutter* without a lengthy repetition of the necessity for the strict exclusivity rule. See *Midland Valley R.R. Co. v. Jarvis*, 29 F.2d 539 (8th Cir. 1928).

210. See *Atlantic Coast Line R.R. v. Bunting*, 84 S.E. 1009 (N.C. 1915) (waiver); *Mobile & O.R. Co. v. Donovan*, 58 S.W. 309 (Tenn. 1900) (reservation in deed); *Atlanta & C.A.L. Ry. Co. v. Limestone-Globe Land Co.*, 96 S.E. 188 (S.C. 1918) (agricultural uses).

211. See, e.g., *ETS I VIII*, 619 F.2d 696 (8th Cir. 1980); *ETS I X*, 606 F.2d 934 (10th Cir. 1979); *Missouri-Kansas-Texas R.R. Co. v. Freer*, 321 S.W.2d 731 (Mo. Ct. App. 1958).

212. See *supra* note 205.

213. This rule extends so far that a servient landowner could not engage in

APPENDIX 2

A TRUE COPY

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
BY Lay Davis
DEPUTY CLERK

FILED

APR 19 2001

CLERK'S OFFICE
U. S. DISTRICT COURT
EASTERN MICHIGAN

RIVERVIEW TRENTON RAILROAD COMPANY,

Plaintiff,

v.

COUNTY OF WAYNE, a Michigan Municipal
Corporation,

Defendant.

Case number 01-70078

Honorable Julian Abele Cook, Jr.

cc M.T.M. M.T.M.
D. STAMPER
M. BLASFELD

JUDGE COOK GRANTED
OUR MOTION FOR
A PREL. INJUNCTION

ORDER

On January 5, 2001, the Plaintiff, Riverview Trenton Railroad Company ("RTRR"),¹ filed a motion in which it asked the Court to prevent the Defendant, Wayne County, from embarking upon a course of conduct under the Uniform Condemnation Procedures Act, Mich. Comp. Laws §§ 213.51-213.75 ("UCPA") that, in its judgment, would result in an illegal seizure of a parcel of realty. However, Wayne County challenges this argument, contending that the RTRR does not have, and cannot provide, the Court with any facts or law which would support its request for injunctive relief.

For the reasons that have been set forth below, the Court will grant the RTRR's request for injunctive relief.

1

On January 5, 2001, the RTRR filed a Complaint with the Court, asserting that it owns a seventy-six (76) acre parcel of land in Wayne County, Michigan which has been used historically

¹ During all times that are relevant to this action, the RTRR was a wholly-owned subsidiary of Crown Enterprises, Inc. ("Crown").

-----for rail transportation and other related rail activities. The RTRR purchased this property on February 11, 2000 to build a rail terminal and to establish "cargo transfer operations along the existing rail line." (Pl.'s Mem. Supp. Pre. Inj. at 4.)

However, prior to the RTRR's acquisition of this land, the Michigan cities of Trenton and Riverview, along with Wayne County, had expressed an interest in purchasing the land from Crown because it ostensibly provided the region with "extraordinary development opportunities given the location of this Property and its riverfront [sic] exposure." (Def.'s Mem. Resp. at 2.) *Id.* at 2. Notwithstanding this expressed interest, their overtures were rejected by Crown. Thereafter, Wayne County began to explore the possibility of "taking" the property by utilizing its authority of eminent domain under the UCPA. *Id.* at 4.

On November 28, 2000, Wayne County informed the RTRR in a letter of a "potential eminent domain proceeding" that could apply to the seventy-six (76) acre parcel. *Id.* at 8. In the view of the RTRR, this letter represented the initial step by Wayne County to commence a condemnation action under the UCPA.

This lawsuit followed. On January 5, 2000, the RTRR filed a motion, in which it asked the Court to preliminarily enjoin Wayne County from proceeding with its condemnation efforts. It was, and continues to be, the position of the RTRR that the UCPA is preempted by the Interstate Commerce Commission Termination Act, 49 U.S.C. §§ 10101-10601 which, by virtue of statutory provisions in 49 U.S.C. § 10501(b), granted exclusive jurisdiction to the Surface Transportation Board ("STB") over all-rail operations, properties and facilities. Against these assertions, Wayne County submits that the Notice of Exemption, which had been filed with the STB by the RTRR, is intentionally misleading and potentially voidable because it failed to "disclose the pending

eminent domain activities." (Def.'s Mem. Resp. at 9.) Moreover, Wayne County submits that the STB will, in all likelihood, override the Notice of Exemption because the RTRR's proposed rail operations are inconsistent with public convenience and necessity.

II

In deciding whether to issue a preliminary injunction, a court must consider: (1) the plaintiff's likelihood of success on the merits; (2) whether the granting of the injunction will prevent irreparable injury; (3) whether the issuance of the injunction will harm others; and, (4) whether the public interest will be served by the issuance of the injunction. *Detroit Medical Center v. GEAC Computer Systems, Inc.*, 105 F. Supp.2d 1019, 1022 (E.D. Mich. 2000). None of the four factors is an absolute prerequisite to the granting of a preliminary injunction. Rather, the Court must balance these four factors when making its determination as to whether an injunction should be issued. *Id.* Finally, in an action involving preemption, such as is currently before the Court, a finding of success on the merits implicitly carries with it a determination that the other three requirements have been satisfied. *See, Greyhound Lines, Inc. v. City of New Orleans*, 29 F. Supp.2d 339, 341 (E.D. La. 1998); *See, also, Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 783 (5th Cir. 1990).

III

Article VI of the Constitution provides that the "Laws of the United States...shall be the supreme Law of the Land; ...any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. Thus, it is a well settled principle that a state law is without any legal effect if it conflicts with a federal law. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). On the other hand, the efficacy of a state law will not be superceded by a federal law unless it is the

clear and manifest purpose of Congress. See, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The intent of Congress regarding preemption may be explicitly stated in the language of the statute or implicitly contained in its structure and purpose. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). If a statute contains an express preemption clause, the focus of the Court should be on the plain language of the clause. *Time Warner Cable, Inc. v. Doyle*, 66 F.3d 867, 875 (7th Cir. 1995).

In the case at bar, the RTRR contends that it is likely to succeed on the merits because the condemnation effort by Wayne County under the UCPA is expressly preempted by the language in section 10501(b) of the Interstate Commerce Commission Termination Act, 49 U.S.C. §§ 10101-16101, which reads in relevant part as follows:

The jurisdiction of the Surface Transportation Board over—

- (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rule (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
- (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b).²

²49 U.S.C. § 10102(5) defines "rail carrier" for purposes of the statute as "a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation. 49 U.S.C. § 10102(5). The term "transportation" is defined broadly by the statute to include: (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or

In support of its position on this issue, the RTRR claims that it acquired the subject parcel for the "express purpose of providing additional intermodal terminal and cargo transfer capacity for Central transportation subsidiaries and other carriers operating in interstate commerce in the Detroit area." (Pl.'s Mem. Supp. Prelim. Inj. at 6). According to the RTRR, these activities will also include "interchange between motor carrier and rail carriers and transportation to ports throughout the United States...[and] a nearby deep-water marina for the interchange of containers between deep-water ships and rail carriers." *Id.* at 6-7. As such, the RTRR contends that these business activities fall within the jurisdiction of the STB. Wayne County disagrees, asserting that the RTRR cannot sustain its burden of proof on the preemption claim because it has failed to demonstrate that a "real federal interest exists" in regulating rail traffic on the property. This argument falls short. In a case cited by Wayne County (namely, *Longshoremen v. Davis*, 476 U.S. 320 (1986)), the Supreme Court, while discussing the doctrine of preemption as it pertains to the National Labor Relations Act ("NLRA"), declared that a "[p]arty asserting preemption must advance an interpretation of the Act that is not plainly contrary to its language and has not been authoritatively rejected by the courts or the Board." *Id.* at 394-395.

In the instant action, the RTRR has fully satisfied this low threshold of proof. It was, and continues to be, the clear intent of Congress to restrict the power of states to regulate rail commerce in favor of a more uniform set of federal rules and regulations.³ Significantly, Wayne County has

property, or both, by rail, regardless of ownership or an agreement concerning use; and, (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling and interchange of passengers and property. 49 U.S.C. § 10102(9).

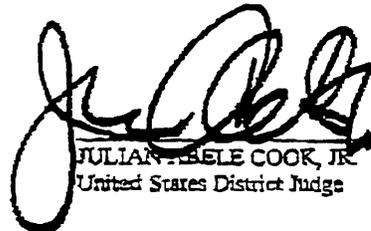
³ The RTRR has proffered a variety of examples in which courts have found preemption in instances that are similar to the case at bar. Moreover, these cases illustrate the support that

not challenged the types of activities that the RTRR intends to conduct. Hence, it is clear to the Court that these projected activities by the RTRR fall squarely within the jurisdiction of the STB, and are preempted. Thus, the Court is satisfied that the RTRR does have a likelihood of success on the merits in the case at bar. Finally, because such a finding implicitly carries with it a determination that the other three requirements (to wit, irreparable injury, harm to others and, public interest) have been satisfied, the Court need not specifically address the remaining factors. *Trans World Airlines, Inc.*, 897 F.2d at 783.

Accordingly, the Court will grant the RTRR's motion to preliminarily enjoin Wayne County from proceeding under the Uniform Condemnation Procedure Act because it is preempted by the Interstate Commerce Commission Termination Act.

IT IS SO ORDERED.

DATED: APR 10 2007
Detroit, Michigan


JULIAN ABELE COOK, JR.
United States District Judge

other courts have afforded this interpretation of the Interstate Commerce Commission Termination Act. (See Pl.'s Mem. Supp. Prelim. Inj. at 11-17). In *Wisconsin Central, Ltd. v. The City of Marshfield*, No. 99-0636-S, U.S. Dist. LEXIS 10570 (W.D. Wis. 2000), the district court, citing the "clear and broad" nature of Congress' intent to preempt state regulatory authority over railroad operations, held that the provisions of the ICCTA preempted the attempt by the City of Marshfield to exercise eminent domain in a condemnation action pursuant to state law. In its holding, the *Marshfield* court emphasized that "condemnation is regulation" and that "[i]n using state law to condemn the track defendant is exercising control...over rail transportation as it is defined in section 10102(9). See *Wisconsin Central, Ltd.*, No. 99-0636-S, 2000 U.S. Dist. LEXIS 10570 at *9.

APPENDIX 3

VERIFIED STATEMENT OF THOMAS F. McFARLAND

My name is Thomas F. McFarland. I am an attorney. I have an office located at 208 South LaSalle Street, Suite 1890, Chicago, IL 60604. I have represented clients before the Surface Transportation Board (Board) and its predecessor, the Interstate Commerce Commission, for over 38 years.

In this proceeding, I represent Lincoln Lumber Company (LLC). LLC is a Class III common carrier by rail subject to the jurisdiction of the Board. In November, 2000, LLC acquired a rail line between 19th and 24th Streets in Lincoln, Nebraska from Union Pacific Railroad Company. That acquisition was pursuant to the Board's approval of an offer of financial assistance (OFA) by LLC under 49 U.S.C. § 10904.

In a verified statement filed as Appendix E to the City of Lincoln's Petition for Declaratory Order in this proceeding Assistant City Attorney Joel D. Pedersen stated (at 2):

A later conversation with Mr. Hamill's attorney made it clear the LLC's interest in pursuing the OFA in the first place involved a deliberate attempt to block any trail use in the corridor regardless of any actual impact to the business.

Mr. Pedersen's reference to "Mr. Hamill's attorney" is to me. I did not make the statement that Mr. Pedersen there attributed to me. Having represented LLC in the OFA proceeding, I have personal knowledge that LLC acquired the rail line in good faith to continue rail service to its place of business, not to block a trail.

In the conversation to which Mr. Pedersen referred, he asked me whether LLC's acquisition of the rail line would have the legal effect of blocking trail use. I replied that it

would, which I understand to be an accurate statement of the law. However, that does not mean, and I did not state, that LLC's purpose in filing the OFA was to preclude trail use.

I adhere to the opinion previously expressed to Mr. Pedersen that under federal law, LLC's acquisition of the rail line for continued rail use precludes trail use. It is also my opinion that the City of Lincoln cannot successfully circumvent that federal law by resort to eminent domain under state law.

VERIFICATION

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

THOMAS F. McFARLAND, being duly sworn on oath, deposes and states that he has read the foregoing statement, that he knows the contents thereof, and that the facts therein stated are true and correct.



Thomas F. McFarland
THOMAS F. McFARLAND

SUBSCRIBED AND SWORN to
before me this 24th day
of December, 2003.

Kathleen Lenihan
Notary Public

My Commission Expires: 1/29/2006

APPENDIX 4

My name is Donald L. Hamill and I have been President and owner of Lincoln Lumber Company, 932 N. 23rd St., Lincoln, Ne. 68503, for over 30 years. I have a lot of railroad experience.

With all of my holdings, including LLC I was directly and indirectly involved in at least an average of 50 carloads per month for most all of those 30 years. These included cars of sand, brick, drain tile, lumber, shingles, and numerous other items.

I feel I am qualified and have family and staff qualified at LLC operation to understand, know, and actually operate this railroad and all of this railroad operations parts, including track inspections, track relay, spurs, mainline, switches, planning for now, planning for the future, short-term planning and long-term planning for this successful railroad operation. I figure out this railroad operation so it works efficiently, so present switching is not difficult, but easy and safe and future switching is not difficult, but easy and safe.

I have this operation not be difficult to move the rail cars around and get the rail cars unloaded quickly. LLC's average unload time is well under 4 hours. We have not paid any demurrage to OL&B (not one dollar) since they have been delivering cars to LLC. We are timely with our unloading, OL&B will tell the STB that we are efficient and on time with the management and decisions and general execution of our Railroad transactions.

BACKGROUND AND HISTORY OF LLC RAILROAD

Union Pacific Railroad filed for abandonment in 1997. In November of 2000, Lincoln Lumber completed the purchase of the abandoned UPRR. It had been agreed during negotiations that upon completion of the sale, the railroad deliveries would no longer be handled by UP. OL&B agreed to take possession of any cars coming to Lincoln Lumber from Burlington SF RR.

The first order of business was to make repairs to the track which had been neglected for a number of years. Our first project was to have the west end from the point where it came off the curve repaired. Atlas Company of Lincoln Railroad Contractors made the repairs from the curve to a point where the existing railroad was in good enough shape to handle incoming freight.

This repair was followed in late 2001 by Friesen Excavating putting in culverts from 24th to 23rd Streets to replace the open ditches. The City had done extensive drainage work which funnelled large quantities of rainwater thru the open ditches and badly damaged sewer lines. LLC installed the culverts, did the dirt work to complete the job with the City's permission but at our expense.

In 2002, OL&B replaced some ties and repaired and relaid track between 22nd and 23rd Streets. We replaced the spur on the south side of the main line between 22nd & 23rd Streets.

The area between 22nd and 23rd is our terminal area. We unload both boxcars and center beam cars in this area. Up to this point we have been able to bring only one car at a time from OL&B's yard. We try to get them unloaded as quickly as possible so we can return the cars. In order to do this, we stack some of the material on the railroad right-of-way until we can get it shipped. Obviously we cannot unload a car and ship out material to the jobsites, or to other locations within our yard area all in one day. We are the largest family owned contractor lumber yard in Lincoln. In addition to the rail cars we bring in material

by truck on a daily basis. We have been averaging one car per week and from 1 to 4 trucks daily.

Our business is a contractor yard. We sell mostly to home builders, apartment houses, etc. While it may seem to the casual observer that we are storing inventory on a permanent basis, this is simply not true. Inventory in photo #4 by Mr. Schuchmann is not there as of 12/15/03. Partly sold or rotated so as of 12/19/03 there was no inventory on the RR spur.

Lincoln Lumber is an old yard. In the beginning it furnished coal and sand to its customers. We still have the sand tower although it is no longer used. When we purchased Lincoln Lumber in 1967, some of the old coal bins were still in place. They have since been removed and new storage and shipping facilities put in their place.

RAILROAD USEAGE

In 1967, Lincoln Lumber was receiving rail shipments of sand and coal and continued to receive rail shipments although the products changed to include lumber, shingles, plywoods, etc.

When UP filed for abandonment, we were greatly concerned and filed a protest. The final result was that UP abandoned the line, but Lincoln Lumber was able to purchase the trackage and right-of-way, and with the blessing of the Surface Transportation Board, LLC became the owner of our railroad, and to this day is still receiving rail shipments. Now we are receiving an average of 50 cars annually. This is fewer cars than several years ago, but the cars are larger. Our records indicate we are purchasing and shipping close to the same amount of material over the last 10 years. Cars 10 years ago averaged 40' in length. We are now receiving many 73' cars.

LEASES

Cushman, Inc. a division of Textron, owned the land directly west of Lincoln Lumber Co. Like Lincoln Lumber they owned land on both sides of the track. They expressed an interest in purchasing the abandoned RR or

failing that, leasing from Lincoln Lumber Company. We did agree to lease to Cushman and Commonwealth Electric. Cushman's has since moved out and we are negotiating a release if we can agree on a buyout figure. If we cannot come to terms, the lease will expire in 2015 and we will not be renewing the lease, nor leasing it to someone else, nor selling any part of the right-of-way. LLC will continue to keep the entire right-of-way and use it to continue and expand our operations. At the time that we are able to gain full control of the entire property, we will put into place our plans to add spur lines and repair or replace the existing lines thru the entire area which is from 19th St. to 24th St.

MAPS & SURVEYS

Mr. Walter Schuchmann, in his statement, says that the map shows 110' of width on the right-of-way. Please note the attached map which is the official map of the City of Lincoln. This is the same map that the surveyors used on Friday, Dec. 19, 2003 when they did their survey for the City. I visited with the lead surveyor with Olsson Assoc. and we discussed the surveyors findings as they compared with LLC's findings when we staked out the trail based on the print enclosed with the City's Petition. The surveyors agreed that the correct width was 100' and Mr. Schuchmann was incorrect. He also agreed with our findings that at the 22nd St. location, where the trail goes around the red brick building, there is only 7.5' of clearance between the bike trail and the north edge of the railroad track. At the east end at 23rd St., there is a clearance of only 28'. This is not enough space to unload center beam cars. See the pictures showing the I-Joists which shows the quantity we ship in by rail of these materials. Our I-Joists are from 24' to 44' long (see purchase invoice from Roberts & Dybdahl. We need the entire 50' width to unload this material from center beam cars.

The purpose of LLC staking out the bike trail was to check Mr. Schuchmann's contention that we could eliminate 20' from the right-of-way and still have room to unload cars. After we had this bike trail marked

we brought our forklift down, picked up a I-joist, backed up from an point where the rail car would set, and determined how much space it took to maneuver the I-joist and set it on the rack. We determined that the I-joist would be setting on the forklift at 12' in the air, and at some point in this operation, the I-joist would be over the bike path. This is an extremely dangerous situation for people on the bike path.

Mr. Schuchman makes the assumption that the rail cars would be going straight down the track, with no allowance for unloading. This assumption is false.

SAFETY

Lincoln Lumber feels that this bike trail on the edge of our railroad is a very dangerous situation. We are concerned both for the safety of the people on the path, and for the liability in case there is an injury. The City of Lincoln does not address the liability policy of this bike path situation. Even though I requested it, the City was unable or unwilling to come up with a liability policy for the surveyors while they were on our land. How can LLC has any faith that either the City or the bike organization will pick up the liability? Do they expect LLC to carry liability even though this bike trail is being forced on us.

OFFER TO NEGOTIATE

When we were finally allowed to see the path proposed for the bike trail, LLC offered to allow the bikers 22' requested from 22nd to 18th St. In return we wanted the bikers to agree to take an alternate route and go by City sidewalk for the one block between 23rd & 22nd St. The City would make no such compromise. Therefore LLC is withdrawing their offer of compromise and asking the Surface Transportation Board to rule on the entire length between 19th and 24th.

Spur track starting east at 22nd St., north side of mainline, south of the new brick building:

Look at picture 9B. The Rails Company, Bob Mitchell, owner, and myself Don Hamill on 12/17/03 went up and down the LLC railroad line to inspect and plan the track from 24th St. to 19th St. The Rails Co. was asked after several hours of review to design an operational railroad spur per 2 page exhibit so marked.

(a) in 9B picture there is existing track shown on Page 2 that was not taken for relay. It was assessed to be OK. The design shows connecting on to this track with rail material he has in stock and relaying his rail, his spikes, his switch and connecting this spur to our LLC mainline as shown on page 2.

(b) LLC feels this to be needed to aid in unloading of center beam cars. If needed we could move box cars on to this spur, for example, and hold them for unloading or for temporary holding of empty box cars.

(c) our Lincoln Lumber railroad division presently has our own equipment to move cars on various tracks and OL&B railroad carrier is very obliging and helpful in regards to our full railroad cars or our empty cars. Their service and help to our railroad operation has been tremendous.

Our railroad division and our railroad staff consisting of the railroad people that do the communicating with OL&B railroad have an excellent relationship and cooperativeness. The two railroad parties get along and the results are railroad efficiencies, railroad profitability, no railroad demurrage. OL&B brings down LLC rail cars of all kinds to our unloading railroad areas. There is easy timely communication between OL&B and LLC designated people to specifically handle our railroad operation. For the most part we use the same railroad people LLC has used for the last 15 to 25 years. They are experienced at handling railroad cars, moving and unloading railroad cars, and reloading railroad cars if needed. They are experienced railroad people.

We have current training sessions regarding railroad cars related to snow, & ice in our country and the unloading safety and efficiency in snow and ice. We have railroad reviews on how to unload rail cars in rainy weather. The rain causes the materials packages to be slick and they have been known to slide off of a forklift.

This brings up safety. We emphasize safety for every rail car, and the north and south sides of a center beam rail car. We have everyone realize that when we lift up above a center beam car, we are lifting the package right at 12 feet high, and this needs a lot of attention, needs a lot of care a lot of thought and a lot of planning and thinking about how high you are. You are reminded to get the package down as soon as we can after backing up. It is important to back up and not back over someone, while this high in the air while unloading a center beam rail car with long lengths as shown in pictures P7, P9, P11 & P14. The I-joists shown are 40'0" x 9 1/2 x LPI 82 and also 44'0" long. These pictures were taken by Don Hamill on Friday, 12/19/03. These movements and positions are necessary to unload a 40' and 44' package. See invoice #94826 from Roberts & Dybdahl to prove we do get this material by rail. We save approx. \$2500.00 by rail car delivery vs. a truck. This savings is per car, so at 50 cars per year this is a significant amount.

All forklift pictures show unloading a railroad car are in the terminal area directly facing Whittier St. and show all the necessary stages of height clearance, back up, turn around, forward, drop down with fork loaded packages. 28' area doesn't have enough room to bring the forks down without hitting the edge of the railcar which might cause the load to go sliding, probably very fast toward the trail.

6

LOCATION: BETWEEN 22nd and 23rd, north of the main line

Pictures from 1-B thru 24-B were taken 12/18/03. As I recall we got snow in our neighborhood on Tuesday, Dec. 16, 2003. I was studying the supporting documents, Appendix A - aerial maps. I was looking at the "Overview of Routes for trail and storm sewer and I decided this map is a noticeable misrepresentation after one studies it. See that fine black line and a green marking color traced over it? That picture, in my opinion, is false, shows deceit, illustrates deliberate misrepresentation. So then I took this map out to Dale Waldron who has been reading blueprints at LLC everyday for over 20 years, smart college graduate and told him to look at the green trail line. He said, all I see is a green line. I, Don Hamill (who also have read a lot of blueprints for over 20 years) said, see the fine black line that has to be hi-lited by the green color. Conclusion, I said this map is not properly drawn in my opinion. There are the words "proposed hiker/biker trail (green) and an arrow that points to the green. Nothing calls out names, or points to the fine black line. The fine black line, in my opinion is really the trail. In my opinion they have deliberately mislead all parties involved.

I am now deciding we are going to lay out the proposed trail of 20' wide between 22nd & 23rd Streets. We laid out this trail on Wednesday, Dec. 17. These 24 colored pictures confirm and illustrate that, in my opinion, the trail on the north side of our property between 23rd and 19th is incorrect. The ratio and scale are misleading. So we spent Thursday starting to prove my assessment above per the pictures. After working all day in bad weather LLC was convinced that the City's maps and some other City information was not accurate and correct.

We then spent another day laying out a much more accurate and reliable proposed trail on the actual ground where the proposed trail will actually go. We had very little time as the City was sending out surveyors at 9:00 a.m. on Friday morning. We were then able to get some pictures to illustrate how our unloading operation would fit over the proposed bike trail. The pictures show that there is a big problem trying to unload rail cars in too small an area with the added problem of the general public walking thru the area.

Terry Genrich, P3, paragraph E states that "appears to be 110' wide in the relevant location". He is describing the railroad ROW between 23rd & 22nd St. On Friday, Olsson & Assoc. told me that the total width for the ROW is 100', not 110'. 100' is also the measurement shown on the City maps. This 110' was also reported by Walter Schuchmann. Apparently someone made a mistake and no one bothered to verify the information.

Except for a short distance west of 23rd Street, the trail does not run along the north edge of the property, but wanders around over the entire right-of-way. Unless LLC is given the right to use the trail for its people and equipment, the trail landlocks the entire ROW unless we go directly on top of the track. When UP abandoned the track, STB saw fit to allow LLC to purchase it. If they allow eminent domain they might as well have given it to the City at that time. The result is the same.

Mr. Schuchmann notes that there are numerous obstructions in the ROW. It appears on the map that his solution is to go around the obstacles. A large building just west of 21st St. has several ramps to loading on the ROW. So while they say the trail is staying on the north edge of the ROW, it goes around these obstacles taking the trail closer to the mainline. If the trail can go around ramps, etc. that are in the ROW, why cannot they go around LLC. These ramps have no easements, etc. giving them permission to be there, yet the bike people accomodate them. What are the guidelines for deciding who gets moved and who is not bothered?

The ROW contains a number of power poles, originally put in to service Cushman. The agreement UP made with Lincoln Electric System which calls for lease payments, has not been enforced and Lincoln Electric System is in arrears by a number of years. Cushman is gone, but the poles are still there and are not being paid for. Where is the equity in that situation

LLC is expected to move over, and in effect, give up their railroad, while others, City and otherwise, are squatting on our land and paying nothing. And when I say "give up our railroad" it may very well come to that. The risk of running a bike trail thru a commercial enterprise that is operating heavy machinery may pose too great a risk. I have no idea of what the insurance companies will charge for this kind of risk, and the City has not volunteered to carry the insurance.

The photos and Olsson's measurements show that the bike trail will run over the top of an existing spur line. It is true that the spur is not currently operational, but this does not eliminate the possibility of repair and extension of this spur line to better serve LLC railroad needs. See drawing proposed by Rails Co. and Bob Mitchell, President.

In photos B-1 thru B-24 we have laid out on the site of the trail, just where the bike path would go, and what obstacles would be in the way. These pictures show clearly what we are all dealing with. What do you intend to do with the poles. The City is not paying for them now. How can we expect them to pay for moving the poles. Or are the bikers expected to go around them.

Mr. Arman Nielsen, Secretary of OL&B (our carrier) and Mr. Robert Miller, CFO and VP of OL&B told me they thought and would recommend an alternate route for the bike trail. There are, in addition to their suggestion, at least 2 other alternates that would be much better. Mr. Nielsen also told me that Mr. Miller call the Lincoln City Attorney, Joel Pedersen, and told Joel Pedersen that he thought the south route made more sense. The south route involves going 1 block south along City sidewalks, going west thru land already owned by the University. So far the only reason we have heard for going thru LLC is that the bikers want a straight line. Apparently turning 2 right-hand corners is too much for the biking public.

LLC is presenting two additional alternatives, as Alternate Trail #1, and Alternate Trail #2.

Mr. Terry Genrich, in his document dated 10/27/03, says "From 22nd St. to 19th St. the trail would be located on the south side of the track adjacent to University of Nebraska property. I attach as Exhibit B, drawings showing the currently planned location for the Husker Link Trail in the 24th to 18th St. area!" He does not put Exhibit B on any of his maps. I count 10 maps and he left titles off all of them. So I will have to guess to what he is referring. I note the following: We have attached letters to the maps so ease in discussing them.

(A) TG-WW the width varies from an 8' trail, 10' trail, and 12' trail. And below that he refers to an 8' trail and 12' trail. It doesn't show or tell us anything about needing 8' for snow removal. He makes no reference to a 20' trail at all. See letter dated October 2, 2002 to Lynn Johnson, Director, from Larry Potratz in which he speaks of a trail 8' to 16' wide.

(B) TG-REM quotes "Because a sidewalk already exists on the north side between 21st Street and 22nd Street, our current design calls for the trail to be located at the location of the sidewalk in order to minimize disruption of any leaseholder". LLC has leased use and storage to a unit of Textron, reserving 12' of the corridor centered on the center line of the track. The map shows removal of the asphalt surface and removal of the sidewalk between 21st and 22nd Streets on the north side. These are contradictory statements. Further on P4, paragraph e, He says "From 22nd St. to 19th St., the trail would be located on the south side of the track adjacent to University of Nebraska Property".

(C) TG- No. 6. (see enclosed and hi-lited) On 23rd St. there is an entrance-exit driveway for approx. 50 cars. This is the parking lot for Lincoln Housing Authority. It is on the south side of the building and has 2 rows of cars going east and west. I have suggested to several different City people who came to Lincoln Lumber and parked their car close to the driveway that they take out one row of cars and run the bike path thru the edge of the parking lot and onto the vacant land just west of the housing complex. This vacant land which has an "available" sign on it could be made into a nice park. The City would be able to do this because they have the power of appointment. The mayor appoints the board who then runs the housing authority.

In the Petition for Declaratory Order signed by Charles H. Montange, he says on P1 "Ostensibly for continued rail use, LLC purchased the acquired land from 24th to 19th for the unconditional use as a railroad operation." He is correct. We did purchase it for use as a railroad. I have had a number of conversations with trail people and everyone always understood that we intended to use this purchase as a railroad to replace the one we lost when UP abandoned their line. We needed the railroad for one main reason - to be able to bring in product at a price competitive enough to compete the the boxes that were coming to Lincoln.

To be able to compete, we had to be able to take advantage of the freight savings rail offered over trucks. And we needed to bring in enough volume to get volume discounts. We operated this way when UP owned the railroad, and with our RR purchase we have continued to operate this way. It has worked for us for over 30 years and it has worked successfully for us. We would like to continue to do business this way.

For several years, I have had discussions with the City about putting a storm sewer in thru the rail corridor. The sewer line that has been there for years is in bad shape and needs to be replaced. While the storm sewer will cost us money and business interruption, I have never opposed the storm sewer. I believe this is the best location, and perhaps the only logical location for the storm sewer. However, I cannot say this is the best location for the bike trail. The City decided to tie these two separate projects together even though they knew we opposed the trail at this location. Obviously they were using this as a method of getting the bike trail thru our yard. See right of entry document.

There is an immense difference between the sewer project and the bike trail. The sewer project will cause disruption and impose some restriction, once it is finished we can continue to operate our railroad in an efficient manner. Nobody is likely to be injured or killed because of the sewer project. The trail, on the other hand will create a permanent disruption, restrict the number and kinds of rail cars we can bring in, and present a safety hazard.

Can the City take our land in its entirety, or parts and parcels for a trail by eminent domain. We were told when we bought this land that Federal railroad law was superior to state and city law and we could rely on the Surface Transportation Board to protect our railroad from any type of city eminent domain. We relied on this information and wrote out a large check to acquire the ground. We spent additional money repair a railroad badly in need of repair so we could bring rail service to Lincoln Lumber.

Lincoln Lumber did not and would never invest this kind of money, operate, improve and maintain a railroad just to stop a bike trail or sewer line. Mopac and UP used this railroad and brought LLC hundreds of rail cars. And I honestly believed that our purchase was safe from eminent domain. I really believed and still do that if we operate an honest and good faith railroad business like we are trying to do, the Surface Transportation Board would not allow our railroad land to be taken away and used for a trail.

I am personally proud of this railroad division, our whole railroad operation, the railroad staff helping me and OL&B and all its people. All of this put together gives us a railroad operation that LLC cares about and that is very important to LLC. We bought a 100' width of rundown railroad trackage that was abandoned. We have been a responsible railroad owner. We have shipped and received as many cars as we can by way of our railroad. I feel we have improved our railroad. Its in much

12

better condition now than when we purchased it. We have replaced a lot of ties between 24th and 19th St. I am certain we will have all our ties replaced and a couple of spur tracks in place this time next year. We want to change the layout of our yard and this will help improve our railroad operation in the future. We have plans to spend the necessary monies to improve our railroad operation, not just in 2004 but to continue to upgrade our railroad throughout the next 25 years or more. We are in the railroad business permanently with no plans for getting out. Our family and our employees knew before the purchase was made that the full intent was to operate this railroad permanently and long term.

Neither LLC nor this railroad operation will ever be sold. We are not buyers, sellers, or traders of property so the ownership will remain in the Hamill family. I am hopeful we will get this railroad operation between 24th and 19th Streets past this eminent domain manuver and I have faith all of this ground will remain to be used for LLC railroad operation.

There are other alternatives for the trail except going thru LLC. We have presented 2 good alternatives. I am appreciative to the OL&B people for figuring out a good alternative to help save our railroad operations. They are smart, knowledgeable, experienced railroad people at the OL&B. They know and understand that 100' width of ROW is really not enough total width for our railroad operation. From the center of track to our north property line is only 50' and they know we can't subtract off 20' between 23rd & 22nd St. and also between 22nd & 19th St. We need all the land to efficiently operate this railroad operation. The bottom line is the trail people have alternatives and we have no alternatives.

I want to report that there was another alternative for the trail brought up shortly after LLC acquired the ROW. We had a meeting with city officials and a large number of bike people in an office building in Belmont. The city and trail people invited me to come and I went. I told them that a number of lawyers told me that the Surface Transportation Board would protect all of the railroad land being used for our railroad operation and they would not preempt our Federal railroad authority away and allow the City to eminent domain our LLC ground away. I told them this was like changing one public service for another public service. LLC thru their purchase of Mopac and UP railroad should have precedence. I told them all the things I have told you and when I left I thought there was an agreement to an alternate route. Apparently someone with more influence than I have, got them to change their mind.

The trail group and the City are using our lease with Cushman & Commonwealth to prove that we don't need the space they want. LLC wants to repond with our side of the story.

(1) We did not lease our terminal and unloading to anyone. The area from 24th to 22nd St. was held for LLC use. The only exception was an area south of the tracks which had an old spur and Cushman needed it for rail protection as a result of disposing of the property and contingent rail spur trackage need. Pedersen said in the abandonment material that Cushman wanted the rail left.

LLC is concerned about the trail safety in relation to our present lines and trackage and we will be equally concerned for railroad safety in the 22nd to 19th area. LLC is very concerned, cautious and worried about the liability issues of our railroad between 24th & 19th Streets. We have asked our liability insurance carrier to help us in full with our safety issues.

The trail proposal shows crossing at 21st St. I am sure this is because LLC has spent money on 21st and RR junction. LLC is opposed to starting out from 22nd and going west. LLC will have a lot of cross over at that point and LLC regards it as unsafe and dangerous.

Between 22nd and 19th, LLC needs the full 100' width for our future railroad operation. The north side of the mainline will be emphasized like that between 22nd and 24th. There will be spurs on the north side near 22nd on the east side and one on the north side near 24th. We had always planned to put a railroad storage bldg. between 22nd & 19th. We have it in our plans to build this RR building whenever we terminate the lease prior to 2015. Textron was uncertain about what was going to happen & they wanted rail protection related to spur track and this was agreeable because of our future plans.

It should be noted a decision between LLC and its attorneys to withdraw the trail option LLC had offered to the City was made because the City would not compromise. They had to have 20' off the north side between 22nd and 23rd. All or nothing they were telling LLC. LLC thought we had been very fair and compromising for several years.

MISCELLANEOUS:

1. Neither project will interfere with the continued rail use of this line. LLC objects. There will be interference by both and it is excessive interference.

2. P-2. Overview routes for routes for trail. LLC objects. In my opinion their trail picture is self-serving and misleading.

3. P-4 (a) The property is obviously surplus to actual trail needs and City's acquisition will have no effect on rail service. LLC objects, disagrees and differs because LLC using the full 100' ROW from 24th to 19th at different time is being over used, overcrowded at times. There are no excesses and surplus of land from our railroad useage view point. There are times we have delayed rail car shipments because of lack of rail car unloading space, moving space, weather impacting our rail servicing. This very noticeable when our 100' ROW is at capacity serving our railroad operations daily, weekly, monthly. We do not have any other alternatives. However the trails does have an alternative. LLC has presented a real good trail alternative and OL&B railroad has presented an alternative. Three of these alternatives takes them away from our much needed railroad operations and away from our

12

overloaded terminal area at 23rd and the center of our main line. Its a dangerous decision to bring a trail into this overloaded mix with school busses, emergency police and fire, 100 cars per day, LLC trucks in and trucks out and safety and liability and workers comp concerns. Source: City of Lincoln

(b) ,Mr. Montanges statement the the City's acquisition will have no effect on rail service.

Its clear the City's acquisition attempt by eminent domain is because of the trail interference and trail disruption to our railroad operation, its not because of the storm sewer issue. The trail will cramp, squeeze, restrict, make unsafe, sky rocket our liability concerns. It will effect our railroad operation in lots, in many ways, see evidence pictures, etc. I believe the STB will learn that LLC is cooperative, helpful, considerate, understanding and concerned about the trail and storm sewer and our much needed parts such as full 50' (this is not excessive for our railroad operation-not at all). for handling, temporarily storing, all the moving around of rail cars on to spurs, off of spurs, on to main line, off of main line. The STB knows we worked hard and long and spent a lot of time and money to acquire the rail road land and they already know, they are very familiar and have lots of files full of LLC railroad operation over the last several years. I think the board is fully informed that we are very cooperative, very attentive, very interested, and very, very appreciative of our railroad operation and our railroad land. If they didn't think we were worthy and deserved it, the board would never let us have it to start with. This is railroad right-of-way and we need the 100' wide with good railroad mainline down the center of this 100' wide trackage and one spur at present and written guarantees we have future spurs that will be laid and become railroad operational. so with these plans these intents, short term and long term, why would we sell these RTO the STB was kind and considerate to feel LLC deserves. We work at it hard and long enough always when we have an issue they will give LLC full consideration on this matter. (see Bob Mitchell exhibit). Mr. Montange, you are trying to tell the board LLC and me personally are not cooperating. We are both cooperating and are happy and interested in cooperating now and in the future.

P-9. I, Don Hamill have not refused to allow the sewer project to move forward unless the the City abandons the trail project.

P-9 Criticism of the LLC and Cushman leases. The lease addresses the storm sewer. but does not address the trail. The lease is designed to take care of the needs of LLC railroad, Cushman employees LLC employees,, Cushman, LLC and railroad needs then and now. I have already stated no guarantees, but lease may end. Started talking and communicating to terminate lease. See Textron letter signed by Jeff Dailey.

This would hold true for Commonwealth lease subject to the right conditions, LLC would terminate the Commonwealth lease also at any time. Note this - the whole Cushman and Commonwealth leases address one object more than any other which is our LLC railroad. This is because without the interest in the railroad and the ground on both sides of the mainline there never would have been a purchase and thus no lease. These leases have no security agreements attached to them. The only thing LLC is looking to is to terminate these leases for the sake of our railroad operation.

Lincoln Lumber is presently the only shipper on this railroad but we have expanded and grow operations before and LLC is confident this railroad operation will expand and grow in the next 15 years.

Mr. Schuchmann contends that the area between 19th & 24th is used mainly for storage. The storage use between 19th and 24th experiences daily in and out and inventory movement. LLC needs the railroad land. The trail has other alternatives. LLC believes the storm sewer will interfere with LLC's LLC's operation. There will be disruption and permanent future plans will be altered due to the storm sewer. In No. 1 thru 3 below I will comment on Mr. Schuchmann's allegations.

P-7. No. 1. LLC is making use of the properties which the City of Lincoln seeks. I have personally owned several companies over my business career. All of them except one use railroads similar to our railroad operation at LLC. I am what you call a hands-on manager. I know by review 3 to 4 times per day about our railroad division, goals, transactions, etc. I really believe these assets you mention work hard and do LLC some real benefit.

P-7. No. 2 LLC differs with Mr. Schuchman on this permanent impact. I would like for you to ask our competition who don't have a railroad and no hopes of getting a railroad and you compare your assessments of LLC railroad operations with how they think we are doing. I know they tell me 4 or 5 times a year that they feel our railroad operation is giving LLC the edge over their trucks. I know LLC has proven railroad results for a long time and successfully. We need all of our present land to continue into the future. We will get it done if STB will trust us and protect our railroad from eminent domain.

P-7, No. 3. The proposed trail and storm sewer will interfere with the OL&B rail service. We can't unload from the side of a rail car with only 28' behind the forklift, 28' to turn around, 28' to be sure we don't run over the trail or anyone on it. We try to honor all safety practices, but some situations are just impossible. The trail people are 96% - 97% unreasonable in their expectations of what we can do with our inventory, our railroad lines, our railroad spurs, forklifts, moving railroad cars, moving our inventory in the short time frames demanded.

Mr. Montange, with all due respect you assess our railroad operations and your suggested non-transportation uses of portions of the right-of-way. How many times have you and Mr. Schuchmann seen LLC operations? How many days have you spent observing how LLC runs its railroad? How many rail cars have you watched us unload? How much inventory have you watched LLC put in temporary storage? How many days have you watched us load trucks from this

temporary storage and haul it to the jobsite? It seems to me you are making a lot of assumptions with very little fact. You look at stacks of lumber and assume these stacks will be here 10 years from now. You come past the LLC operation on a day we don't have a rail car and assume we never have rail cars. You have never watched LLC unload cars so you assume that it takes very little room to unload a car. If you, or anyone had watched I-Joists being unloaded, you would be appalled at the idea of exposing the public to such danger. It is obvious that you and the people you represent know nothing about rail operations.

On the other hand, LLC has operated a rail line from purchase to repair to unloading, to loading, and mostly to solving the problems that go with operating a rail line. And even before the purchase, LLC has brought in material, unloaded it, and handled it safely. It takes time, experience, and mostly good common sense. And I feel the City is sadly lacking in common sense. All they are interested in is the politics and giving the powerful groups what they want. You might be interested to know that only one person came to see us after being asked to write a letter of support for the City. That person told us as they left that they would oppose the location of the bike trail. Where are the rest of the supporters? Driving by on a weekend and seeing no activity? Saying, based on this, this would be a good trail location? Where was Mayor Seng?

P 13, LLC differs with Mr. Schuchmann when he says LLC would be the same after construction of a storm sewer or trail. This is not true. Lincoln Lumber had planned to build a building approx. between 21 and 20th Streets into which we could unload inventory directly, eliminating handling costs. With the storm sewer, we cannot do that because codes will not allow a building on top of a storm sewer. Will our railroad handling operations be affected? Most certainly "YES". Will our south spur be like it was after they tear out the spur, bury a sewer line, and fill the dirt back in? I hope so. OL&B put in a high quality spur that is quite long. See the invoices for putting in this spur. The trail will cut our turn around time down, our back up area down, have long lengths hanging over the trail, increase our danger, increase our liability, and affect our safety.

P 14. Interference will be more than negligible. It will be substantial. Yes, only one customer is served by the rail line, Lincoln Lumber, but we are important to Lincoln Builders, customers and employees. OL&B tells me the trail thru LLC will interfere with rail operations. Mr. Robert Miller, CFO-OL&B called Mr. Joel Pedersen and told him the trail should go around Lincoln Lumber. Mr. Pedersen said he supported the trail at this location because another location would cause the bikers to have to make right turns. How is that for a reason to interfere with a business and expose people to danger. Or perhaps Mr. Pedersen was just doing as he was told and he really had no reason.

Mr. Genrich - see earlier evidence - you have not prepared a design that will not interfere with LLC rail use. If the design fails, it is of no value. It impacts all present and future railroad operations and plans extensively. Add up your false information and misrepresentations and misleading information that affects LLC railroad operation. Information and facts need to be reliable and dependable, not reckless.

The trail should have been designed by at least one of three routes that have been proposed. And I believe there are more than three routes that would bypass LLC and should be considered.

P 15, Mr. Montange states that this location is not being used for rail purposes, but to stack lumber. This is not true. LLC is using all of the 100' for rail purposes. When a railroad car is unloaded, it is logical to set the material on the back of the property. LLC would not leave an unused void on the north property line. LLC is criticized for stacking large piles of lumber. Big piles vs. lots of little piles is called good planning. And the piles are neat and organized. Photo #3 to which he refers, was a one day situation, not an every day occurrence which Mr. Schuchmann implies. As shown in photo #4, this was a temporary inventory placement. Our inventory turns, it is sold, shipped, moved, or a combination of all 3. Example to increase sales LLC new wholesale company (see letterhead) starting 2004.

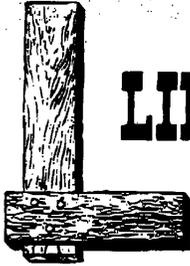
Mr. Montange states that the trail follows existing sidewalks or other roadways designated for 24 hour pedestrian access. This is only true in part. There is no designated sidewalks or roadways between 22nd & 24th. There is a paved roadway designed to carry motor vehicles between Cushman buildings and it is on leased land which is not open to the public without specific permission.

P 15, #23, This lease does not constitute an admission that the proposed trail is compatible with rail service. Cushman did not receive rail service. The train ran thru Cushman's area, but it did not stop, did not unload materials, did not employ forklifts or other equipment to move material. All this was done in the terminal area which is between 23 & 22nd. This terminal area was never leased to anyone. The major difference between the terminal area and the corridor thru the Cushman lease is the unloading process. Carrying freight from point A to point B is what rail service is all about. If the cars were never loaded nor unloaded, there would be little point in rail service. Yet this is an assumption Mr. Montange makes.

Bike trails are not compatible with rail service, except in very limited circumstances. One of these circumstances might be the absence of any type of freight handling or absence of any plans by the carrier to expand their terminal area to additional land owned by it. The Cushman or Commonwealth leases contain no reference to putting a bike trail on the property.

Useage of whatever amount of ROW is not what eliminates landlord liability. A load of material, high in the area (see pictures) being ever so carefully swung around by LLC operators creates great uncertainty and a risk of injury and loss of human life.

b

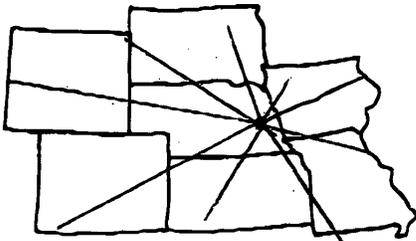


LINCOLN LUMBER COMPANY

P.O. Box 30373
Station A
Lincoln, Nebraska 68503

WHOLESALE

EXHIBIT letterhead of new company starting business in 2004.



Dec 26 2003 10:00 P.17

Fax:4024743749

P 16, -24. Mr. Pedersen seems dedicated to distorting the facts. LLC did not link the storm sewer to keeping the bike trail off his property. The City made that link (see call report from Brian Kramer.) As Mr. Kramer said, Mr. Hamill would have signed the sewer permission form if it were not linked to the trail.

Included in LLC opposition statement, the verified statement of Tom McFarland makes it clear that he did not make the comment to Mr. Pederson regarding the reason for refusal of entry, that Mr. Pedersen said. The reason for the refusal was that a trail was not agreed to and we didn't want to mislead the people involved.

The proposed restrictions that eminent domain of the north 20' of LLC right-of-way will bring, will create a serious challenge to LLC railroad operation. It may drive LLC railroad operation out of business. I will absolutely assure STB that it will eliminate entirely the flat center beam car railroad deliveries. The risk to our employees and the general public is just too great.

I seriously question how easy it will be for this railroad operation to get liability and workman's comp insurance without purchasing high cost, insurance. For the past 4 or 5 years, insurance was not easy to purchase, aside from the high cost. This will be a much higher risk from liability and safety standpoint. I am attaching as Exhibit A information on liability and how it relates to trails.

Mr. Pedersen states that there will be little or no disruption to the rail operation. This is not true. Having heavy const. machinery in the rail corridor for several weeks will be disruptive. There will be noticeable construction with the storm sewer, including taking up and relaying a spur line so the sewer line can be laid under the track.

We agreed to give notice to all the parties in the area that we are going to be doing const. and give them the starting date. These include City, STB, UNL, Commonwealth, and OL&B. This is unlike the City who held a public hearing (that I only found out about when I read the eminent domain documents). Even though it was published as the law requires, common courtesy says that since they were discussing my land, a letter would have been nice.

Prior to buying the UP property, Bill Austin (who was then the City Attorney) and I discussed the bike trail. Bill said he did not foresee the City using eminent domain. But later the possibility was mentioned in the newspaper. See Exhibit H. I was assured by my attorney that as long as I operated a railroad, I would be in no danger of losing my railroad.

I knew about the pending const. of the storm sewer line and I made a number of phone calls to people in the City trying to determine where the sewer was going and when. Douglas Stevenson from Holdrege, surveyor, told me the sewer work was complete approx. in January 2003. 8

List of phone calls and meetings to City personnel re: sewer.

List of phone calls and meetings

8/30/00	phone calls to Al Imig & Mike Michaelson
12/26/01	Phone calls to Al Imig and Larry McNeil
12/27/01	Phone to Lee Gustafson with E.A. Engr.
1/22/02	Phone call to Larry McNeil
2/6/02	Phone call from Rick Wilson
4/12/02	Phone call to Matt Lindburg
6/13/02	Phone call to Matt Lindburg
7/3/02	Received map from Olsson & Co.
11/19/02	Phone call from Matt Lindberg
11/21/02	Phone call to Matt Lindberg
1/10/03	Meeting with Clint Thomas
1/14/03	Set up meeting
	Talked to Douglas Stevenson - surveyers
2/18/03	Meeting with Joel Pedersen, attorney
2/18/03	Phone call to Dave Skirodas
6/20/03	Meeting with Matt Lindborg & Brian Kramer

On 1/10/03, at a meeting with Clint Thomas, he presented me with a Right of Entry Agreement, which gives the City authority to enter my land to construct the storm sewer and bike trail. This is the document that ties the 2 projects together. See exhibit F. I refused to sign this agreement as I was opposed to the trail going thru Lincoln Lumber property.

Pedersen, in his verified statements makes several statements that I would like to refute. #4 he refers to the "current plan" which means that the current plan could change, so anything said this week, might be different by next week. Further, Mr. Pedersen says there would be no disruption. It is not possible to install a sewer and bike trail with no interference in the rail operations.

Further he says the trail would be in the north part of the ROW, and further reading says that means anywhere in the north half. The trail does indeed start along the north property line, but it doesn't say there for long, only to Whittier Street. After that it wanders around in the north 1/2 of the ROW, making this land virtually wasted. This would mean crossing the trail just to get from one side of our land to the other, and I see no provision made for this. Would we have the right to wander back and forth across the bike path (they have the right to wander all over our land) with our machinery and to continue to do business. Or is the City seeking an easement over the entire north 1/2 of the corridor?

No. 5 deals with the meeting with Clint Thomas. You will note on Exhibit F, a large circle which was drawn by Mr. Thomas to show that both projects were tied together.

#6 Pedersen said that a letter was sent to LLC demanding entry which we refused to allow. I find it interesting that he should send this letter, but not bother to send a letter notifying us of a public hearing. It seems to me that a project of this size should notify the owner of the property.

#8, This entire paragraph is false. Mr. Hamill did not state the trail was not important, or that he opposed the trail, only that he opposed the location. The prints and surveying for the storm sewer were done as reported to Mr. Hamill by the surveyors themselves. And indeed when the surveyors gained entry, it was to survey for only the trail. The surveyors spent a few days setting pins on the north property line.

Pedersen says Mr. Hamill would not agree to any amount of compensation. This is false. Money was never discussed. Pedersen also says this refusal was a deliberate attempt to block the trail. This is false. I am in favor of trails except they should not go thru businesses.

#9. My refusal to cooperate is denied. I have never sent a letter to the City criticising anyone. All my of letters to the City have been in appreciation of some service rendered.

12d. The lease negotiation was not bitter and contentious. Mr. Pedersen was not a party to the negotiations, and there was no barring of passage at all. The rent went up because the cost to LLC had gone up. The City and Cushmans both expressed interest in the property which drove the price up. The amount we finally settled on was comparable to other similar land in the area. The other provisions have no bearing on this case. One important provision LLC and Cushman had in common and was of vital importance to both was the ability of both to move freely around the property. This ability to move over the entire property allowed our rail system to work.

INTERFERENCE

Here I want to address specifically some of the items of interference that Mr. Pedersen says we won't have. Assuming the we start at the east end, the first item to be disrupted is 23rd St. The City has closed 25th and 26th Streets, and with this sewer project they are closing 23rd St. for a time. This is right beside our office area which is our sales area. Customers won't be able to come in from the north. So every customer who wishes to pick up material must come in from the south. Our customer parking will be covered up with construction. So the only place they have to park is on a vacant lot, which we own, to the south that the City says we can't park on. Assuming the City relents on this, this lot will be covered up with contractors trucks, equipment, materials for const. Or these contractor items will be blocking the street.

So since customers cannot get in, we have to figure out a way to make more deliveries. The customers solution to not getting getting in, will be to call for us to deliver. Some of our inventory will be on one side of the ditch and some on the other. I will have to hire additional people just to get trucks loaded. Where we are now sending out approx. 75-100 loads per day, we will have to get out 200 or more.

All of our employees will have to work around construction equipment, being careful to not get injured. most of our loading and unloading is done with forklifts which are backing around, going forward while looking over the top of a load.

Then we have to figure out how to get material shipped in. Trucks cannot use 23rd Street. We cannot get rail cars in because we have no place to unload with all this construction. We will have to try to plan ahead and stock up on inventory. Where are we going to put this extra inventory. We can't put it on ROW even temporarily because there is no room after the contractors put their stuff there.

I am sure there will be continuing every day problems that we have not thought of that will need working out which will take my time away from running LLC. And if we have a wet fall, (and we are about due for one since it has been dry for so long) the project could be delayed. The City makes it sound like everything will go like clockwork, but it won't. It never does.

Then the City wants to put in a bike path. They give no time table for this, but the same type of interference will occur. WE will need to take as many loads as possible out 22nd st. But with the bike trail coming within 7.5' of the track, we can't get a truck thru there without driving on top of the main line track. Over a period of time this will damage the track and cause great expense. If the City has figured out how to move our traffic with all this interference, I have not heard about it.

FUTURE PLANS

Included is this information is a map showing a diagram of the railroad track from 24th to 19th. You will note on this map that I have marked out a 2nd terminal area between 21st and 20th Streets. It is my plan to put in additional spurs so that we can bring in cars, set them off on spurs and unload from the spurs so as not to block our main line which we will need to get cars down to the spur at Whittier St.

We are increasing our sales annually from 10-15%. And now most of our material is coming in by truck. We are making plans to shift much of this truck freight to rail. We will be doing block buying because we can buy in blocks more economically. To do this we will need enough spur track to set the cars on until we can get them unloaded. Block buying involves purchasing 10 or more cars at one time. The mills don't have space either so they will ship the cars at their convenience and we need to have places to put them. And we may continue to add spurs over time as our needs increase. Also block buying allows us to purchase the cars when the prices are lowest. The price of lumber is very volatile and we ship a lot of lumber. Prices change daily and buying at the lowest price can save a lot of money.

Our terminal at 21st St. would involve figuring out how to move this inventory to a place where we can ship it. The logical route is to cross the track at 21st Street because the track here is already set up for vehicle traffic. The trail also wants to use this crossing. And we have determined that UNL is also using this crossing as their rear gate opens onto it. These are 3 different operations competing for the same crossing space. I believe we can work with UNL at this crossing as their use is limited. But the trail is another matter DANGEROUS!!!

This railroad will develop slowly over the years with about a 10% rate. There must be much construction of rail lines, leveling of the area for unloading, temporary storage space made available and other items that develop as we go along. At the same time we have to keep LLC selling and shipping. We cannot neglect our business if we expect to expand at the rate we are forecasting. I anticipate that by 2015 when the lease expires (if we cannot negotiate a buyout, we will have the project complete and useable. We will, however, be using as much of this second terminal as we can as we go along.)

An example of new kinds of materials we can bring into this new terminal is shingles. We currently bring in over 100 truck loads of shingles in January and February. The City is always complaining about the shingle trucks blocking the street. Some mornings we have 4-5 trucks setting along 23rd St. when LLC employees arrive and start unloading. Bringing these shingles in by rail will solve that problem. We have shipped a few shingles by rail and it works well. This is the time shingle prices are lowest and we also need to gear up for the shingle season. Flat materials such as plywoods, OSB board, lumber, are all materials that we can bring in by rail. Every house has lumber, flat materials and shingles so we sell a lot of them. Transferring these from truck to rail will make us more competitive. And we need to be very competitive if we are to compete with Menards and Home Depot who each have 2 stores in Lincoln. Lowes is in Omaha and we anticipate them moving to Lincoln soon. We are not the only lumber yard in Lincoln that has a railroad. In order to be competitive we need to have our railroad to maintain our profitability. As our profitability grows so will our company which creates additional need for rail service.

I am optimistic that in a few years we will be shipping out to large job such as apartment complexes, commercial buildings, low cost housing, etc. throughout our state and the surrounding area. See Lincoln Lumber Company Wholesale letterhead exhibit.

I have been talking to Wells Fargo, our banker, about my plans. See the letter of support from Jim Bishop of Wells Fargo. In it he says that we plan to ship a minimum of 300 cars into LLC by 2019. I have a history of growing small businesses into large ones. In 1967 when we purchased Johnson Supply & Coal, now LLC, it was a small yard handling just coal, sand, and shingles. We have grown into the largest contractor, privately-owned yard in Lincoln and with the help of the Surface Transportation Board protecting our rail rights I see no reason why we cannot continue to grow. Wells Fargo is convinced we can do it, and so am I.

LIABILITIES

As we grow, our potential liabilities increase, we try to keep them at a minimum. I am listing some of our potential liabilities connected with the storm sewer and railroad and bike trail, all wanting to use this same corridor.

1. We must keep RR Crossing signs at all intersections and from time to time, these signs disappear.

2. We had to get permission to take out the crossing lites at 21st St. We did this. We have to be very careful to follow regulations such as this.

3. UP had a number of licenses, and other documents that they acquired when various public projects were buried or installed on their ROW. Among them are a natural gas line supplying power to Cushman, fiber optics, plumbing and sewer lines. When any construction is done, we must be very carsful not to hit a gas line or fiber optics line, etc.

4. We have a number of employees and this number will continue to grow if we are allowed to expand. These employees must be protected.

5. I have spent a large part of this statement talking about the liability we are exposed to with the trail. This is perhaps our biggest liability and the one we have the least control over. We try to control this by keeping the general public away from the jobsite and from our heavy equipment, but the City is determined to expose the general public to this danger. I believe that if the STB allows the bike trail here, there should be a provision that the city carry enough liability insurance to protect the general public and LLC. etc.

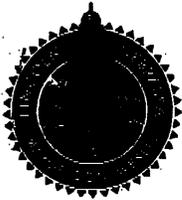
6. Photo #4, of Mr. Schuchmann's statement shows electric poles on the ROW. I have been told by an employee of Lincoln Electric System that these poles are coming down, but so far they are still there. As Mr. Schuchmann states, there are a number of obstacles in the ROW. We will be working with various business owners who have encroached on our land to get these obstacles removed.

7. With the increased traffic when the increased volume of business, we will be putting in place safety measures to prevent accidents. We have never had a traffic accident at our hub of operations, and we don't plan to start now. By shipping more material in by rail, we will be getting trucks off the street and this should help the traffic situation.

I received a phone call yesterday, Dec. 24 from Arman Nielsen with OL&B. He said he would like to set up a time when he and Mr. Robert Miller, CFO could walk around the area with me. We agreed I would phone him Friday morning and we would set a time to meet, probably around 8:00 a.m. that day. I really appreciate the phone call and their interest in this situation. Given the time constraints I am working under, I will do my best to get you a report on this meeting. I have enjoyed working with OL&B over the years and hope to continue to do so for many years. I will show them the staked out area and pictures.

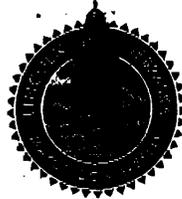
Enclosed with this statement is a map of the bike trails in Lincoln. I have marked on this map the location of the 2 campuses of UNL. Commuting between these two campuses is the reason the City is pushing the trail at this location. I call your attention to a couple of facts. (1) The East campus is not on the trail now. It is 5 blocks north of the "X" Street corridor or also known as the MoPac line. So any commuters have to exit the trail and travel at least 5 blocks to the Campus by City Street. (2) Going around LLC by City streets for a lesser distance seems to be a major problem. See the alternate route #1. "Y" Street is not a heavily travelled street, but there is a little more traffic than 'W' street which is one block south. This is an alternate route suggested by OL&B. And there are other available alternate routes.

Evidence of trail tie to storm sewer by the City. Per Matt Lindburg, engineer with EA, (see his card) the designated route for the storm sewer was decided approx. 2 weeks prior to when I talked to him on 11/19/03. Matt Lindberg said Terry Genrich had a meeting regarding piggy-backing the trail on top of the storm sewer approx. 1 week after the designation was made. Note the circle and arrow on the Right Of Entry document from Clint Thomas.



Lynn Johnson
DIRECTOR

Lincoln Parks & Recreation Department
2740 A Street
Lincoln, Nebraska 68502
402 441-7847 / fax 402 441-8706
ljohnson@ci.lincoln.ne.us



Terry Genrich
NATURAL RESOURCES MANAGER

Lincoln Parks & Recreation Dept.
2740 A Street
Lincoln, Nebraska 68502
402 441-7839 / fax 402 441-8706
tgenrich@ci.lincoln.ne.us

11/19/03 3:20 PM
6/20/03 8:11 AM

EA Engineering, Architecture, Inc.
721 South 13th Street, Suite 201
Lincoln, NE 68502
Telephone: 402-476-3700
Fax: 402-476-7025
lincoln@eaconsult.com

EA

EA
Matt Lindberg, P.E.
Engineer

Engineering, Architecture, and Consulting Services

1. Notes on storm sewer project. Map part of Brian Kramer Exhibit for City. Pages 4, 5, 6 & 7 of 11.

Misc. storm sewer facts including illustrations of liability, uncertainty, disruption and future cost of LLC.

Site survey conducted by Tagge Engineering Consultants of Holdrege, Ne in December 2001.

2. Sheet 4 of 11 (between 19th & 22nd)
- A. Build 2 manholes
 - B. Reconstruct 6" water main (angle line approx. 160' long across storm sewer.
 - C. Remove 113' feet of something?
 - D. Plug and abandon approx 96' something?
 - E. Look how close they come to the mainline trackage with const manhole.
 - F. Remove & replace parking surfaces in 2 places.

The proposal is swing the trail to the north (too close as shown on Routes Overview map) to the north. Summary a lot of disruption, liability and then we design a trail to be compatible with this. It is not. This is partly where future railroad terminal operation will go.

3. Page 5-11 (21st to 22nd St. including 22nd St.)
- A. Reconstruct 2 water mains near 21st
 - B. South of 21st construct approx. 60' water mains, separate in 2 places.
 - C. Remove and replace surface and construct grade inlet
 - E. Connect roof drainage to new pipe
 - E. Remove 454' ???
 - F. Remove manhole and make new manholes (two of them)
 - G. Remove and replace curb and gutter
 - H. Reconstruct 12" water main

Summary: a lot of disruption to work around and be able to service after complete and we propose a trail also. Not feasible for a trail. Our business and railroad can't stand a storm sewer easily without LLC expense and disruption. Can't tolerate a trail in addition.

4. Page 6 of 11 (north of Whittier & Short Street between 22nd & 23.)
- A. Remove and replace surfaces
 - B. Construct concrete collar
 - C. Build station and storm sewer manhole (huge per drawing. This is south of our present terminal unloading area. City shows doing nothing to ditches. This is unsafe (see photos). Whittier is lower elevation than our main line. LLC was forced to wait on this area of what was going to be decided and finally agreed on?
 - D. Remove approx. 193' of CMP. It points to the very center of RR mainline.
 - E. Build 2nd manhole.
 - F. Remove & replace approx. 85-86 tone crushed rock near Short Street.
 - G. Plug and abandon 21.5' pipe??
 - H. Short street build a storm sewer station
 - I. North of Short St. map shows going under LLC south RR spur. Specifically very disruptive to LLC and potentially very costly.
- Note: I suggest no one can estimate and project these costs of

disruption, changes and over-all interference. So the map shows LLC spur and & replace. And there is risk it won't be like it was. OL&B did a terrific job on installing this south spur and time has proven it to be so.

J. Have to deal with 2 radius curves on RR spur and storm sewer. They are also opposite curves. See map of crossover impacts. It is not possible to take out 20' opposite all of this for a trail.

K. How is this going to be handled on LLC property (50' south of center of main line toward Whittier St. going south?? This map shows expensive to someone at this junction point. Is the City going to bear all of this cost and leave it useable for rail~~road~~ unloading when finished? I don't see map referencing on this. If ground is not level a forklift will be subject to tipping over and falling on Whittier St. Summary is that the items listed above are risky, disruptive, and have a lot of liability.

5. Page 7 of 11. This is at 23rd to 24th St.

A Plug and abandon 106.5'. Let someone else worry about it?

B. Get to overloaded 23rd St. hub and RR main line area. The map shows 6 major projects to be constructed at this intersection. This consists of manholes, inlets, removal of existing manholes, replacement of new manholes, remove and replace curb and gutter, asphalt and concrete paving and piping to work.

C. 50' of 4" water main under the top of the main RR track on E. 23 St. property line.

D. Remove approx. 244' pipe.

E. Install grate

F. Removal of misc. concrete and asphalt and replace.

G. Install earthen bumper at end of main line track. This was not planned for by LLC at this time.

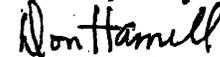
In my opinion, this is going to take much longer than the city has represented. LLC railroad will be tore up a long time.

I have written the above as though I were under oath. I always lean forward everyday with natural desires to be truthful, honest in all ways, be guided by integrity, be reliable, and be dependable. I go to work almost every day. I have been fortunate and blessed that I haven't missed work very often. Occasionally I work long, long days. I have a couch in my office and if I need to work 24 hours or more, I'll lay down and take a couple hours nap, then get up and back to matters that need my time. I try to be fair. I will admit I feel I understand income statements and balance sheets. I am a businessman.

Upon purchase of the railroad, we were guided 100% by the help the railroad could continue to give our Lincoln Lumber Co. I felt 100% secure that federal laws administered by STB would give LLC protection against City of Lincoln eminent domain. I still feel secure with the federal laws as administered by STB.

I am submitting my facts and information for your review. Lincoln Lumber Company asks for your favorable consideration of our protest in response to the Petition for Declaratory Order.

Thank you



Don Hamill
President & owner
Lincoln Lumber Company

EXPLANATION OF EXHIBITS

- A Legislation, Liability and Insurance
- B Letter from Jeff Dailey regarding buyOut of lease
- C Map of proposed bike trail from 10th to 33rd St. showing that the bike trail west around two businesses at 33rd instead of going thru the middle of them.
- D. Copy of parts of the annual report of Lincoln Housing Authority, illustrating that the City, thru appointment controls this property and could, if they chose, use part of this land for an alternate trail.
- E Copy of invoice, shipping ticket, and check that paid that invoice which shows that Lincoln Lumber does receive long lengths of I-Joists in rail cars.
- F Copy of the City of Lincoln, Nebraska Right of Entry Agreement. This is the Agreement presented to me by Mr. Thomas with the City. It ties the Storm Sewer Project and the Husker Link Project together.
- G Copy of letter to all City departments dated 2/12/02 which outlines LLC plans for our railroad at that point. We have since had to change plans because a building on top of a sewer line is not allowed.
- H Copy of a newspaper clipping from 12/30/97 which discusses possibilities for completing the Husker Link Trail (Mopac trail).
- I Copy of a recommendation for improving LLC terminal area from a qualified railroad contractor.
- J Letters of support from people within or with knowledge of the railroad industry and the serious problems we have.
- K City map of Lincoln with alternate bike routes marked.
- L Letter to Armon Nielsen regarding our railroad concerns.
- M Map of City of Lincoln showing 100' width markings in yellow.
- N Map of railroad line from 23rd to 1/2 block West of 20th St.
- O Alternative bike trails, description and map showing each.
- P Invoices and checks for rail shipments for Cascade Empire These shipments contain long lengths of 2x4's.

EXPLANATION OF EXHIBITS

- Q Map of trails showing University campuses not directly linked by trail
- R Newspaper article, 5-31-03, UNL to Invest in Cushman Plant
- S Materials relating to Lincoln Housing Authority as part of an alternate route for a trail
- T Report of meeting between Lincoln Lumber Company and Omaha, Lincoln & Beatrice Railway Company, 12-26-03
- U Drawing showing full width of right-of-way required for unloading 48-foot material

EXHIBIT A

SECTION IV:

Legislation, Liability, and Insurance

Liability is an extremely important area of concern in virtually all RWT projects. In the context of RWT, liability refers to the obligation of a trail manager or railroad to pay or otherwise compensate a person who is harmed through some fault of the trail manager or railroad. The filing of a personal injury or tort claim against the presumed responsible party typically enforces responsibility. However, because there are relatively few RWTs, the courts rarely have analyzed the relative responsibilities of railroads and trail managers toward an injured trail user. Additionally, cases often are settled before they reach a court trial, leaving no legal precedents from which to draw. Thus, there are no clear legal guidelines as to how the courts will view RWT liability issues. Also, some liability questions relating to RWTs are resolved by State law, which varies from State to State, and the applicability of which depends on the specific facts of each case. Nevertheless, some conclusions, with certain references to minority positions, can be made as to how liability issues arising in the context of RWTs are likely to be resolved. This section¹ discusses the principles governing liability in the context of RWTs, including both statutory protections and common law standards.² This section does not address RWT disputes related to land ownership and acquisition.

Overview of Recommendations

1. Trail development agencies interested in pursuing a RWT should conduct initial legal research as early into the process as possible. Important information includes: ownership, easement, and license agreements in the railroad corridor; legal protections available at the State level (e.g. indemnification, applicable State statutes, and strength of local trespassing ordinances); local or State property rights ordinances and information; and trail management organization insurance protection.
2. Trail development agencies should acquire railroad property for public ownership whenever feasible in the context of RWTs.

¹ Karl Morell, Ball Junik, LLP, who has experience representing railroads, and Andrea Ferster, Esq., who represents trail and land conservation proponents and serves as counsel to the Rails-to-Trails Conservancy, analyzed rails-with-trails issues for this section.

² "Common law" standards are those developed by judges through case-by-case litigation and set forth in published judicial decisions that are considered precedent in factually similar contexts.

D.H. 12/20/03

SECTION IV



3. Trail managers should adhere to design recommendations identified in this report and in design standards and guidelines (e.g., the *AASHTO Guide for the Development of Bicycle Facilities* and *Manual on Uniform Traffic Control Devices*.) (See *Appendix A* for explanation of these documents.) In particular, signs should be provided at entrances to warn users to stay off the railroad tracks and that trespassing is a crime.
4. Both trail managers and railroad companies should review State statutes to ensure the validity of indemnification agreements, and the scope or applicability of fencing laws. (See *Appendix B, Matrix of Statutes and Laws*.) To the extent there is any ambiguity as to the applicability of the statute, trail proponents should lead an effort to strengthen their State's laws to increase railroad liability protection, as States such as Arizona have done.
5. Trail management organizations should absolve railroad companies of liability responsibility for injuries related to trail activities, to the extent practicable and reasonable.
6. Trail management organizations should purchase or provide comprehensive liability insurance in an amount sufficient to cover foreseeable liability costs and pay the costs for railroad company insurance for defense of claims.

Overview of Concerns

Railroads have a number of liability concerns about the intentional location of a trail near or on an active railroad corridor:

- Trail users may not be considered trespassers if a railroad intentionally invites and permits trail use within a portion of their right-of-way, and that the railroad would therefore owe a higher duty of care to trail users than they would otherwise owe to persons trespassing on their corridor.
- Incidents of trespassing and injuries to trespassers will occur with greater frequency due to the proximity of a trail.
- Trail users may be injured by railroad activities, such as an object falling or protruding from a train, hazardous materials, or by a derailment.
- Injured trail users might sue railroad companies even if the injury is unrelated to railroad operations, incurring expensive legal costs. Railroads have in the past borne the burden of litigation for many incidents on their property, even for crashes with at-fault automobile drivers who have blatantly ignored obvious warning systems.

The level of railroad company concern is dependent in part on the class of railroad and the type of operations they perform. Privately-owned Class 1 railroads (see *Appendix A: Definitions*) tend to be reluctant to grant non-rail usage of their rights-of-way because loss of right-of-way width at any given location could reduce the ability of the railroad to add main track and sidings necessary to provide increased capacity and serve customers. In addition, their perceived deep financial pockets make them a frequent target of lawsuits. Transit and tourist train operators may support RWT projects because they often are quasi-governmental entities, with a mission of attracting people to their service. Finally, locally-based short-line operators have less reason to be concerned about future track expansion, and may be inclined toward the potential financial rewards of permitting a RWT

N.H. 12/20/03



project along their rights-of-way. For all RWTs proposed for railroad property, the railroad must weigh the safety and liability risks against potential financial and other gains. Thus, minimization of risk is a key ingredient to a feasible RWT.

Definitions and Laws

As the owners and occupiers of their rights-of-way, railroads have legal duties and responsibilities to persons both on and off their premises. Railroads have a duty to exercise reasonable care on their premises to avoid an unreasonable risk of harm to others who may be off the railroad premises. For example, railroads may be found liable if the use of their right-of-way creates an unreasonable risk to persons on an adjacent "public highway" such as through derailments or objects falling off the trains.

In most States, the duty of care owed to persons who enter another's property depends on whether the injured person is considered a trespasser, a licensee, or an invitee. Trespassers are due the least duty of care, while invitees are due the most.³ (See Figure 4.1.)

As a general rule, railroads owe no special duty of care to persons trespassing on railway premises, other than to refrain from intentional, harmful, or reckless acts. There are, however, four exceptions to this general rule:

- **FORESEEABLE TRESPASS:** Whenever the railroad is aware, or should be aware, that trespassers are frequently entering on a small area of the right-of-way, most courts will find that the railroad has a duty to exercise reasonable care to look out for the trespassers. Where a known and apparent pathway is located along a railroad track, most courts will hold a railroad liable for not anticipating the presence of persons near the tracks and exercising ordinary care to prevent injury to them, such as by keeping a reasonable look-out.⁴
- **DANGEROUS CONDUCT:** A few States have placed an obligation on railroads to use reasonable care whenever a trespasser can be anticipated and the railroad's activity in that area involves a high degree of danger.
- **DISCOVERED TRESPASS:** Under the 'last clear chance' doctrine, a majority of States impose a duty on railroads to use reasonable care whenever the engineer of a train becomes aware of a trespasser on the right-of-way. In these jurisdictions, the railroad has a duty to use ordinary care to avoid injury to a discovered trespasser.⁵
- **YOUNG CHILDREN:** Under the 'attractive nuisance' doctrine, a vast majority of States hold railroads to a duty of exercising reasonable care for young children of whose presence the railroad has actual or constructive knowledge.

In deciding whether to allow a RWT on its right-of-way or determining the indemnity and insurance coverage appropriate for a given RWT, a railroad needs to weigh and balance three factors: (1) the extent, if any, to which the RWT will elevate the railroad's duty

³ A number of States have adopted a rule that a landowner's liability depends on the foreseeability of the injury rather than the status of the injured person as invitee, licensee or trespasser. See Gulbia, Vitale, "Modern Status of Rules Conditioning Landowners' Liability Upon Status of Injured Party as Invitee, Licensee, or Trespasser," 22 ALR 4th 294, § 3a.

⁴ In some States, a railroad's tolerance of frequent trespassers has led courts to elevate the status of an injured intruder to licensee.

⁵ A railroad has a duty to take affirmative action to aid or protect a trespasser where the trespasser's peril is caused by active force under control of the railroad, such as where a member of a train crew observes a trespasser in danger on a trestle.

N.H. 12/20/03

SECTION IV

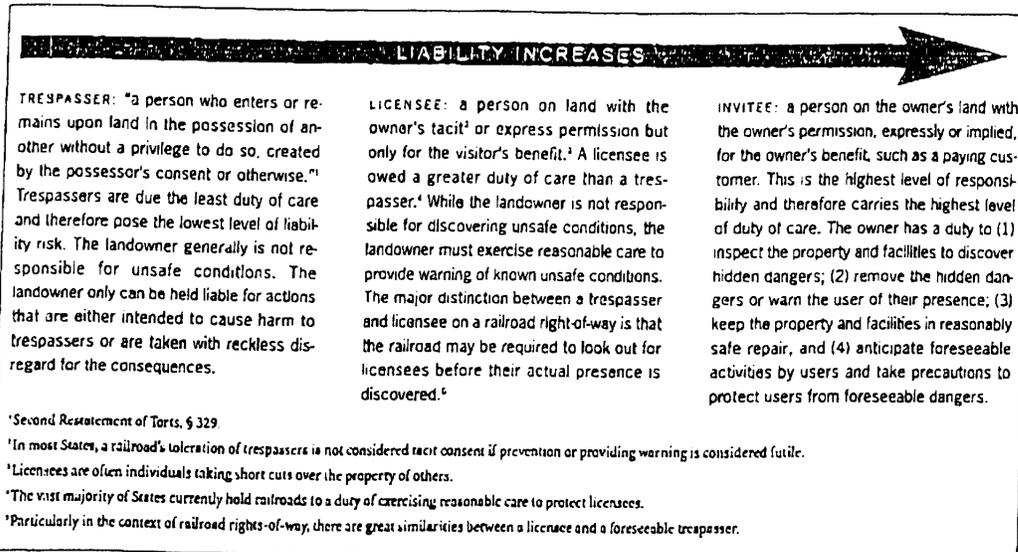


FIGURE 4.1 Liability definitions

of care to any particular individual; (2) the potential increased scope of the railroad's liability; and (3) the increased or decreased likelihood of an injury occurring as a result of the RWT.⁶ Each RWT project will necessarily have unique characteristics affecting the extent, if any, to which a railroad's liability is potentially enlarged. Some general observations, however, can be made.

By selling or leasing a longitudinal strip of its right-of-way for a RWT, the railroad will be permitting the creation of a public way immediately adjacent to its tracks. For rights-of-way not already adjacent to public highways and for those having low incidents of trespass, a RWT would likely enhance the railroad's duty of care under common law principles and increase the scope of its potential liability for those on the trail. In such situations, an individual traversing the longitudinal strip would generally be deemed a trespasser pre-RWT, to whom no duty of care is owed, but would be considered either a licensee or invitee on the trail post-RWT. As a licensee or invitee on the adjacent trail, the railroad would owe the trail user a duty to exercise reasonable care. The scope of liability is likely to increase by virtue of the RWT increasing the public usage of the longitudinal strip. A well-designed RWT, however, may mitigate these potential increases in off-property liability by decreasing the likelihood of injury.⁷

⁶ The elevation of the duty of care owed to an individual can occur, for example, by having a current trespasser, to whom the railroad generally owes no duty of care, elevated to a licensee, to whom the railroad owes a duty of reasonable care.

⁷ "Scope of liability" means the potential number of individuals that may be injured.

⁸ In assessing a railroad's potential off-property liability, a number of factors need to be considered, including the width of the right-of-way, trail setback distance, condition of track, speed of the trains, and nature of the barrier between the track and trail.

S.H. 12/20/03



LEGISLATION, LIABILITY, AND INSURANCE

In the above situation, a trail user who departs from the trail and unlawfully enters the railroad's remaining right-of-way would most likely be deemed a trespasser in most States as long as the incidents of trespass remain infrequent. Thus, the railroad's duty of care likely would not be enhanced for individuals leaving the trail and intruding on the right-of-way. In several cases involving track-side paths, such as a surfaced walkway, courts have found the person injured while walking near the tracks but off the pathway to be contributorily negligent thereby absolving the railroad from responsibility for the injury.⁴ By inhibiting trail users from accessing the right-of-way, a well-designed RWT also could prevent an increase in the scope of the railroad's on-property liability and the likelihood of injury.

For rights-of-way already adjacent to public highways and those with high incidents of trespass, a RWT likely would not enhance a railroad's duty of care to individuals on the trail. Railroads already have a duty to exercise reasonable care to those lawfully occupying adjacent property. Most States impose that same duty on railroads whenever trespassers frequently enter discrete areas of their rights-of-way. Most likely, the scope of the off-property liability will increase, since in only rare, if any, instances should the frequency of current trespass exceed the projected use of the trail. A well-designed RWT, however, could offset the increased scope of the off-property liability by channeling current trespassers away from the right-of-way, decreasing the likelihood of injury.

In this latter situation, a well-designed trail could reduce a railroad's current liability exposure by reducing the number of individuals to whom the railroad owes a duty of care, limiting the scope of the potential liability and decreasing the likelihood of injury. If appropriate barriers are erected on the right-of-way between the trail and the tracks so as to reduce the incidents of trespass onto the tracks, the courts may view the remaining isolated trespassers as no longer foreseeable. Thus, at least in those States that recognize the "foreseeable trespass" exception, the railroad may no longer owe a duty of care to adult trespassers as a result of the RWT. By reducing the number of trespassers, the barriers also should serve to limit the scope of the potential on-property liability and the likelihood of injury on the right-of-way.

The railroad's concern is that a RWT will bring a large and increasing number of individuals near the tracks. This, they claim, will inevitably increase the incidents of trespass and number of locations where the railroad will have to anticipate trespassers. For a RWT without barriers, or with improperly constructed or maintained barriers, these concerns are valid. Without appropriate separation between track and trail, the incidence of trespass is likely to increase and most States likely would hold the railroad to a standard of reasonable care in anticipating a trail user crossing or longitudinally traversing the tracks along the entire RWT corridor. In these circumstances, both the railroad's duty of care and scope of liability are likely to increase. A trail with well-constructed and properly maintained barriers, however, could serve to reduce, rather than increase, the frequency of trespass onto the tracks. As indicated in *Section II*, a well-designed RWT can reduce trespassing by "channelizing" pedestrian crossings to safe locations or by providing separation or security. In these circumstances, the incidents of trespass and the railroad's corresponding duty of care may decrease or stay the same.

⁴ Some States use comparative negligence instead of contributory negligence, thereby allowing juries to assess some portion of responsibility to the railroad.

N.H. 12/20/03

SECTION IV



Available Legal Protections

Potentially offsetting some or all of a railroad's increased liability attributable to a RWT are the State-enacted Recreational Use Statutes (RUS) and Rails-to-Trails Statutes. Landowners receive special protection from liability by the RUS. All 50 States have Recreational Use Statutes, which provide protection to landowners who allow the public to use their land for recreational purposes. Under an RUS, an injured person must prove the landowner deliberately intended to harm him or her. States created these statutes to encourage landowners to make their land available for public recreation by limiting their liability provided they do not charge a fee.

Table 4.1 shows the available legal protections that reduce risk for adjacent property owners on RWT projects, with sample language from relevant legal documents. A compilation of the laws of the 50 States and the District of Columbia relating to the liability issues associated with RWTs is shown in *Appendix B*, providing a listing of the RUSs and Governmental Tort Claims Acts for each State. In addition, *Appendix B* also lists Recreational Trail and Rails-to-Trails Statutes for the States that have enacted them. These are laws specifically enacted to clarify, and in some cases, limit, adjacent landowner liability. Over half of the States have enacted a recreational trail statute that directly addresses the issue of liability. This can range from protecting adjacent landowners from liability to making the RUS for the State specifically applicable to a Rails-to-Trails program.

Trail managers face similar common law duties of care for on- and off-property injuries and damages. Recreational Use Statutes and Governmental Tort Claims Acts, however, can significantly limit a manager's liability. These Statutes and Acts vary greatly from State to State.

Recreational Use Statutes typically protect managing agencies from being held liable for injury to trail users, unless trail managers intentionally or recklessly injure or create danger to users. Virtually all RUSs essentially treat trail users as trespassers on the trail property for purposes of determining the duty owed by the manager of the property to the trail users. Most RUSs, however, are not applicable where a fee is charged for entry or use of the trail.⁹ In most States, the RUS grants immunity for the recreational use of any land, whether developed or undeveloped, rural or urban, so long as the plaintiff used it for recreation.¹⁰

Not all States' RUS cover trail managers. The courts in California, Pennsylvania, and New York have held that the State RUSs do not cover public agencies, but instead are only applicable to private landowners.¹¹ Under those circumstances, the public agencies would be liable to the extent specified by the State's tort claim statutes.

⁹ Many RUS Statutes, however, specifically provide that any consideration received by the private owner for leasing land to a State or State agency shall not be deemed a charge for purposes of rendering inapplicable the RUS. See Del. Code § 5906; Ga. Code § 51-3-25.

¹⁰ The possible exceptions are Alaska and Oklahoma. Alaska's RUS is only applicable to certain specified undeveloped lands. While the definition of "unimproved land" includes a "trail," it is unclear whether developed trails would fall under that Statute. See AK Stat. Ann. § 09.65.200. Oklahoma's RUS appears to be limited to land "primarily used for farming and ranching activities." See OK Stat. Ann. Title 76 § 10.

¹¹ See, e.g., *Delta Farms Reclamation Dist. No. 2028 v. Superior Court of San Joaquin County*, 660 P.2d 1168 (Cal.), cert. denied 464 U.S. 915 (1983); *Leonakis v. State*, 511 NYS2d 119 (NY App. Div. 2d Dept., 1987); *Watterson v. Commonwealth* 18 Pa. D. & C.3d 276 (1980).

S.H. 12/20/03



LEGISLATION, LIABILITY, AND INSURANCE

TABLE 4.1 Liability exposure reduction options

Measure	Sample Language
Recreational Use Statute	"An owner of land who either directly or indirectly invites or permits, without charge, any person to use such property for recreational purposes does not thereby: (a) Extend any assurance that the premises are safe for any purpose; (b) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed; (c) Assume responsibility or incur liability for any injury to person or property or for the death of any person caused by an act or omission of such person." ¹
Trespassing legislation	Whoever, without lawful authority or the railroad carrier's consent, knowingly enters or remains upon railroad property, by an act including, but not limited to— "(1) standing, sitting, resting, walking, jogging, running, driving, or operating a recreational or non-recreational vehicle including, but not limited to, a bicycle, motorcycle, snowmobile, car, or truck; or "(2) engaging in recreational activity, including, but not limited to, bicycling, hiking, fishing, camping, cross-country skiing, or hunting—except for the purpose of crossing such property at a public highway or other authorized crossing, shall be guilty of a misdemeanor. Upon conviction of such act, the person shall be fined not more than \$100, imprisoned for not more than 30 days, or both." ²
Trail or rail-with-trail State statute	"No adjoining property owner is liable to any actions of any type resulting from, or caused by, trail users trespassing on adjoining property, and no adjoining property owner is liable for any actions of any type started on, or taking place within, the boundaries of the trail arising out of the activities of other parties." ³
Easement/lease agreements that limit liability	"The County hereby releases and will protect, defend, indemnify and save harmless Conrail from and against all claims, liabilities, demands, actions at law and equity (including without limitation claims and actions under the Federal Employer's Liability Act), judgments, settlements, losses, damages, and expenses of every character whatsoever (hereinafter collectively referred to as "claims") for injury to or death of any person or persons whomsoever which results from the unauthorized use of motorized vehicles, such as but not limited to, motorcycles, minibikes, and snowmobiles within the easement area, and for damage to or loss or destruction of property of any kind by whomsoever owned, caused by, resulting from or arising out of the exercise of this Easement granted hereby, except to the extent that such claims arise from Conrail's negligence." "Permittee shall assume complete liability for any and all claims resulting from the construction, reconstruction, maintenance, operation, use, and existence of the Facility located on, under, or over the Site... however, (the) Permittee shall not be required by this permit to indemnify any person against liability for damages arising out of bodily injury or property damage caused by or resulting from the sole negligence of such person or such person's agents or employees." ⁴
Easement/lease agreements with full indemnification	"...the City assumes all risk of loss or destruction or damage to the Walkway, to property brought thereon by the City or by any other person with the knowledge or consent of the City, and to all other property, including property of the Railroad, and all risk of injury or death of all persons whomsoever, including employees of the Railroad, where such loss, damage destruction, injury or death would not have occurred but for the presence of the walkway on the Bridge." ⁵
Insurance	See Appendix C, p. 149
Transfer of ownership	The language limiting liability or granting indemnification on behalf of the railroad should be the same or similar to easement agreements.

¹ Colorado Recreational Use Statute: TITLE 33: WILDLIFE AND PARKS AND OUTDOOR RECREATION, ARTICLE 41. OWNERS OF RECREATIONAL AREAS - LIABILITY. Other examples available on-line at http://www.imba.com/resources/trail_issues/liability_chart.html

² Federal Railroad Administration, Office of Safety, Model State Legislation for Railroad Trespass and Railroad Vandalism, available at <http://www.fra.dot.gov/safety/states/state1.htm>

³ California Recreational Trails Act, Section 5075.4, available at <http://www.leginfo.ca.gov/cilaw.html>

⁴ Schuykill River Trail Indemnification agreement

⁵ Coastal Bike Trail Permit between Municipality of Anchorage and the Alaska Railroad Corporation, August 1987: p.5.

⁶ Lease and Operating Agreement between City of Portland and the Union Pacific Railroad, January, 2000: p.9. Agreement provided in full in Appendix C.

28.14. 12/20/03

SECTION IV



On the other hand, the Wisconsin RUS expressly covers the owner of the land, any governmental entity that leases the land, and any nonprofit organization that has a recreational agreement with the owner. (WI Stat. Ann. § 895.52(1.))

Even if a public agency is not covered by a State RUS, its tort claims law may grant immunity. For example, California absolves governmental entities of liability for injuries caused by a condition of certain paved and unpaved trails. (Cal. Civ. Code, § 831.4; Minn. Stat. § 3.736.3(h); S. Dakota Comp. Laws Ann., § 20-9-12 to 18; Isham, 1989.) Pennsylvania has enacted a comprehensive rails-to-trails law that expressly extends the State RUS to "any person, public agency or corporation owning an interest in land utilized for recreational trail purposes." (Penn. Consolid. Stat. Annot., Title 32, § 5621.) By contrast, Wyoming law specifically provides that the government is liable for damages resulting from negligent operation of maintenance of any "recreation area or public park." (Wyoming Stat. § 1-39-106.)

A trail along a right-of-way may be considered a linear park, the operation of which in some States is considered a "discretionary" or "proprietary" function and immune from liability.¹² For example, most States accord highway agencies with immunity from charges of defective highway design (called "design immunity") if the highway was designed in accordance with accepted engineering practices and standards. (NCHRP, 1981.)

The railroad's increased on- and off-property liability for RWT may also be limited, in whole or in part, pursuant to the various State RUS.¹³ Although there is little case law specifically interpreting the impact of the RUS on RWT, two Federal courts have given a very expansive interpretation to the scope of the recreational use and the reach of the immunity granted by the various RUSs. In both cases, the courts held that railroad rights-of-way are suitable for recreational use and that the railroads are immune from liability for negligence under the respective State RUS where the plaintiffs used the rights-of-way for recreational purposes even though no developed trail had been established on the rights-of-way.¹⁴ Virtually all RUSs provide that the owner of the property owes no duty of care to a recreational user as long as the use of the property and the property itself qualify under the RUS. The theory behind these statutes is that if landowners are protected from liability they would be more likely to open up their land for public recreational use and that, in turn, would reduce State expenditures to provide such areas. Consequently, the RUSs can

¹² See *Mayor and City Council of Baltimore v. Ahrens*, 179 A. 169, 171-73 (Md. Ap. 1935) (to hold governments liable for injuries in parks "would be against public policy, because it would retard the expansion and development of parking systems, in and around growing cities, and stifle a gratuitous governmental activity vitally necessary to the health, contentment, and happiness of their inhabitants.")

¹³ For example, Arizona's RUS is expressly extended to "railroad lands ... which are available to a recreational or educational user, including, but not limited to, paved or unpaved multi-use trails ..." Ariz. Rev. Stat., Annot., § 33-1551.

¹⁴ In *Lovell v. Chesapeake & Ohio R.R.*, 457 F.2d 1009 (6th Cir. 1972), a Boy Scout leader was killed when he tried to rescue a Scout from an oncoming train. The court found that the Boy Scouts had gone onto the railroad tracks for hiking, which was a recreational purpose. Consequently, the court held that the Michigan RUS "deprives his widow of a cause of action absent proof of gross negligence or wanton or willful misconduct on the part of the railroad." *Id.* at 1011. See also *Powell v. Union Pac. R. Co.*, 655 P.2d 1380 (9th Cir. 1981) (The Washington State RUS was interpreted as potentially immunizing the railroad from liability where a teenager was killed when she used the right-of-way to access the beach, if, on retrial, the railroad was found to have allowed the use of the right-of-way for recreational purposes.)

N.H. 12/20/03



LEGISLATION, LIABILITY, AND INSURANCE

be reasonably interpreted as overriding the common law duty railroads would otherwise owe to recreational users on their rights-of-way.¹⁵

Presumably as an added incentive to encourage private landowners to allow use of their property for recreational purposes, the California RUS allows the landowner to recover reasonable attorney's fees in defending against any unmeritorious claim for injury or damages on the property. (Cal. Civ. Code § 846.1.(a.)) The Colorado RUS, in addition to limiting liability to willful and malicious conduct, limits the amount of damages owed by a private landowner for injury to a recreational user on his or her property as long as the owner does not share in any fees paid by the injured person. (CO Rev. Stat. § 33-41-103(2.)) Similarly, the Maine RUS permits courts to award legal costs, including reasonable attorneys' fees, to an owner or manager of a trail who is unsuccessfully sued for injury or damages. (Me. Code § 159-A.6.)

Apparently the most sweeping protection for landowners who enter into an agreement with a governmental entity for recreational use of their property is offered by Virginia. The Virginia RUS expressly mandates that any governmental entity entering into such an agreement must "hold [the owner] harmless from all liability and be responsible for providing, or paying the cost of, all reasonable legal services required by [the owner] as a result of a claim or suit attempting to impose liability." (See Va Code § 29.1-509.E.) The Statute further provides that any attempt to waive this governmental indemnification is invalid. The Virginia Statute, thus, appears to provide total indemnification for a railroad entering into an agreement with a Virginia governmental entity for trail use along the railroad's right-of-way.

Crash Trends

Almost 3,500 highway-rail incidents occurred in 2000, a dramatic decrease from the 5,715 reported in 1990. (See Figure 4.2.) In almost three-quarters of the cases, a train strikes a motorist. However, the motorist is almost always at fault, having ignored warning signs, bells, lights, even gates. Automobile, van, and truck crashes make up 83 percent of railroad collisions. Pedestrian crashes only account for about two percent. (See Figure 4.3.) These incidents reveal the dangers of trains interacting with people, whether in a car or on foot. Since 1975, the number of trespass fatalities has risen and fallen. Over the past seven

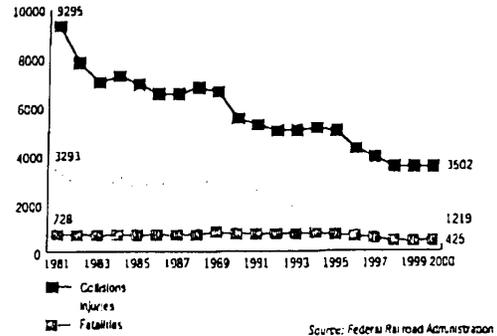


FIGURE 4.2 Highway-rail grade crossing collisions and casualties at public crossings, 1981-2000

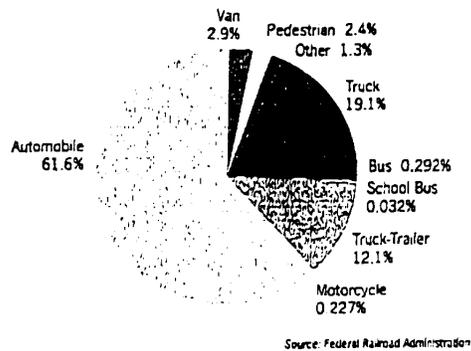


FIGURE 4.3 Highway-rail incident breakdown, 2000

¹⁵ As previously discussed, under common law, railroads have a duty to exercise reasonable care to prevent harm to anyone lawfully occupying adjacent property and those tacitly or expressly permitted to enter the railroad's property. Under virtually all of the RUSs, however, railroads would only be liable to recreational users on the right-of-way for intentional or reckless conduct. Also, most RUSs define the recreational users in a manner that would include minors. See e.g., Mass. Code § 17C(1.) The Texas RUS, however, does not limit liability for "attractive nuisances" except for injured trespassers over the age of 16 on agricultural land. See TX Code § 75.003 (b.)

D. H. 12/20/03

SECTION IV



years, the number of trespass fatalities has remained approximately 500 per year, a number that now exceeds deaths at highway-rail crossings. As a result, trespasser fatalities represent the greatest loss of life associated with railroad operations.

Researchers queried trail managers, railroad officials, and official railroad industry records for historical trends and information about at-grade RWT-track crossings. The available official documentation yielded no crash information. None of the trail managers or railroad officials reported any crashes along the RWTs studied for this report. The Reading and Northern Railroad official for the Lehigh River Gorge Trail, however, did report frequent close calls.

The Rails-to-Trails Conservancy's (RTC) 2000 report, "*Design, Management, and Characteristics of 61 Trails along Active Rail Lines*," identified one crash that occurred at an at-grade road crossing on the Illinois Prairie Path. The bicyclist ignored the warning bells and flashing lights, rode around a lowered crossing gate, and collided with the train. Technically, this incident did not occur on the trail corridor but at an adjacent, pre-existing highway-rail crossing.

RTC found another incident involving a boy in Alaska who used the Tony Knowles Coastal Trail to approach the tracks. The boy climbed under a damaged fence then attempted to hop onto a passing freight train, with tragic results. The City of Anchorage, which manages the trail and assumed liability, settled the case with the plaintiff for \$500,000. The railroad was held harmless from any liability for this accident by the terms of its indemnification agreement with the City. Subsequently, the Alaska Railroad Corporation took out a \$10 million per incident insurance policy with a \$100,000 deductible at a cost of \$15,000 per year.

Although these are the only known RWT incidents, it is important to recognize the potential dangers of human interaction with moving trains. In summary, almost no reported crashes appear to have occurred where RWTs cross active rail tracks at grade.

Many RWT agreements specify design features that are intended to reduce liability potential, such as fencing, landscaping, crossing design, and maintenance. None of the railroad officials interviewed reported an increase in liability costs since the adjacent trail was developed, nor had they had their indemnification agreements challenged in court.

Property Control

The type of property control dictates both the ease of the project and the liability burden. There are three types of property arrangements: purchase, easement, and license. Sample agreements are contained in *Appendix C*.

Acquisition

To accommodate the concerns of rail operators with respect to the location of a trail in an active right-of-way, a public agency might look to own the active rail corridor itself. This internalizes the liability and coordination efforts. Governments under civil law are treated differently from those of private landowners due to their unique status as sovereign entities. In some jurisdictions, immunity available to governmental agencies depends on



the particular function performed, ranging from highway design and maintenance to employment. Many States have recently enacted statutes that limit the amounts or kinds of damages recoverable against governments. (Isham, 1995.)

Two examples of public ownership include the City of Seattle, WA, which acquired a right-of-way for use by its Waterfront Streetcar and a RWT located next to the track. Portland, OR's regional government, Metro, purchased property under the Oregon Pacific Railroad tracks from a local utility so it could have control of the proposed Springwater Corridor Extension RWT. (See Section II: Case Studies, for more information regarding these projects.)

However, most examples of public acquisition of rail lines involve development of transit facilities or of new facilities providing access to intermodal hubs, such as the 16 km (10 mi) Alameda freight corridor in Los Angeles. The Dallas (TX) Area Rapid Transit agency has acquired title to short lines for eventual development as extensions of the existing Dallas light rail system. In California, acquisition of former Class I lines by Caltrain in the Bay Area, the purchase by North County Transit District (NCTD) and the Orange County Transportation Authority (OCTA) of the old Santa Fe mainline into San Diego, and the acquisition of surplus Southern Pacific and Santa Fe lines in the Los Angeles area by the Los Angeles County Metropolitan Transportation Authority (LAMTA) are other examples. These acquisitions have translated into hundreds of millions of dollars for railroads, while retaining use of the lines for their continued private enterprise.

On lightly-used branch lines, a railroad may prefer simply to sell the entire right-of-way rather than encumber it with easements or sub-parcels. Where a railroad corridor traverses suburban or urban areas with high property values, a prime consideration from the railroad's perspective is whether a trail constitutes the highest and best use for an interim or permanent use.

Class I railroads, however, consider their property to be a very important tangible resource. They commonly reserve corridor property for future potential capacity expansion and, for the most part, remain firm in their intent to retain full ownership and control of their infrastructure. Any public agency considering studying the feasibility of a RWT first must start with the assumption that railroads are profit-making enterprises with a strong fiduciary responsibility to their shareholders. Since large railroads are publicly-held corporations, their shareholder base includes millions of Americans with investments in mutual funds and retirement programs. While on occasion they may 'donate' items to the public, for the most part they do not expect to part with their assets for free.

Railroad corridors are being sold to public transit agencies around the world for tens of millions of dollars, with the railroad still maintaining the ability to provide freight service. While a public agency may believe that their trail does not impact existing rail service, Class I railroads see no incentive to giving an agency a free easement but do see the potential problems. While there are documented benefits from RWTs, they are unlikely to convince a railroad that it is beneficial to lose control of part of their right-of-way for public recreation. This is particularly true for heavily-used freight railroad routes, on which there are few existing RWTs today.

D, H, 12/20/03

SECTION IV



The Steel Bridge Riverwalk in Portland, OR is on property owned by the Union Pacific Railroad (UPRR) via a license agreement. Opened in May 2001, the shared use path is cantilevered off the south side of the bridge. Previously, the bridge was kept in the raised position until a train came across (about 60 per day at less than 32 km/h (20 mi/h.) This was to prevent trespassing and to reduce the maintenance cost of raising the structure for each watercraft.

The license agreement specifies that the UPRR is to incur no additional liability risk as a result of the trail, thus the City of Portland indemnifies the railroad against any and all incidents, including derailments. The City also is required to carry \$10 million private insurance at a cost of approximately \$40,000 annually, pay the railroad for the additional maintenance costs it has as a result of the trail, pay for safety improvements as needed, and provide a detailed management plan. The Riverwalk sees over a thousand daily users.

Public agencies considering RWTs should be prepared to identify financial incentives for a railroad to consider. This may be in the form of land transfers, tax breaks from donated land, cash payments, zoning bonuses on other railroad non-operating property, taking over maintenance of the right-of-way and structures, and measurably reducing the liability a railroad experiences. The agency should employ an experienced land appraiser and attorney. A public agency may submit an offer to a railroad and then negotiate a purchase price for an easement. Once settled, the easement becomes a permanent feature on the land title regardless if it is sold in the future.

Other key considerations for a railroad include future needs for additional tracks and sidings, which a RWT may preclude. On a lightly-used corridor that may be abandoned in the future, the benefits of a short-term sale may outweigh the costs of waiting for a long-term sale. Other questions may include: What is the likelihood of the entire corridor being rail-banked and purchased for transit or a linear park? What is the likelihood of the corridor being developed, and could a local agency exert control on type of development? What is the likelihood of the corridor being sold to adjacent property owners? The real estate department will want to analyze these options to determine which is best from an economic standpoint for the railroad.

Easements and License Agreements

In most instances, fee-simple (i.e., full ownership) acquisition is not necessary for trail development, and, in many cases, is not really an option. Easements, which come in many forms, typically are acquired when the landowner is willing to forego use of the property and development rights for an extended period. The landowner retains title to the land while relinquishing most of the liability and the day-to-day management of the property. The trail manager gets a lower price than a fee-interest acquisition and sufficient control for trail purposes. The easement is attached to the property title, so the easement survives property transfer. Figure 4.4 provides a listing of the preferred contents of an easement agreement from both the railroad and trail manager perspective.

A license is usually a fixed-term agreement that provides limited rights to the licensee for use of the property. Typically, these are employed in situations when the property cannot be sold (e.g., a publicly-owned, active electrical utility corridor), or the owner wants to retain use of and everyday control over the property. The trail management authority avoids a large outlay of cash, yet obtains permission to build and operate a trail. But it will have little control over the property, and may be subject to some stringent requirements that complicate trail development and operation. Figure 4.5 provides a listing of the preferred contents of a license agreement from both the railroad and trail manager perspective.

Design

Visible signage and good design are prudent liability protection strategies, as will be explained in Section V: Design. Trail users should be warned at the trailhead and at any other entrances to stay off the railroad tracks, particularly where there is no fencing or physical separation between the trail and the rail corridor. If the RWT is clearly designed to indicate that the railroad corridor is separate from the trail, trail users should be considered trespassers to which no special duty of care is owed.

W.H. 12/20/03



LEGISLATION, LIABILITY, AND INSURANCE

From the trail manager's perspective, a model easement agreement should:	From a railroad's perspective, a model easement agreement should:
<ol style="list-style-type: none"> 1. Guarantee exclusive use. 2. Be granted in perpetuity. 3. Include air rights if there is any possible need for a structure. 4. Broadly define purpose of the easement and identify all conceivable activities, uses, invitees, and vehicular types allowed to avoid any need to renegotiate with fee interest owner in future. 5. State that all structures and fixtures installed as part of trail are property of grantee. 6. Limit grantor indemnification to trail-related activities only. 	<ol style="list-style-type: none"> 1. Include a revocable clause, including removal, if the trail becomes a safety or liability problem. 2. Indemnify the railroads against trail-related trespasser activities. 3. Provide a specific definition of 'negligence' in the indemnification exception section as it relates to the railroad's liability exposure, or potentially indemnify the railroad against all incidents including such events as derailments. 4. Place responsibility for ensuring adequate railroad access to the tracks, at any time, for any reason, and place responsibility for needed trail repairs or improvements in the hands of the public agency. 5. Reference a detailed trail management plan and feasibility study which includes design review, feasibility analysis, and maintenance and management procedures and responsibilities. 6. Retain approval rights for any improvement or use on the easement.

FIGURE 4.4 Preferred easement agreement contents

From the trail manager's perspective, a model license agreement should:	From a railroad's perspective, a model license agreement should:
<ol style="list-style-type: none"> 1. Provide an acceptable term length with an option to renew. 2. Identify all conceivable activities, uses, invitees, and vehicular types. 3. Allow for railroads to review and approve the plan within a time limit. 4. Provide clarity on maintenance responsibilities. 5. Narrow potential environmental liability for pre-existing conditions. 6. Limit grantor indemnification to trail-related activities only. 7. Specify limits on other uses of license property. 	<ol style="list-style-type: none"> 1. Allow for temporary trail closures for railroad maintenance activities. 2. Include a revocable clause, including removal, if the trail becomes a safety or liability problem. 3. Indemnify the railroads against trail-related trespasser activities. 4. Provide a specific definition of 'negligence' in the indemnification exception section as it relates to the railroad's liability exposure, or potentially indemnify the railroad against all incidents including such events as derailments. 5. Place responsibility for ensuring adequate railroad access to the tracks, at any time, for any reason, and place responsibility for needed trail repairs or improvements in the hands of the public agency. 6. Reference a detailed trail management plan and feasibility study which includes a design review, feasibility analysis, and maintenance and management procedures and responsibilities.

FIGURE 4.5 Preferred license agreement contents

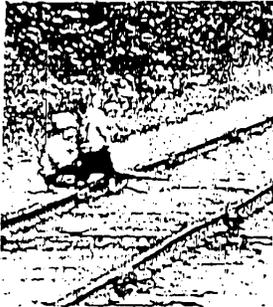
Several court cases have held that the availability of a safer path or route, such as a surfaced walkway between two lines or railroad tracks was a factor in determining that a person injured walking near a railroad track was contributorily negligent, and absolved the railroad from responsibility.⁴ As the case studies in *Section II* summarize, a well-designed RWT can actually reduce trespassing by channelizing pedestrian crossings to safe locations or by providing separation or security. A well-designed RWT trail should have the effect of reducing both trespassing, as well as risk of being held responsible for injuries sustained by trespassers.

⁴ See *Missouri, K. & T. RR Co. v. Wall*, 116 S.W. 1140 (Tex. 1909); *Chicago, & Q. RR Co. v. Flint*, 22 Ill. App. 502 (1887).

S.H. 12/20/03



SECTION IV



Trespassing can lead to potentially deadly consequences. Lake State Railroad tracks. Gaylord, MI

Risk Reduction: Trespassing

For this study, researchers counted trespassers on the tracks adjacent to the case study trails for two hours during the time of day/week the trail manager, railroad official, or law enforcement agent suggested they would be most likely to observe trespassing activity. Researchers observed few trespassers on tracks near existing trails, and typically only on tracks not separated by fencing.

In corridors with planned RWTs but no formal trail facility, researchers observed more trespassing, with the most serious conditions along the proposed Coastal Rail-Trail in California near Del Mar and Encinitas. There, researchers observed 155 trespassers over the course of two hours. Most trespassers were crossing the track to access water (ocean or river) for surfing, fishing, and other recreational activity. (See Figure 2.2 on page 10.) The remainder were walking alongside the tracks with very few actually on the tracks. Researchers observed that at least one-third of the activity occurred in areas planned to become the trail, while 44 percent seemed to be in areas that would not be accommodated by the planned trail. (See Figure 2.3 on page 10.)

TRESPASSING REDUCTION Most U.S. railroad companies rely on local and State trespassing ordinances to bolster their enforcement attempts and on local police departments to enforce trespassing and vandalism problems. However, most police departments respond "as needed" rather than having regular patrols. Additional information on various enforcement practices is contained in Section VI.

Railroad and trail officials on several of the existing trails studied reported some relief from trespassing. Several others reported no change (some with recurring problems), although at least one reported what they felt to be an increase in trespassing. The key to trespassing relief appears to be good design, particularly separation.

On the Lehigh River Gorge Trail (PA), much of the trail is relatively close to the tracks (less than 4.6 m (15 ft) from the track centerline), and is not separated by fencing. Railroad officials report trespassing is indeed a frequent problem. In contrast, as a condition of the sale of the property, CSX required the Three Rivers Heritage Trail (PA) to build a chain link fence the entire length with no opening or fence breaks allowed. Trespassing relief is expected.

However, fencing alone does not always solve the problem. On a RWT section of the Outremont Spur in Montreal, Canada, Canadian Pacific Railway officials noted 23 locations where the fence had holes. They also observed numerous locations where gates were not locked or secured properly. These incidents serve as evidence of significant continued trespassing and determined vandalism.

Risk Reduction: Vandalism

Railroad officials report the most common types of vandalism incidents on RWTs are fence cutting and graffiti. Several trails, including the ATSF (CA) and Burlington Waterfront Bikeway (VT), report continuing problems. Others, such as the Platte River Trail (CO) and Schuylkill River Trail (PA), report decreased problems. Few report increased

The Canadian government sees the development of RWTs as a trespassing reduction strategy. "The proper design and effective use of space can lead to a reduction in the incidence of pedestrian conflicts with railway operations and improve overall safety and quality of life in the neighboring community."

CONSTABLE WILLIAM LAW,
CANADIAN PACIFIC RAILWAY

* (handwritten mark)

✓ (handwritten mark)

12/20/03

S.H.



LEGISLATION, LIABILITY, AND INSURANCE

problems. Some trail agencies have installed innovative features to solve both trespassing and vandalism problems simultaneously, such as the "living fence" — tall and thick vegetation separating the trail from tracks — on the Burlington Waterfront Trail (VT.)

Review and Strengthen State Statutes

Trail managers should work to strengthen protections afforded by State statutes. (See *Appendix B*.) For example, RUSs should cover both recreational and transportation trail use. A number of States have enacted laws that require railroads to fence their rights-of-way under certain circumstances, and impose liability on the railroad for livestock that are injured on unfenced railroad corridors.¹⁷ In general, such laws are enacted for the benefit of adjacent landowners along the corridor and not for the benefit of the public at large. (*Barbee v. Southern Pacific Co.*, 99 P. 541 (Cal. App. 1908.)) In the absence of a statute, a railroad company does not have a duty to build fences to prevent trespassers from coming onto its property,¹⁸ though fencing appears to offer significant trespassing relief. However, fencing is not a practical or cost-effective option for many railroads, particularly for lengthy corridors in rural areas. Thirty States have passed laws relating to trespassing on railroad property, and the Federal Railroad Administration has developed a model State trespassing law that imposes misdemeanor penalties for entering or remaining on a railroad right-of-way. (See Table 4.1 on page 45.)

Crossings

The consolidation and closure of highway-rail at-grade crossings remains a key element in the U.S. DOT's action plan to improve grade crossing safety. As part of this continuing national effort to improve rail safety and reduce costs associated with highway rail crossings, many Class I railroads, as well as the FRA and many State Departments of Transportation, are working to close existing at-grade rail crossings (FRA, 1994) in order to reduce liability exposure and incidents. For example, from 1991 to 1999, they closed 33,599 public and private at-grade crossings, an 11.5 percent decrease.

Typical criteria for closure of public at-grade crossings is:

- Redundant or unnecessary to meet motorist needs
- Usually requires hearings, a public forum, and/or City Council approval.

Typical criteria for closure of private at-grade crossings is:

- Unlicensed, non-permitted, illegal, redundant, or alternate access exists
- Decision between the railroad and the user

Nationwide At-grade Crossings (2000):

Public-owned	154,084
Privately-owned	98,430

¹⁷ These fencing laws are identified and summarized in Appendix B. In addition, fencing obligations can be imposed by municipal ordinance. See *Hetting v. Chicago, R. I. & P. R. Co.*, 96 N.E. (11. 1981) (Railroad's violation of City ordinance requiring fence was proximate cause of injury to child who entered right-of-way at location where fence had previously existed and was torn down.)

¹⁸ See *Nixon v. Montana, W & S W.R.*, 145 P.8 (Montana, 1914); *Nolley v. Chicago, M., St. P. & P. R.*, 153 F.2d 566, 569-70 (8th cir. 1950); *Scarborough v. Lewis*, 518 A.2d 563 (Pa. 1986.)

12/20/03 D.H.

SECTION IV



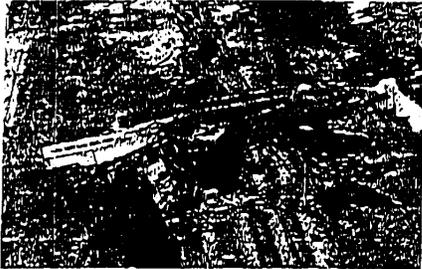
A RWT feasibility study must include a detailed assessment of crossings and should seek to close existing at-grade crossings, if possible, or redesign the crossings to accommodate the RWT safely. It should be noted that closing existing at-grade crossings can have a detrimental impact on pedestrian access.

A railroad's liability may depend on whether the railroad has adequately maintained the crossing or complied with State statutes controlling the signals and warnings that are required. (Kuhlman, 1986.) The railroad may minimize its liability by requiring trail managers to indemnify the railroad for liability in the event of an injury to trail users, to the extent permitted by State law, and by requiring insurance coverage of this risk.

Indemnification

To the extent practicable and reasonable, trail management organizations should enter into indemnification agreements that absolve railroad companies of liability responsibility for injuries related to trail activities. Less than half the case study trail agreements require the government entity to indemnify the railroad against claims. (See Figure 4.6.) For RWTs like the Mission City Trail (CA) and Schuylkill River Trail (PA), the City or County assumes all liability.

The extent to which government agencies possess the authority to enter into reasonable indemnification agreements depends on the law in that State. Public agencies may be more limited in their ability to enter into indemnification agreements than private trail managers. For example, a governmental entity may be barred by its State constitution from imprudently assuming the liability of another entity.¹⁹ Other States have, by statute, specifically granted agencies indemnification authority.²⁰



Derailed train, Bourbonnais, IL

In the event of a derailment, the issue would be whether or not the derailment was caused by the railroad's negligence; if so, the railroad likely would be held responsible for injury to any persons lawfully using a trail alongside the railroad right-of-way. However, the railroad's liability would be no different from its liability to persons injured on any other adjacent public highway, sidewalk, or crossing. The question from the railroad's perspective is whether the trail is bringing people into close contact with the rail line who would otherwise not be there. The railroad will seek to be indemnified for all potential incidents including derailments.

Insurance

Railroads may be concerned that trail users might sue them regardless of whether the injuries were related to railroad operations or the proximity of the trail. These concerns are best addressed through insurance and, to the extent permissible under State law, through

¹⁹ See, e.g., *Chicago & N.W. Transp. Co. V Hurst Excavating, Inc.*, 498 E Supp. 1, 4 (N.D. Iowa 1980) (relying on Section 1 of Article VII of the Iowa Constitution)

²⁰ For example, Oregon law provides authority for the parks department to indemnify "an owner of private land adjacent to an Oregon recreation trail... for damage clearly caused to the land of the owner, and property therein, by users of such trail..." Oregon Rev. Stat. § 390.9980.

12/20/03
S.H.



LEGISLATION, LIABILITY, AND INSURANCE

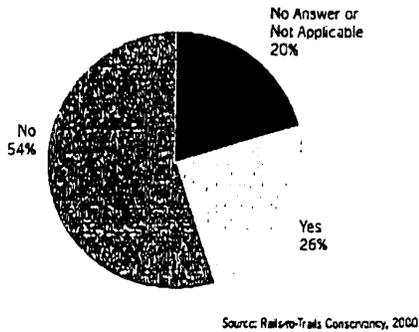


FIGURE 4.6 Requirement for indemnity, by percentage of RWTs

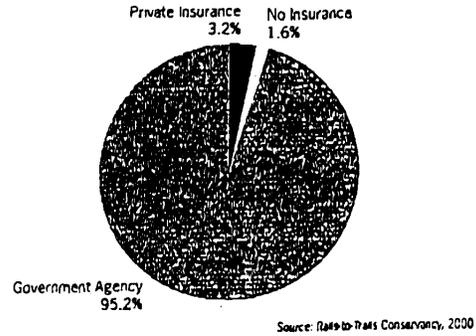


FIGURE 4.7 Source of liability insurance, by percentage of RWTs

indemnification agreements with trail managers. Because of the many jurisdictions that have some involvement in a RWT—including the owner of the right-of-way, the operator of the railroad, and the trail manager(s)—one important function of a license agreement is to identify liability issues and responsible persons through indemnification and assumption of liability provisions. In most instances, the railroad will seek an agreement by which the trail manager agrees to purchase comprehensive liability insurance in an amount sufficient to cover foreseeable liability costs. The railroad also may ask the trail manager to assume liability, as well as responsibility for the legal defense, in the event of damage or injury sustained by virtue of the trail use of the property.¹¹

The relevant government agencies' umbrella policies insure 95 percent of the existing RWTs against liability. Many government agencies are self-insured. (See Figure 4.7.) Insurance has been invoked very few times from injuries related to RWT activities. (RTC, 2000.) Railroad companies interviewed for this report declined to provide information about claims, citing privacy concerns.

In very few cases, a private or nonprofit organization such as the snowmobile club for the Railroad Trail (MI), carries a supplemental insurance policy for the trail. However, the Lake State Railroad company official expressed doubt that the additional \$2 million policy would be sufficient in the case of a serious claim. For the planned Kennebec River Rail-Trail, the City of Augusta (ME) will pay an additional \$2,000 annually to add railroad indemnification to their insurance.

As mentioned earlier, the City of Portland (OR) carries a \$10 million annual insurance policy on the Steel Bridge Riverwalk. Class I railroads often require \$5 million to \$10 million insurance policies for other activities permitted on their rights-of-way.

To the extent practical and reasonable, trail management organizations should purchase or provide liability insurance in an amount sufficient to cover foreseeable liability costs and pay the costs for railroad company insurance for defense of claims.

¹¹ Indeed, in Alaska, any State or municipality using railroad lands for a public trail or walkway is required to indemnify and hold the railroad harmless for liability and claims arising from such use. Alaska Stat. § 42.40.420 (Michie 2000.)

12/20/03
S.H.

JACOBSEN
A Textron Company

Exhibit B

Mr. Donald L. Hamill, President
Lincoln Lumber Company
932 North 23rd Street
Lincoln, NE 68503

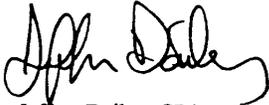
Dear Mr. Hamill,

I am writing as a follow up to our conversation of a few weeks ago in which I expressed an interest in negotiating a buy out of the lease dated March 13, 2003, a copy of which is attached hereto.

The payments remaining on the lease total \$413,500.00, consisting of eight payments of \$27,000.00 and five payments of \$39,500.00. I am prepared to offer you an immediate lump sum payment of \$315,000.00 as compensation for full termination of the lease and release of Textron and it's affiliates of any and all further obligations under the lease. If you were to invest this \$315,000.00 at an annual percentage rate of 4% for the same 13 years that remained on the lease, you would have approximately \$524,498.00 at the end of the time period. I believe this to be a very fair offer and solicit your acceptance at your earliest convenience.

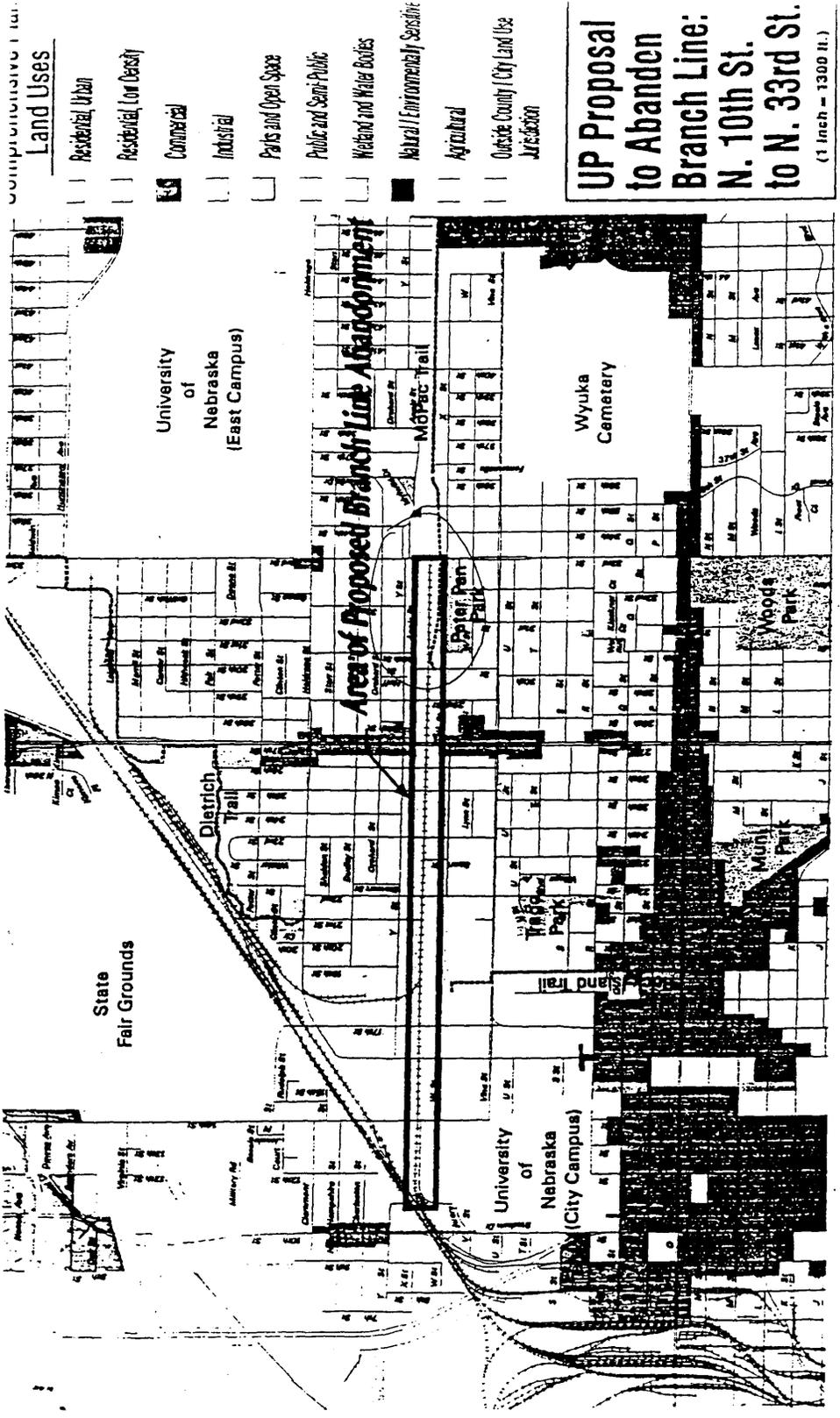
I may be reached at 704-504-6612 or by mail at 3800 Arco Corporate Drive, Charlotte, NC 28273.

Sincerely,



Jeffrey Dailey, CPA
Vice President Finance
Jacobsen division of Textron

Exhibit C



Note that the bike trail was moved away from the railroad line to go around Hyland Bros. Lumber Co. and Kamterter II, LLC. Note circled area.

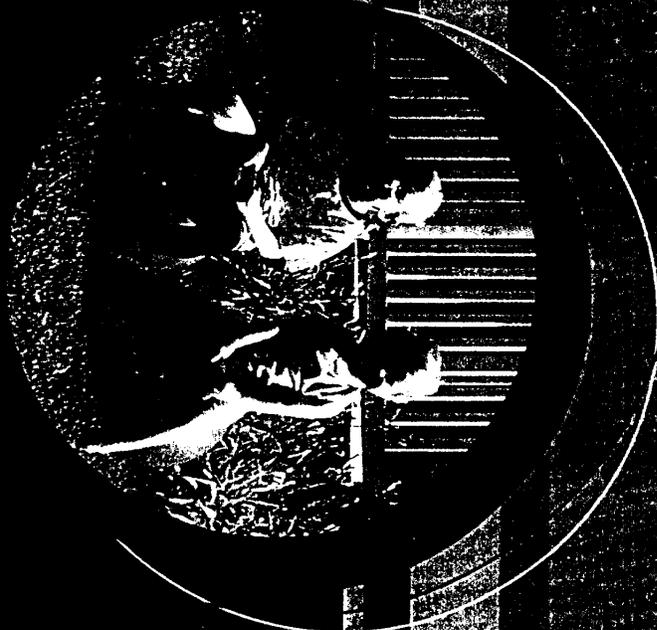
Location - 33rd & former UP tracks - near Peter Pan Park, abandoned

Exhibit D



Housing Authority

Annual Report



Lincoln



Nebraska's Capital City

Mayor Coleen J. Seng

June 11, 2003

Dear Friends:
As Mayor of Lincoln, I want to extend my congratulations to the Lincoln Housing Authority for another year of exemplary service to the community.

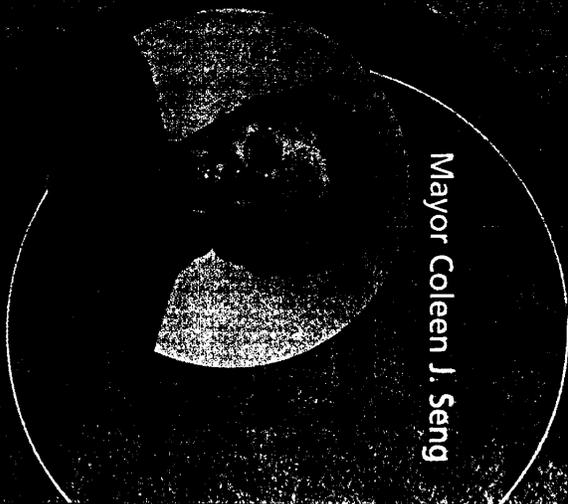
The Lincoln Housing Authority is a gem worthy of recognition in the Capital City. In the past year, the Housing Authority has built on its award-winning traditions through its commitment to renovating its properties using Capital Fund Program dollars available through the U.S. Department of Housing and Urban Development. The goal at all times is to provide safe, decent and affordable housing for Lincoln's residents.

But the Lincoln Housing Authority's mission goes beyond maintaining physical assets to encourage development of human resources. Housing isn't just about buildings; it is about people. Among the Authority's excellent programs this year are its self-sufficiency initiatives. Moving to Work demonstration project and affordable home ownership opportunities.

The quality of life in our community has been enriched by the Lincoln Housing Authority's 57 years of loyal dedication to making quality housing choices available to all the residents of the City. My thanks to the Lincoln Housing Authority and congratulations on another fine year!

Sincerely,

Coleen Seng
Mayor of Lincoln



Mayor Coleen J. Seng

COMBINED STATEMENT OF REVENUES AND EXPENSES

COMBINED BALANCE SHEET

MARCH 31, 2003

OPERATING REVENUES		
Rental Income	\$ 4,410,612	
HUD Section 8 Contributions	12,575,442	
LHA Subsidy Payments	184,257	
Management Income	394,514	
Program Income	11,550	
Other Income	195,498	
TOTAL OPERATING REVENUES	17,771,873	
OPERATING EXPENSES		
Administrative	3,259,864	
Tenant Services	405,293	
Utilities	493,611	
Ordinary Maintenance & Operation	2,103,999	
General Expense	320,164	
Housing Assistance Payments	12,100,506	
Non-Federal Assistance Payments	364,199	
Depreciation	1,492,979	
TOTAL EXPENSES	20,540,015	
NET OPERATING INCOME (LOSS)	(2,768,142)	
NON-OPERATING REVENUES (EXPENSES)		
HUD Operating Subsidy	283,339	
HUD Capital Grants	708,268	
Other Grants	76,834	
Interest Income	801,794	
Interest Expense	(1,787)	
Downpayment Repayments	10,059	
Downpayment Assistance	(115,765)	
Drug Elimination Grant Income	104,981	
Drug Elimination Grant Expenditures	(79,452)	
Casualty Loss Proceeds	35,149	
Gain On Real Property Dispositions	38,041	
TOTAL NON-OPERATING REVENUES (EXPENSES)	1,811,459	
NET OPERATING INCOME (LOSS) from above	(2,768,142)	
NET INCOME (LOSS)	\$ (956,683)	
RETAINED EARNINGS		
Beginning Balance	39,652,648	
Prior Period Adjustments	89	
Retained Earnings - Restated	39,385,305	
Retained Earnings - Ending Balance	10,644,806	
CONTRIBUTED CAPITAL		
Beginning Balance	(689,257)	
Depreciation Transferred from Retained Earnings	9,955,549	
CONTRIBUTED CAPITAL - ENDING BALANCE	\$ 49,340,854	

CURRENT ASSETS		
Cash & Cash Equivalents	\$ 305,198	
Investments	15,030,912	
Accounts Receivable	218,554	
Due from Other Governmental Units	224,932	
Accrued Interest Receivable	120,585	
Prepaid Items	43,394	
Inventory	159,824	
TOTAL CURRENT ASSETS	16,103,399	
RESTRICTED ASSETS		
Cash and Cash Equivalents	79,017	
Investments	3,987,979	
TOTAL RESTRICTED ASSETS	4,066,946	
PROPERTY PLANT & EQUIPMENT		
Fixed Assets (net of accumulated depreciation)	22,036,055	
TOTAL PROPERTY PLANT & EQUIPMENT	22,036,055	
NONCURRENT ASSETS		
Accounts Receivable	63,303	
Notes Receivable	8,257,479	
TOTAL NONCURRENT ASSETS	8,320,782	
TOTAL ASSETS	\$ 50,527,182	
CURRENT LIABILITIES		
Accounts Payable	\$ 159,293	
Compensated Absences Payable	22,402	
Accrued Payroll	167,300	
Due To Other Governmental Units	76,704	
Deferred Revenue	61,739	
TOTAL CURRENT LIABILITIES	487,438	
CURRENT LIABILITIES PAVABLE FROM RESTRICTED ASSETS		
Trust & Deposit Liabilities	485,416	
TOTAL CURRENT LIABILITIES PAVABLE FROM RESTRICTED ASSETS	485,416	
NONCURRENT LIABILITIES		
Compensated Absences Payable	213,473	
TOTAL NONCURRENT LIABILITIES	213,473	
TOTAL LIABILITIES		
TOTAL LIABILITIES	1,186,327	
EQUITY		
Contributed Capital	9,955,549	
Retained Earnings	3,574,250	
Reserve for Capital Activities	35,811,065	
Unreserved	49,240,855	
TOTAL EQUITY	98,571,859	
TOTAL LIABILITIES & EQUITY	\$ 50,527,182	

Note: The full audit report for the fiscal year ending March 31, 2003 is available to the public through Housing Authority.

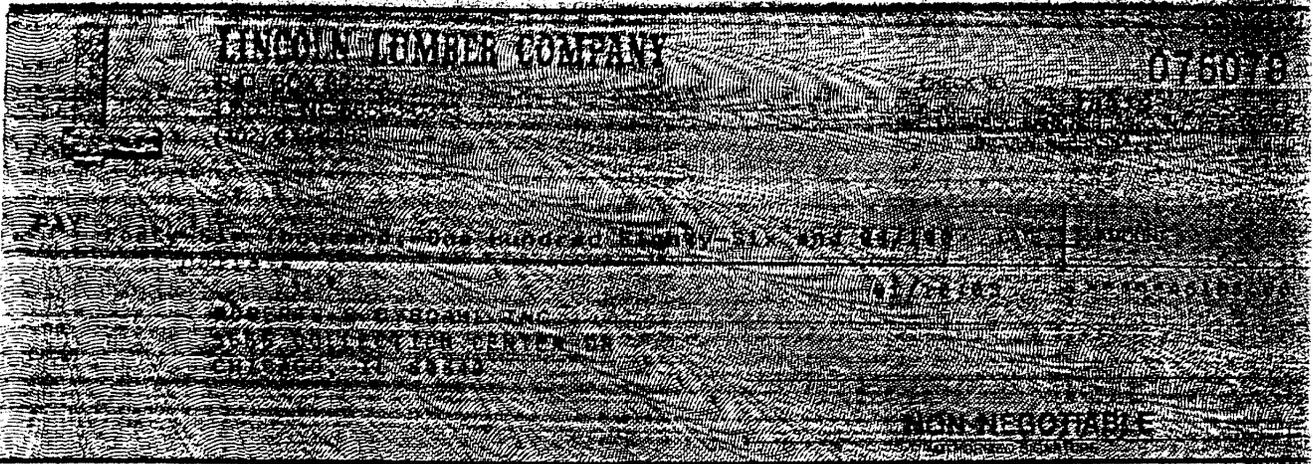
10/11/62	91289			
11/11/62	91764			
12/20/62	94825	44397.75	-414.32	10555.74
		48500.03	-414.32	48135.05

Exc. b. t E

LINCOLN LUMBER COMPANY

W.B. BOX 80379

LINCOLN, NEBRASKA



075079 41040000584 8180000713*

This is order acknowledgment, invoice &
check for 1 can see back page for
explanation of lengths



TRADE LIST 2007 7100

PO BOX 30373, LINCOLN, NE 68503

SOLD TO: LINCOLN LUMBER
932 N 23RD STREET
PO BOX 30373 STA A
LINCOLN NE 68503-0373

SHIP TO: LINCOLN LUMBER
932 N 23RD STREET
PO BOX 30373 STA A
LINCOLN NE 68503-0373

ORDER DATE	ORDER NO.	CUSTOMER ORDER NO.	SHIP DATE	ROUTE	
11/25/02	JHO1125 -24589	CAR-DALE	W/O 12/09/02	RAIL	
F.O.B.	FREIGHT RATE	CUSTOMER TERMS	MILL TERMS	BUYER	SELLER
		1 3/4 ADF		JHO	JH
QUANTITY	U.O.M.	DESCRIPTION	SELL PRICE		
		CALL MARY KAYE 1-515-283-7142 WHEN READY FOR SHIPMENT			
		73' RAIL CAR			
		UP DELIVERY			
17	UNT	I-JOIST (MSR FLANGE) 2-1/2" X 9-1/2" 99/24 132/28 66/32 99/36 99/40 66/44	99 pcs - 24' long, etc 132 pcs 28' long	.99	
11	UNT	I-JOIST (SS FLANGE) 2-1/2 X 11-7/8" 99/24 66/28 33/32 66/36 33/40 66/44	24' to 44' lengths	.98	
13	UNT	I-JOIST (MSR FLANGE) 2-1/2 X 11-7/8" 99/24 33/28 33/30 99/32 33/36 99/40 33/44	24' to 44' lengths JH JH JH	1.06	
ALL FREIGHT RATE INCREASES AND SURCHARGES TO CUSTOMERS ACCOUNT					
NOTIFICATION OF SHIPMENT MUST BE GIVEN TO ROBERTS & DYBDAHL INC IMMEDIATELY UPON SHIPMENT.					
All					

SUBJECT TO THE TERMS AND CONDITIONS SET FORTH ON BOTH THE FACE AND THE REVERSE SIDE HEREOF. This agreement is expressly limited to and made conditional upon the terms and conditions set forth herein. (both on the face and reverse side hereof), and any terms or conditions in addition to or different from those contained herein are hereby objected to and shall be of no effect. Any modifications to the terms, conditions or specifications contained herein can be effected only by a writing signed by an authorized representative of Roberts & Dybdahl Inc. CARRYING CHARGE in the amount of TWENTY (20%) PER CENT PER ANNUM or the maximum lawful rate, whichever is less, will be added to all past due accounts.

ANY GOVERNMENT TAX OR ADVANCE IN FREIGHT WILL BE FOR BUYER'S ACCOUNT

SALE SUBJECT TO WARNING ON REVERSE SIDE.

CUSTOMER COPY

Part of Exhibit F

D. H. read this when
Clinton Thomas gave it
to me I circled + drew
the arrow, I felt he
was for sure trying to
quickly get this by me.
He called me right after lunch
on a Friday + he was urgent,
real urgent.

There evidence related
to this + me being quality one
this shows was City on tie together

Part of Exhibit F
Clint Thomas wanted
D. H. to sign this. D. H.
did not sign this. It is
misleading my part (not
fair or honest) to lead the
City on, we spend their
money surveying for trail
and then later on refuse
them. I give Clint Thomas
credit he really put press
on for 2 to 3 hrs, Don Hamill

Note it has Lincoln
Lumber Company on it
note the name L & C on
this page twice. To
my knowledge it does
describe the land L & C
owns on P-1.

Don Hamill

CITY OF LINCOLN, NEBRASKA
RIGHT OF ENTRY AGREEMENT

This agreement, entered into this ____ day of _____, 20__ by and between the CITY OF LINCOLN, NEBRASKA, a municipal corporation, hereinafter called the "City", and LINCOLN LUMBER COMPANY, hereinafter called the "Owner", whether one or more.

WITNESSETH:

1. In consideration of the payment set out below, the *Owner* hereby grants unto the *City* the right to enter upon the following described real estate located in Lincoln, Lancaster County, Nebraska:

All that part of the Missouri Pacific Railroad Company, predecessor to Union Pacific Railroad Company main line track known as the Lincoln Branch situate in Section 24, Township 10 North, Range 6 East of the 6th P.M., Lincoln, Lancaster County, Nebraska, lying between the west line of 24th Street and a line lying 84.0 feet easterly of the westerly line of Lots 6 and 7 in the Antelope Addition to the City of Lincoln according to the official recorded plat thereof and as referred to in the Deed recorded March 30, 1886 in Book 27 Page 559 and Deed recorded July 23, 1886 in Book 30 Page 99 Official Records Lancaster County, Nebraska, said westerly line of said Lots 6 and 7 also being the easterly line of 18th Street.

Together with that portion of Lot 6 in the Antelope Addition to the City of Lincoln according to the official recorded plat thereof described as follows:

Commencing at the point of intersection of the southwest corner of Lot 5 in said Antelope Addition and the east line of 18th Street as shown on said plat; thence easterly along the south line of said Lot 5 a distance of 64 feet more or less to point being 15.0 feet southwesterly as measured concentric to the center line of track of an existing spur track, said point being the Point of Beginning. Thence continuing along the south line of said Lot 5 a distance of 20.0 feet more or less to a point 84.0 feet east of said east line of 18th Street; thence southerly parallel to as measured at right angles and 84.0 feet east of said east line of 18th Street a distance of 11.17 feet more or less to a point being 15.0 feet southwesterly as measured concentric to the center line of track of an existing spur track; thence northwesterly along a line being 15.0 feet southwesterly as measured concentric to the center line of track of an existing spur track to the Point of Beginning, containing an area of 5.59 acres, more or less.

said right of entry to permit surveying and other non-invasive examinations for **Husker Link Trail (Project #409375) and Storm Sewer (Project #701321)** the plans of which are incorporated herein as though fully set out.

2. The *Owner* agrees to permit the *City* and its contractors to go upon the described premises, and, to complete a survey of the property and other non-invasive examinations that do not involve any digging, boring, or change in grade upon the described premises.

3. The right of entry herein granted shall be in force and effect from and after its execution until the same is terminated by the *City* for a period not to exceed ninety days and all without any liability whatsoever to the *City* except as provided herein.

Exhibit G



LINCOLN LUMBER COMPANY

Lumber Division
932 No. 23rd Street
402/474-4488

P.O. Box 30373
Station A
Lincoln, Nebraska 68503

Millwork Division
2201 Dudley
402/435-5073

February 12, 2002

Roger Figard
Mike Merwick
Jim Visger
Tom Cajka

Dennis Bartels
Larry Worth
Brian Will
Marc Wullschleger

Byron Blum
Larry McNeil
Ray Hill

Gentlemen:

Lincoln Lumber as a whole is very concerned about meeting the needs requested of our company by our City over the long-term future of 25 to 30 years. We want to take care of Lincoln's needs the best we can. We have invested our time and our money to a noticeable extent.

Our Lincoln Lumber world really started to turn when UP filed for the abandonment of its track from 18th to 24th St. Next, we have invested our time and money into trying to improve this ground and to make long term plans related to this ground. We have been making plans related to this ground for some time. I verbally told the planning dept., building and safety dept. and public works that our long-term plans were to move the RR tracks to the south side of the land and then build several buildings on this land to house building material. All three departments told me that a sewer easement would not let Lincoln Lumber construct buildings over the top of this storm sewer easement.

The storm sewer project will prevent the above and be very costly to Lincoln Lumber as we won't be able to use the ground as planned. Further, Lincoln Lumber is very concerned about disruption to our daily business and the cost of this interference and disruptions.

Lincoln Lumber also wants to be out-front and tell all the departments about our future plans. We plan to apply to:

Rezoning lot 4, Block 1 Vine Street Addn.; rezoning Lots 5,6 & 7 in Tresters Addn. from R-6 to I-1.

Vacate the 23rd St. that abuts Lincoln Lumber property between the north edge of the RR right-of-way and the south edge of lot 4, Block 1 Vine Street Addn.

Vacate the alley between 23rd & 24th St. in Block 5 of Tresters Addn.

To rezone the R-6 zoning that is on railroad land south of A.K. Griffiths Addn. AA a result of meetings with codes dept., public works, planning and transportation, Lincoln Lumber is becoming prepared to file in the near future.

I realize as of this date the storm sewer route has not been determined. Maybe the above facts will help this determination. The decision is not up to Lincoln Lumber, but if it was the decision would be to route it some other than over Lincoln Lumber railroad land.

First in Quality—First in Service



LINCOLN LUMBER COMPANY

Lumber Division
932 No. 23rd Street
402/474-4488

P.O. Box 30373
Station A
Lincoln, Nebraska 68503

Millwork Division
2201 Dudley
402/435-5073

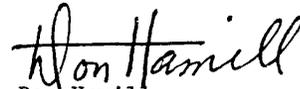
Page 2
February 12, 2002

Lincoln Lumber will want a total and complete release of liability for anything related to this storm sewer construction responsibility and any long-term responsibility. There is a lot of stuff buried in this RR ground and on the surface of this ground.

We plan to ask Mark Hunzeker to help Lincoln Lumber with this complicated overlapping situation as Mark will understand all of this far better than we understand this whole matter. We will do our best to be timely with all of this. We will continue to be upfront as we have expressed above.

The people in all the departments have been very nice, helpful, cooperative, reasonable and just plain decent in every way regarding the zoning, vacations, the storm sewer and just everything. We appreciate very much your being this way. If you have any questions, or if anything comes up that Lincoln Lumber should be informed of, please let us know.

Sincerely


Don Hamill
President & owner

First in Quality—First in Service

Tom McFarland said - Remember Bill Austin saying 300+ million
App wouldn't use condemnation even if he could against U.S.C. R.R. land

Note
Bill Austin City Attorney - Came to my office & said Mayor Johnson wanted me to come
acced. H. He brought money & said I don't need any money & won't take any money
Note
What does this mean? I don't know who related to the trail
My guess was that it was a short matter dropped

City seeks to fill railroad gaps in MoPac trail

BY AL J. LAUKAITIS
Lincoln Journal Star

The city of Lincoln is trying to find a way around a "gap" in the MoPac Trail so it can continue with its plans to bring the popular recreational trail to downtown.

The gap was created when Lincoln Lumber Co. recently acquired from the Union Pacific Railroad the right-of-way to an abandoned railroad corridor from 19th to 24th streets, said City Attorney Bill Austin.

That segment is part of the 1.33 miles abandoned by the federal Surface Transportation Board. In early December, the Washington, D.C.-based board set the price for the five-block-long segment at slightly more than \$300,000 after UP and Lincoln Lumber Co. could not reach an agreement on a price, he said.

The city wanted to acquire the segment to bring the MoPac Trail - which now ends near 33rd and Apple streets - to the University of Nebraska-Lincoln City Campus near 10th Street. It also would run through the Clinton and Malone neighborhoods.

However, Lincoln Lumber said it needed the five-block-long corridor next to its business so it can continue to receive freight service from the Omaha, Lincoln and Beatrice Railway Co., a short-line railway operation.

The Lincoln Lumber acquisition does not completely derail the city's plans to extend the MoPac Trail.

Jim Morgan, director of the Lincoln Parks and Recreation Department said his department is exploring several options to continue the MoPac to downtown, includ-

ing developing some type of trail adjacent the Lincoln Lumber property. He said some issues such as safety issues still need to be worked out but he is hopeful that an agreement can be reached. If the trail could not stay within the railroad corridor, the city could continue the trail along Vine Street located to the south to the University of Nebraska-Lincoln campus or north along Y Street to the UNL campus.

Austin said the city also may want to see what happens to the segment that Lincoln Lumber acquired. Under the terms of the agreement with the federal Surface Transportation Board, the company is obligated to keep the corridor open for rail service for two years, but it could be abandoned some time after that. There also is another option.

"The city does have power of condemnation," Austin said. "If it ultimately concluded that a route through that corridor was appropriate, it could seek to exercise that."

The MoPac Trail runs from 33rd Street to 84th Street, a few blocks south of O Street. It then becomes the MoPac East Trail, which goes just past Elmwood in Cass County. Two other segments would need to become part of the trail to bring it to downtown. One is from 24th to 33rd streets, which the city is definitely interested in acquiring, Morgan said. The other is from 10th to 19th street, which UP donated to the University of Nebraska-Lincoln.

"It's definitely to the university's advantage to work the trail into its system," said Rich Rodenburg, chairman of the City's Pedestrian/Bicycle Committee. "This trail will be a major thoroughfare for students traveling between East Campus and City Campus."

In Paper
12/30/97
D.H.

12/30/97
What is this
two year Business
This 2 yrs new
to me ???
my family looking
during this 75 to 100 ft
D.H.
Note Mr. Austin
opinion,

Interested in
acquiring ?

Bill Austin - Didn't use Condemnation against Highlands
been since 1989. D.H.

Exhibit I



P.O. BOX 177

511 E. 16th BELLEVUE, NEBRASKA 68005

(402) 292-6080

FAX 402-292-6081

12/19/03

DATE:

12/19/03

TIME:

TO:

Lincoln Lumber Co

FROM:

Bob McMill

ATTN:

Mr. Don Demill

THIS TRANSMITTAL CONSISTS OF 2 PAGES INCLUDING COVER SHEET
TRANSMITTAL MESSAGE

If you have any questions please
call

Bob

THANK YOU

SPECIALIZING IN RAILROAD TRACK WORK AND MAINTENANCE

B. McMill
12/19/03

TO WHOM IT MAY CONCERN

Dec. 19, 2003

My name is Gerald Ogren and I live in Lincoln, Ne. I am now retired, but prior to my retirement, I was General Manager of Cushman, a division of Textron. This is a large company on the NY stock exchange. In this capacity I managed 6-700 employees. I had a number of dealings with the bike trail people over the years. I have experience and personal quality knowledge of this situation. I feel I am qualified to give you this recommendation. I recommend that you don't allow this trail to be pushed thru the rail corridor. It will hurt LLC railroad operation and cause danger to people using the trail.

Cushman, a division of Textron, was always opposed to the bike trail running thru their plant. Cushman had buildings on both sides of the track and the proposed bike trail would run thru the middle of their plant.

One of the things we did to try to solve the problem was to try to convince the bike people to go down 'Y' St. instead of thru the middle of businesses. For, example, I had a meeting with Bill Wittmer of ABC Electric and we agreed that when we put in new sidewalks along 'Y', we would make them double wide so they could be used for a bike path. And, both ABC and Cushman's followed thru with this agreement and several walks were installed double wide.

Cushman had forklifts going across the railroad right-of-way. We always wanted to do the safest thing. It was our company policy to do everything we could to avoid any accidents. There were several situations in the area that we felt made a bike trail inadvisable.

There is no lighting in this area. The area around 19th St. seems to be a hangout for transients. They camp out in this area. There is also no traffic in this area. If a young girl, for example, got in trouble, there would be no one around to either help out or deter any sort of criminal activity.

On the other hand, 'Y' Street is well lit, There is normal traffic plus a number of residences, all of which provides protection for either a biker or pedestrian.

Another concern is the speed of the traffic on 22nd St. There are a number of businesses on 22nd St. and the traffic moves fast. Also there is a hump in the middle of 22nd St. where the UP railroad installed a crossing some time ago and left a significant rise here. I have seen cars flying over the track. And City busses cannot travel this street because they will hit bottom. And these cars cannot see bikers until the very last minute because of the buildings set so close to the street. And likewise the bikers cannot see oncoming cars.

The bikers will need to use the crossing at 27th St. because this is where the light is. Crossing 27th without a light is very difficult. The crossing is at 27th & 'Y'. It seems to me that once they are on 'Y', it would be prudent to stay on 'Y'.

Exhibit J

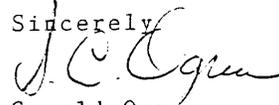
Over the years and months, I have talked to a number of our employees. These are people who work at all levels and many of them have occasion to see our outside operations. They all feel that this situation is too dangerous for both users of the trail and any employees who are outside near the bike path. One example given to me is that with a huge load on a forklift, the operator can't see at all going forward and therefore they have to back up. This is hard enough to do safely without outside interference.

It my opinion, putting the bike trail thru the middle of Lincoln Lumber, thru the old Cushman plant and on west is asking for trouble. I recommend staying on sidewalks that parallel city streets such as 'Y' St.

I am not opposed to bike trails, nor are the other businessmen I have met with. However, they are opposed to trails going thru the middle of any business. It is extremely dangerous to any trail user to go thru an area where heavy machinery operates. And it is disruptive to the business involved.

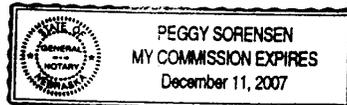
In summary, it is my opinion that putting the proposed bike path thru Lincoln Lumber will destroy their railroad operation and ultimately destroy their business. The railroad LLC owns and operates keeps them competitive. Trucking will not keep them competitive with Lowes, Home Depot and other large competitors

Sincerely



Gerald Ogren
General Manager
Cushmans 1985 to 1996

Sworn and Subscribed to before me this 17 day of December, 2003.



Notary Public

P.O. Box 1343
Sioux City, Iowa 51102
PH (712) 277-4001
FX (712) 277-3316



700 SE Dalbey Drive
Ankeny, Iowa 50021
PH (515) 964-7777
FX (515) 964-7789

December 19, 2003

To Whom It May Concern:

I have been asked to draw on my years of knowledge and experience related to railroads of a realistically safe and operational railroad system and apply it to Lincoln Lumber Company. LLC is currently operating mainline and a spur track to the north of the mainline between 22nd and 23rd Streets. The City of Lincoln and the trails people wish to subtract 20' off by way of eminent domain from the north side of LLC's right of way between 22nd and 23rd.

In my opinion, after being at LLC very recently and reviewing the facts of the situation and knowing my own railroad operation, cutting to the quick is wrong. I recommend you do not release your Federal authority and let the City of Lincoln use its authority to eminent domain 20' from LLC. It will impair and impede their railroad operations and create a very dangerous situation for the trail users.

I wish each of you could look at this railroad operation like I have and it would be so clear, so plain, and so obvious that there should be no bike trail at this location. LLC needs all the unloading, moving cars, moving away from rail cars and for temporary storage of inventory.

I reviewed their inventory which comes in by rail. They had lumber and beams that are from 8' to 48' long. There is 50' from the center of the main line to the north property line. On center beam cars for example, unloading a rail car from the north side you need to subtract approximately 6' for the forklift to approach the rail cars then lift the package higher than the rail car, swing it around maybe halfway between the railroad car and property line and then go east or west with the forklift loaded. I assure you this load will be going over the top of the bike trail. Then let's address snow, ice and rain and these packages can slip and slide and perhaps just drop off the forklift onto the trail. This same situation can happen with uneven ground, rocks, etc. which causes the load to shift. In spite of all precautions taken, accidents happen. Someone could be hurt or even killed by having a beam dropped on them.

I understand they do have an alternate route to either the north or south of this track by going around this 1 block area. Even though LLC doesn't get a railcar in every day, they are running forklifts every single day in this area.

The map that I have been shown shows the proposed trail looping down at approximately Whittier St. and getting far too close to the mainline. They also propose the trail to go right over the top of the railroad spur north of the mainline. LLC does not under any circumstances allow the public near their material handling operations.

I believe I can be fair in this situation. Yes, our company supplies building material to Lincoln Lumber. I don't live in Lincoln and I can look at this matter objectively. Please do not allow the City to take this land and run a bike trail thru this very dangerous situation

Thanks for reading my concerns and Merry Christmas to you all.

Sincerely,



William Engeler
President
Hawkeye Distribution, Inc.





ROBERTS & DYBDAHL INC.

December 16, 2003

Mr. Don Hamill
Lincoln Lumber Co.
932 No. 23rd St.
Lincoln, Nebraska 68503

Dear Don,

Both Ron Hein and I enjoyed visiting with you on 12/16/2003. As requested, I have set forth below my opinion regarding your safety concerns as to a bike trail skirting along the north side of your rail spur. My opinion is based on what you showed us during our visit, my personal experience in building materials handling and my knowledge of your operations derived from the long term business relationship that my employer has had with your company.

First of all Don, as you know, my employer, Roberts & Dybdahl Inc., also unloads both flat cars and box cars at our distribution centers throughout the Midwest just as you do at Lincoln Lumber. We know how important it is to minimize pedestrian traffic around this type of operation due to the heavy equipment and materials involved. We also realize how critical it is to have enough space to operate a forklift, either loaded or unloaded, in a safe manner. There is 50 feet between the center of your unloading track and your current property line, which in my opinion is an already tight area due to the type of products you currently handle.

If we are all to be good corporate citizens, it is my opinion that the safety of employees and the public must always come before anything else. Don, you told me that the city wants to use 20 feet of your property where you unload flat cars to build a bike trail. In my opinion, this could be a recipe for disaster as it would put the public, who uses this trail not only for biking but also walking, roller skating and so on, literally right under the longer materials which your forklifts must unload from the flat cars. As pointed out above, your site currently has approximately 50 feet in which to move materials from the rail cars to a storage area away from the cars. If you are handling long materials such as I- Joists or long length lumber which can be up to 48 feet in length, the loss of 20 feet from your unloading area would mean that 18-20 feet of this material would have to be



ROBERTS & DYBDAHL INC.

elevated over a fence and carried above the heads of the public who may be using the bike trail at that time. This also puts your forklift operators at a greater risk of a tip over accident since the center of gravity of the forklift is so high it causes the forklift to become unstable under this type of operating condition. I do forklift operator training as a part of my job, and one of the most basic things we teach our operators is to travel with the forks loaded or unloaded no more than 12 inches off the ground in order to maintain stability and stay away from tip over situations. Tip overs can occur if a forklift is operated with the forks elevated, especially if the terrain is not perfectly level such as is the case with your graveled unloading area.

You also mentioned that you were considering purchasing the old Desmond Lumber building to the west of your unloading area in order to increase your business. You said you would install another switch on your rail spur in order to reactivate an existing spur which runs next to the building that you're considering purchasing. It is my opinion that if the city takes 20 feet of your existing property, there would not be adequate space to hook your existing spur to this spur due to the fact that the bike trail actually swings further south at about the point of the future track extension. I will send you the name of the track design people I used for our new track construction in Omaha.

I have worked at R&D for 30 plus years both in operations and in management with the last 10 years spent as Director of Compliance handling our safety program and laying out new distribution centers. In my opinion, if there is another route for the bike trail, I would hope that the City would use it instead of pushing more pedestrians towards your already busy area. I say this first of all from a safety standpoint, and secondly from an operations standpoint. Heavy, noisy, limited vision equipment and pedestrians don't mix well, especially today when everyone is in such a hurry to get things done and to get somewhere. I am all for providing safe areas for people using other transportation than cars to travel, however, I believe that this bike trail along your property would be a mistake, and that at some point and time, there could be a devastating accident.

Sincerely,

Michael D. Hecker

209 Haymarket Square / P.O. Box 80226
808 "P" Street • Lincoln, NE 68501
Office: (402) 477-5434
Fax (402) 441-0606
giims@radiks.net

Group & Individual Insurance Marketing Services, Inc.

THOMAS H. "TOMMY" TAYLOR, JR.
Agent

December 20, 2003

To whom it may concern:

The use of eminent domain serves best only when it seeks to achieve its intended objective by preserving rather than jeopardizing the livelihood, life enhancement and safety of its citizenry

Livelihood: as a citizen, business owner and consumer of goods and services in our great city Lincoln, I, among many, have witnessed the resulting impact of competition from Big Box national corporations and severe economic down turns that have eliminated or severely crippled businesses like the Lincoln Lumber company. In the face of ruthless competition and hard economic times the Lincoln Lumber company, under the leadership of Don and Bev Hamill continues to thrive. If, brutal competition and hard times could not put Don and Bev out of business it is incredible to believe that this great city would follow through on a plan of eminent domain that could close for ever the doors Lincoln Lumber without carefully considering alternate plans that could achieve the intended objective and at the same time allow Lincoln Lumber to remain in business.

Life enhancement: as a member of the Great Plain Trails Network I really appreciate and support the increase of trails. Non motorized transportation reduces air pollution, promotes good health through exercise, increases safety, reduced transportation cost. Life enhancing activities should do just that, not cause a reduction in livelihood.

Safety: I have taken care of the Lincoln Lumber co. insurance for over ten years. Therefore, I am very familiar with the employees and the ownership. I have always known Don & Bev Hamill to be extremely concerned about the safety and welfare of all people. They think, talk, plan and execute safety. Their concern for safety extends to all of the employees and also to the general public. They are especially concerned for the safety of the adults as well as children that walk on 23rd street between Y and W. I have been told that there have been no injuries or fatalities at the junction of 23rd street and the railroad tracks a fact that Lincoln Lumber is proud of. Lincoln Lumber is careful to watch for children and adults. Any change in the Lincoln Lumber area would not only serve to interrupt their ability to do business but would unnecessarily hazard the safety of the public and Lincoln Lumber employees. Safety is the issue.

All things considered, I strongly encourage the trail be moved to an alternate route. The portion of the trail that goes through the heart of Lincoln Lumber should be move out of the right of way.

There are several advantages to moving the trail off the railroad right of way. First, increase safety of trail users and lumber employees. Second, limit the liability for the City and for Lincoln Lumber Co.

Tommy Taylor



Business Banking
MAC NB032-035
1248 "O" Street
Lincoln, NE 68508

Wells Fargo Bank Nebraska, N.A.

December 23, 2003

To: Vernon A. Williams, Secretary
The Surface Transportation Board
Case Control Unit, Suite 713
1925 K St. NW
Washington, D.C. 20423-0001

RE: Finance Docket # 34425
City of Lincoln
Petition for Declaratory Order

I have been asked to write a letter regarding Don and Bev Hamill personally and Lincoln Lumber Company, a Corporation they own.

Don and Bev Hamill do not have any personal debt and haven't borrowed for many years. Lincoln Lumber Company doesn't have any bank debt with us and there are not any bank security agreements or mortgages on real estate. All assets are free & clear. They have had excellent liquidity and cash in the past and have excellent liquidity and cash now.

It was mentioned that you might like verification that they have \$250,000 or more in cash available. Yes, they do and I would project they will continue to have more than \$250,000 in cash available in the future.

I understand that Don and Bev Hamill and Lincoln Lumber Company have shared with you their plans to expand the current railroad operation. They want to do the following:

- (1) 24th & 19th – Continue & complete all repairs to main line. Total new relay where needed.
- (2) Next they would like to put in a spur East of 22nd, south red brick blding. Go eastward with it to main line. This is between 22nd & 23rd Street.
- (3) Will put a spur in West of 22nd and on South side of main line.
- (4) Put a spur line to west of approx. 20th.

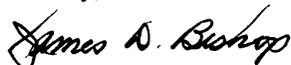
Purpose is to take care of the aggressive growth patterns with Lincoln Lumber Company's railroad operation. They project to more than double their railroad car shipments in the next 4 years. They want to get their rail car shipments up to 275 rail cars minimum per year by the year 2019. They are planning a big railroad celebration in year 2020 when they ship in a minimum of 300 cars.

Lincoln Lumber Company is very interested in their railroad operation and want to expand it for the future. Given what I know about the Hamills and Lincoln Lumber Company, I am confident they will make it happen. They have always managed their business well in the past and continue to do so.

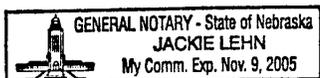
In summary, the Hamills and Lincoln Lumber Company are serious about their long term growth for the next 20 to 25 years. They have the liquidity and capacity to fund the railroad expansion plans they are talking about and their expansion plans are not subject to any loan approval.

If you would like to visit further about this letter or have any additional questions, please do not hesitate to contact me at 402-434-6111.

Sincerely,



James D. Bishop
Senior Vice President
Wells Fargo Bank, N.A.



Notarized By:



12-24-2003



State of Nebraska
Public Service Commission

300 THE ATRIUM, 1200 N STREET
LINCOLN 68508

FRANK E. LANDIS
COMMISSIONER

December 24, 2003

PHONE
(402) 471-3101

Mr. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street
Washington D.C. 20423-001

Dear Mr. Williams:

RE: Finance Docket Number 34425

I want to express my full support of Lincoln Lumber Company's opposition to City of Lincoln's request that the Surface Transportation Board relinquish authority over railroad land owned by the Lincoln Lumber Company between 24th Street and 19th Street in Lincoln, Nebraska.

I respectfully request that the SBT not, under any conditions, allow the City of Lincoln, Nebraska, to use eminent domain powers to acquire 20 feet or any portion of this land. The 100-foot wide strip of right-of-way between 24th Street to 19th Street must remain under your Board's control.

A number of good reliable alternatives for trail paths exist. There is no reason to use land now actively used by the Lincoln Lumber Company.

The Lincoln Lumber Company has been an excellent corporate citizen in the City of Lincoln for many years. It will continue to benefit the City in the future – unless the business is jeopardized by the hostile takeover of the property it owns. I would appreciate any assistance you are able to provide in protecting land that is vital to Lincoln Lumber Company's future.

Sincerely,

A handwritten signature in black ink that reads "Frank Landis".

Frank Landis
Commissioner, First District



Indiana Lumbermens Mutual Insurance Company • ILM
National Building Material Assurance Company • NBMA
Lone Star National Insurance Company • LSN

Mr. Vernon Williams
Surface Transportation Board
1925 K Street
Washington, D.C. 20423

Re: Finance Docket #34425

I want to give my full support for our insured Lincoln Lumber Company in there efforts to stop a bicycle trail from running along there lumber yard property between 19th & 24th streets in Lincoln, Nebraska.

From a liability standpoint we are concerned about the heavy traffic that we encounter on a day to day basis with the loading and unloading of trucks with building materials. Our concern is that someone will be injured by possibly one of our employees during the loading process and we will become liable for these type of actions.

I would assume that the people wanting to put in the trail would have other alternatives for a new trail and we would hope they would explore those options so we can avoid possible liabilty concerns.

Sincerely,

Dean Pohlman
Agency Manager



1012 north 25th street
p.o. box 82466
lincoln, nebraska 68501
telephone (402) 435-3514
fax (402) 435-6091

December 24, 2003

Mr. Vernon Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street NW
Washington, D.C. 20423-0001

RE: Finance Docket #34425 - City of Lincoln, Petition for
Declaratory Order

Dear Mr. Williams

ABC Electric would like to go on record as supporting Lincoln Lumber in their opposition to the declaratory order. I am very familiar with Lincoln Lumber and I know how very extensively they use their railroad.

I have visited with Mr. Hamill and know he has plans to enlarge the railroad area so that they can bring in more cars at a time. To do this, he will need and plans to add extensive spur trackage.

I have watched Lincoln Lumber unload the cars and I am amazed at how efficiently they use the limited space they have. I cannot imagine them losing 20' off of their right-of-way area and still being able to make efficient use of their railroad. Some of the lumber is so long that moving from rail car to temporary storage stretches their limits.

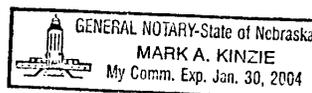
I understand there are alternate paths for the bike trail which do not add any great distance to the commute and would certainly be safer than trying to move thru a busy railroad terminal area.

Thank you for your consideration of this matter, and I urge you to decide in Lincoln Lumber's favor.

Sincerely

Bill Whittier
President

Subscribed and sworn to before me this 24th day of December, 2003



Mark A. Kinzie
Notary Public

EXHIBIT K

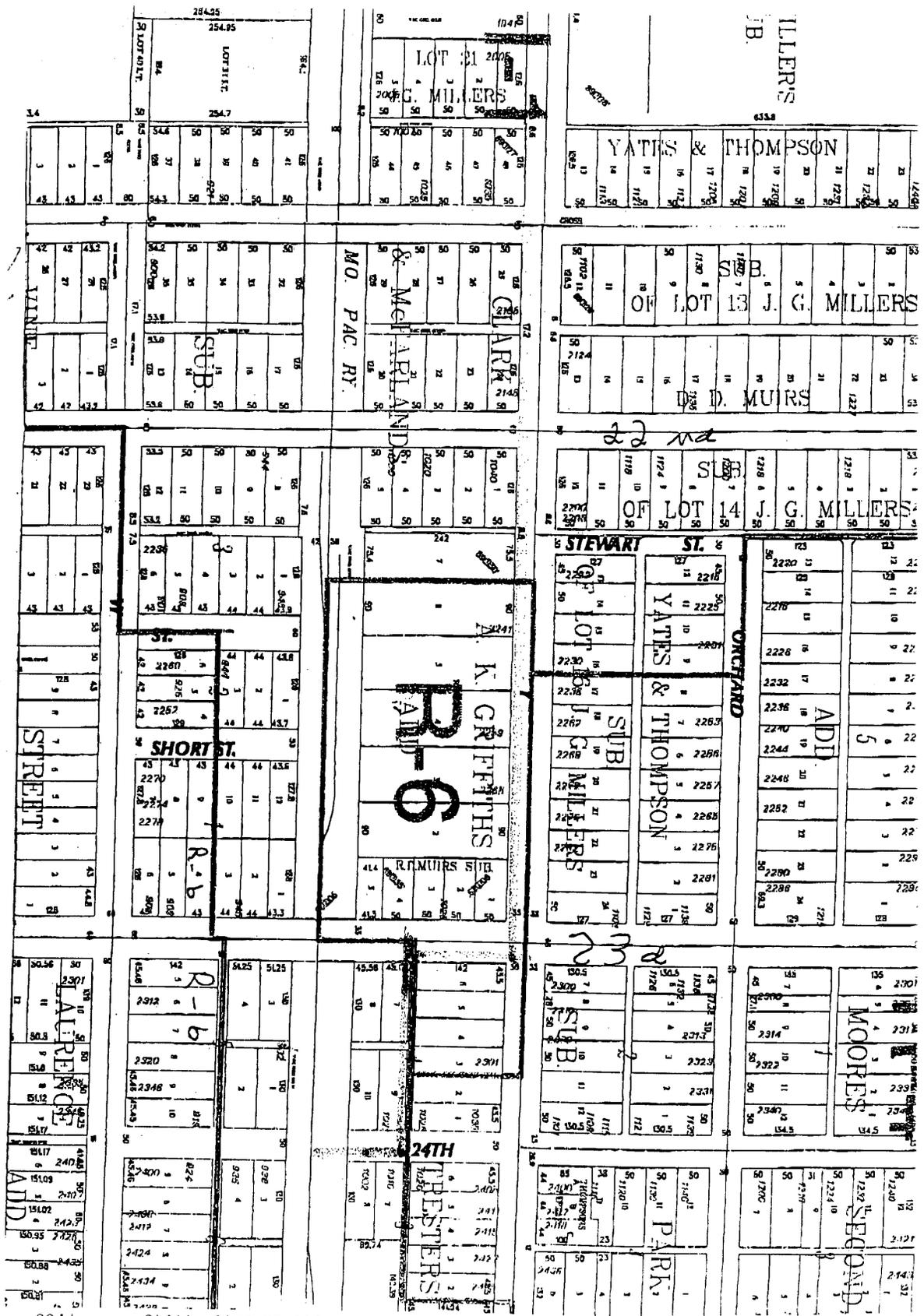
Option #1

From 24th & RR, go north to alley. Go west thru the alley to 23rd St. On the east side of 23rd St., go to the corner of 23rd & 'Y'. Go west on "y".

Option #2

From 24th & RR, go north to the alley. Go west thru the alley to 23rd St. On 23rd St., go south to the edge of Lincoln Housing property. Go west thru the parking lot of Lincoln Housing and thru the vacant lot west of the housing and go to 'Y' St.

Option 1



Option 2

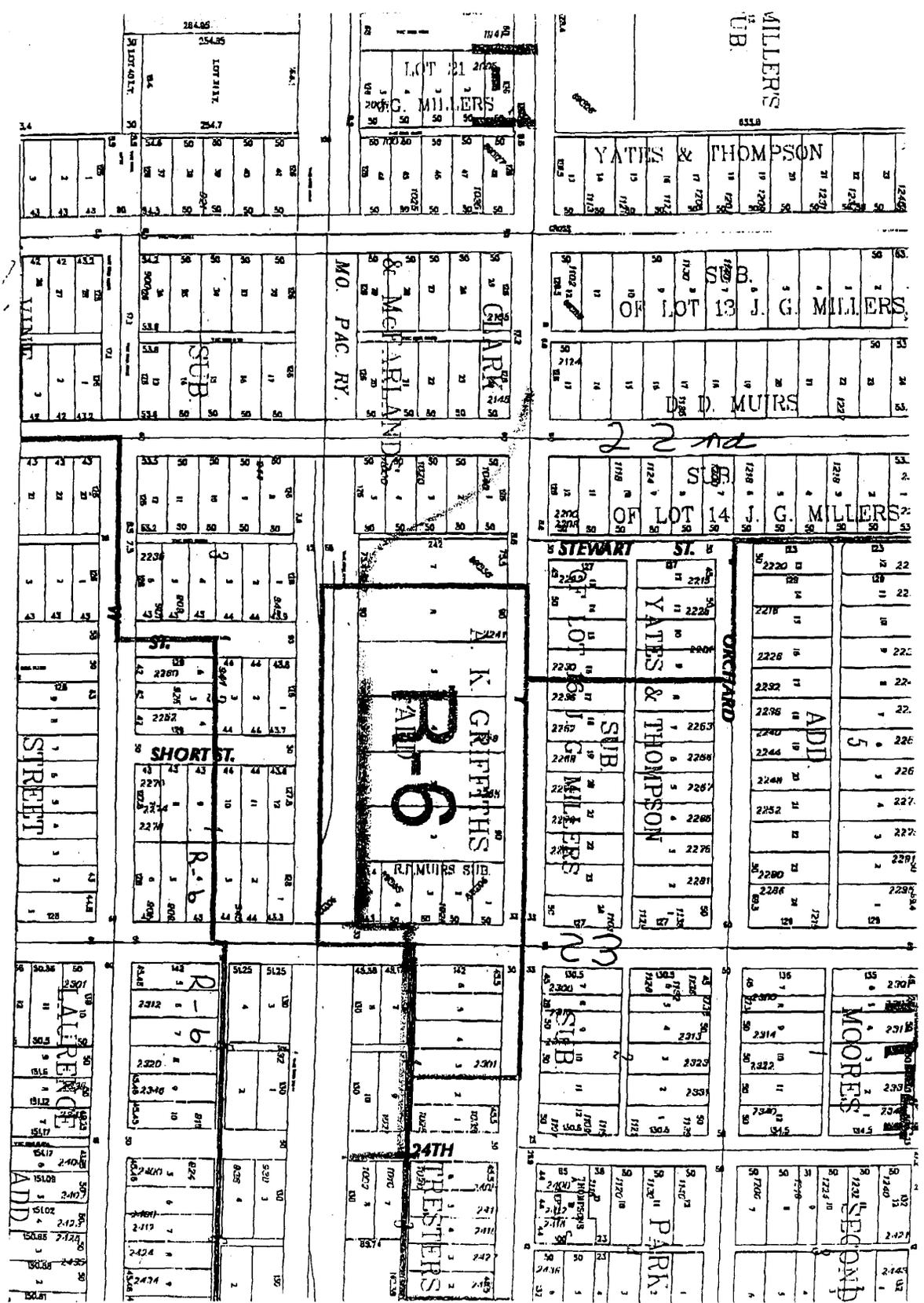


Exhibit L

LINCOLN LUMBER COMPANY

Lumber Division
932 No. 23rd Street
402-474-4488

P.O. Box 30373
Station A
Lincoln, Nebraska 68503

Millwork Division
2201 Dudley
402-435-5073

December 12, 2003

Mr. Armon Nielsen
Secretary OL&B Railroad
1815 "Y" St.
Lincoln, Ne. 68503

Dear Armon

Please find enclosed a railroad map illustrating the spur that is north of LLC mainline between 22nd & 23rd Streets.

Per our most current sources from the center of LLC mainline to the north edge of LLC property line is exactly 50'. For a number of years it has been LLC intent to have a much needed operational spur track that is available for actual LLC railroad useage as soon as possible directly north of the LLC mainline between 22nd and 23rd Streets.

With only 50' and the LLC spur track between the mainline and the north property line the railroad useage will be maxed out completely. Specifically we unload material lengths from 60' to 8'. The contingent liability, and unknown situations for our carrier, OL&B, LLC employees, and the general public safety concern me immensely. ~~We are going to try real hard to increase the quantity of railroad cars we unload between 22nd & 23rd Streets. We expect 2004 to be a good year for Lincoln Lumber.~~

~~When LLC, OL&B and the public already has high liability and high risk concerns with keeping everyone safe and all the equipment on the mainline I don't believe it is a good business or public decision to subtract off a rail 20' and cut an already tight 50' down to 30'~~ Then we must consider all the factors. This area has to accomodate additional railroad cars going over the mainline and both the north spur and south spur tracks with railroad car use between 22nd and 23rd Streets.

Summary: perhaps we can picture a forklift at north side of a rail car on mainline and at north side of rail car on north spur track, the lift up, back up, and turn around area is going to be tight, real tight.

First in Quality—First in Service

LINCOLN LUMBER COMPANY



Lumber Division
932 No. 23rd Street
402/474-4488

P.O. Box 30373
Station A
Lincoln, Nebraska 68503

Millwork Division
2201 Dudley
402/435-5073

Page 2
December 12, 2003

I personally have a number of times over a number of years unloaded railroad cars from the mainline on the north side and from the spur on the north side of the mainline. From actual experience I know we are dealing with a very tight clearance and it is not easy to do now. Subtracting 20' off the north side is like subtracting 20' from the east side of Tom Osborne football field.

Armond, I appreciate your calling me on 12/9/03 and telling me that you and Robert Miller, CFO of OL&B, had been thoroughly reviewing the neighborhood and trying to help with the location of the bike trail consideration to be located in LLC right-of-way. I appreciate your efforts and recommendation to run the trail down lightly used 24th St. to lightly used 'W' and then west to 22nd St. From 23rd & 'W' street westward all the land on the south side is owned by UNL. From 22nd St. the trail can go back to the RR right-of-way and then west as we have already agreed. We have already agreed to trail over some approx. 4 to 4½ blocks of LLC property.

I want to come down in a few days for 5 to 6 minutes and get acquainted with Mr. Miller. I really would also like to get to know Mr. James Abel.

I wish you all a very Merry Christmas.

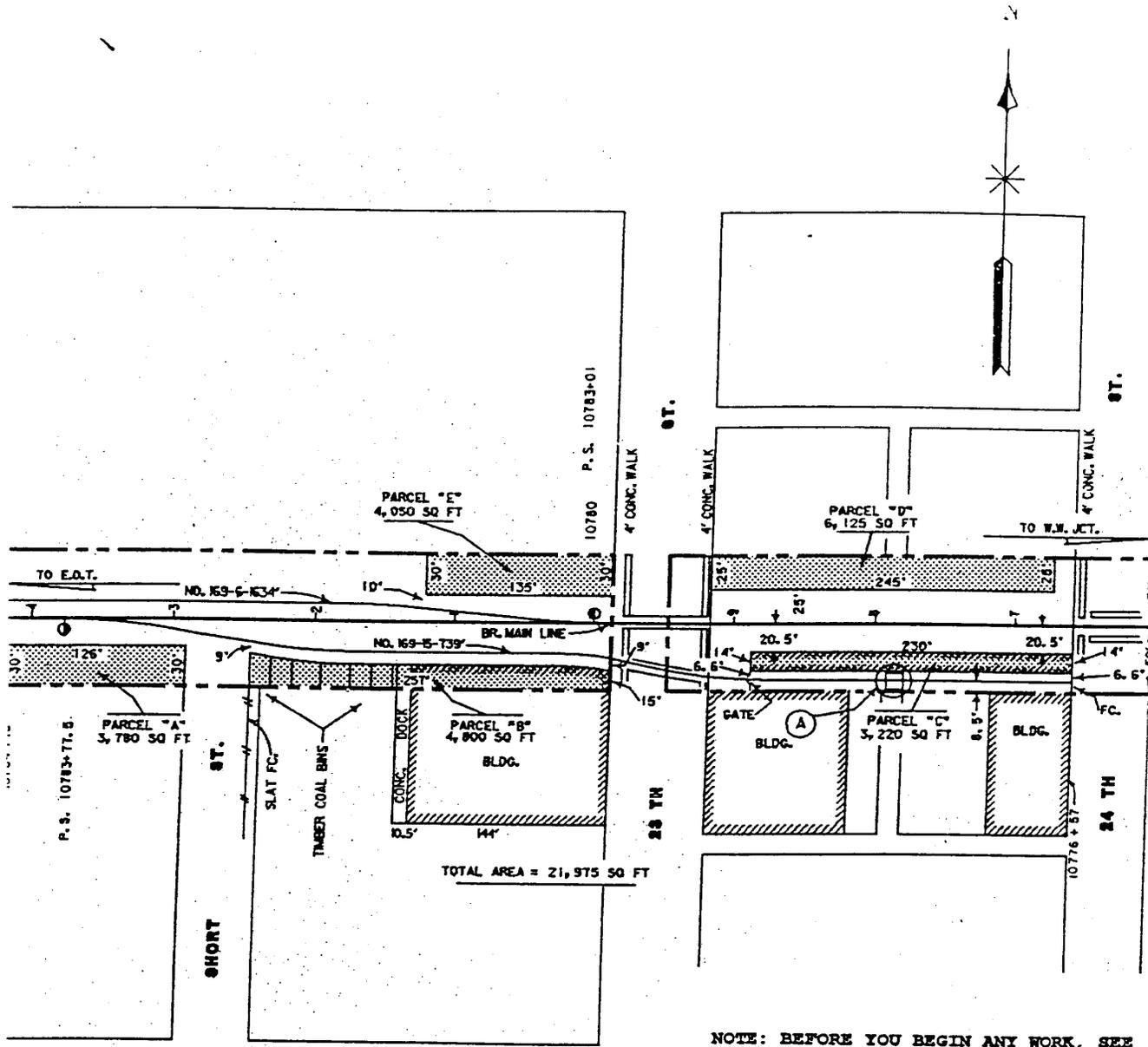
Sincerely

Don Hamill

President & owner

cc Tom McFarland, Attorney
To OL&B RR file

First in Quality—First in Service



NOTE: BEFORE YOU BEGIN ANY WORK, SEE AGREEMENT FOR FIBER OPTIC PROVISIONS.

NOTE: BEFORE YOU BEGIN ANY WORK, SEE AGREEMENT FOR FIBER OPTIC PROVISION.

EXHIBIT "A"
 MISSOURI PACIFIC RAILROAD COMPANY
 Lincoln, Lancaster County, Nebraska
 M.P. 495.1 - Weeping Water Branch

Lease to LINCOLN LUMBER COMPANY

SCALE: 1" = 100'

OFFICE OF CONTRACTS & REAL ESTATE
 OMAHA, NE Date: September 26, 1995
 Folder: 1126-28

* L E G E N D *

Lease Area Shown Dot Screen
 (RR)R/W Outlined

Option #1

1. From 24th & RR go north on east side of street to alley
2. Go west down the alley to 23rd St.
3. Go north on east side of street to "Y" St. At 23 & "Y" there is a stop sign protecting "Y" St. There are no openings (driveways) to this point.
4. Go west on south side of street to 22nd St. There are 5 openings between 23rd & 22nd on the south side. On the SW corner is a Lincoln Housing Complex.
5. On west side of 22nd St. go south to RR and continue west along RR.
6. There is a stop sign on 22nd & Y, protecting "Y" St. Since all stop signs are protecting "Y", the bikers would not be required to stop on this route. We feel this is the best option.

Option # 2

1. From 24th & RR go north on the east side of the street to the alley. Go west down the alley to the west side of 23rd St.
2. Go south to the south edge of the Housing Complex property.
3. Go west across the south edge of the Housing Property to the point where the line angles south across RR property.
4. This would involve moving parking for the Complex to vacant land to the west of the Complex. This would also involve a lease along the south edge of land belonging to B&J Partnership.

Exhibit '0'

CONTROL # C2550 CASCADE EMPIRE CORP
 Inv Date Invoice No. Description Invoice Amt Discount Amt Net Amount
 06/05/03 66955 30382.35 -245.82 30136.53
 30382.35 -245.82 30136.53

06/16/03 76089

LINCOLN LUMBER COMPANY P.O. BOX 30373 LINCOLN, NEBRASKA 68503-0373

LINCOLN LUMBER COMPANY
 P.O. BOX 30373
 Lincoln, NE 68503-0373
 (402) 474-4488

PAY THIRTY THOUSAND AND ONE HUNDRED TWENTY DOLLARS
 TO THE ORDER OF
 CASCADE EMPIRE CORP
 BOX 847258
 DALLAS TX 75281-7258

NONNEGOTIABLE

076089

⑆076089⑆ ⑆104000058⑆ ⑆180000713⑆

12/11/03

Attn: Accounts Payable: PLEASE PAY FROM THIS FAXED DOCUMENT

Cascade Empire

P.O. Box 2770 Portland, Oregon 97208
1-800-767-8371 532770

**ORIGINAL
INVOICE**

Please identify remittance with

INVOICE DATE: 6/05/03
OUR ORDER NO: 66955
FAXED 999999

INVOICE TO

LINCOLN LUMBER COMPANY
P O BOX 30373
LINCOLN NE 68503-0373

SHIP TO

CASCADE EMPIRE CORP
LINCOLN NE

ROUTING	CAR NO. AOK 21531	YOUR NO. 1654
TERMS 1% 5 DAYS AAC ADF NET 6TH DAY		
THEREAFTER INTEREST WILL BE BILLED AT THE CURRENT RATE		

SHIPPED 5/29/03
PLEASE ADVISE CASCADE EMPIRE OF TALLY DISCREPANCIES PROMPTLY
S-DRY SPF - WESTERN #2 & BTR
S4S-ALS DET EE G/S

2 X 4 - 1764/8 1764/10 2058/12 2058/14 112,112 ' 271.00 30,382.35
3822/16 882/18 294/20 *20' dimension lumber*

***** TOTAL FOOTAGE 112,112

This is a mixed Railroad car 8', 10', 12', 14', 16', 18' & 20' lengths.

INVOICE TOTAL 30,382.35

LESS DISCOUNT IF PAID WITHIN TERMS 245.82

30,136.53

 * PLEASE REMIT TO: CASCADE *
 * PO BOX 847260 *
 * DALLAS, TX 75284-7260 *

THANK YOU..16-RODEN/SAND*

Will MK 6/05/03

VENDOR	<i>C2530</i>
DEPT.	<i>1000</i>
DATE DUE	<i>6-16</i>
ACCT. NO	<i>003</i>
G/L ACCT.	<i>1501</i>

NATIONWIDE DISTRIBUTORS OF FOREST PRODUCTS

PLEASE verify all freight deductions with original receipted freight bills.

COPY HOLD #

2550

CASCADE EMPIRE CORP

75623

Date Invoice No Description

Invoice Amt Discount Amt Total Amount

1/25/03

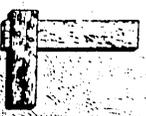
65435

32288.26	-268.53	32029.73
32288.26	-268.53	32029.73

LINCOLN LUMBER COMPANY

P.O. BOX 30373

LINCOLN, NEBRASKA 68503-0373



LINCOLN LUMBER COMPANY

P.O. BOX 30373
LINCOLN, NE 68503-0373
(402) 474-4465

PAY Thirty-two thousand, twenty-nine and 71/100 dollars

TO THE ORDER OF
CASCADE EMPIRE CORP
BOX 841260
DALLAS, TX 75284-7260

⑆075623⑆ ⑆104000058⑆ ⑆180000713⑆

NONNEGOTIABLE

Attn: Accounts Payable: PLEASE PAY FROM THIS FAXED DOCUMENT

Cascade Empire

P.O. Box 2770 Portland, Oregon 97208
1-800-767-8371 532770

ORIGINAL INVOICE

Please identify remittance with

INVOICE DATE 3/25/03 OUR ORDER NO. 65435

999999

INVOICE TO

LINCOLN LUMBER COMPANY
P O BOX 30373
LINCOLN NE 68503-0373

SHIP TO

LINCOLN LUMBER
LINCOLN NE

ROUTING	CAR NO SRY 873061	YOUR NO. 1645
TERMS 1 1/2 5 DAYS AAC ADF NET 6TH DAY THEREAFTER INTEREST WILL BE BILLED AT THE CURRENT RATE		

SHIPPED 3/25/03
PLEASE ADVISE CASCADE EMPIRE OF TALLY DISCREPANCIES PROMPTLY
S-DRY SPF - WESTERN #2 & BTR
S4S EE DET G/S

2 X 4 - 1470/8 1764/10 2058/12 2646/14 112,896 ' 286.00 32,288.26
3528/16 882/18 294/20 20'

***** TOTAL FOOTAGE 112,896

*This is a mixed Railroad Car's 2x4's in 8', 10', 12', 14', 16', 18' & 20' lengths
Railroad Car*

INVOICE TOTAL 32,288.26

LESS DISCOUNT IF PAID WITHIN TERMS 258.53

32,029.73

 * PLEASE REMIT TO: CASCADE *
 * PO BOX 847260 *
 * DALLAS, TX 75284-7260 *

AK

THANK YOU..16-RODEN/SAND*

3/25/03

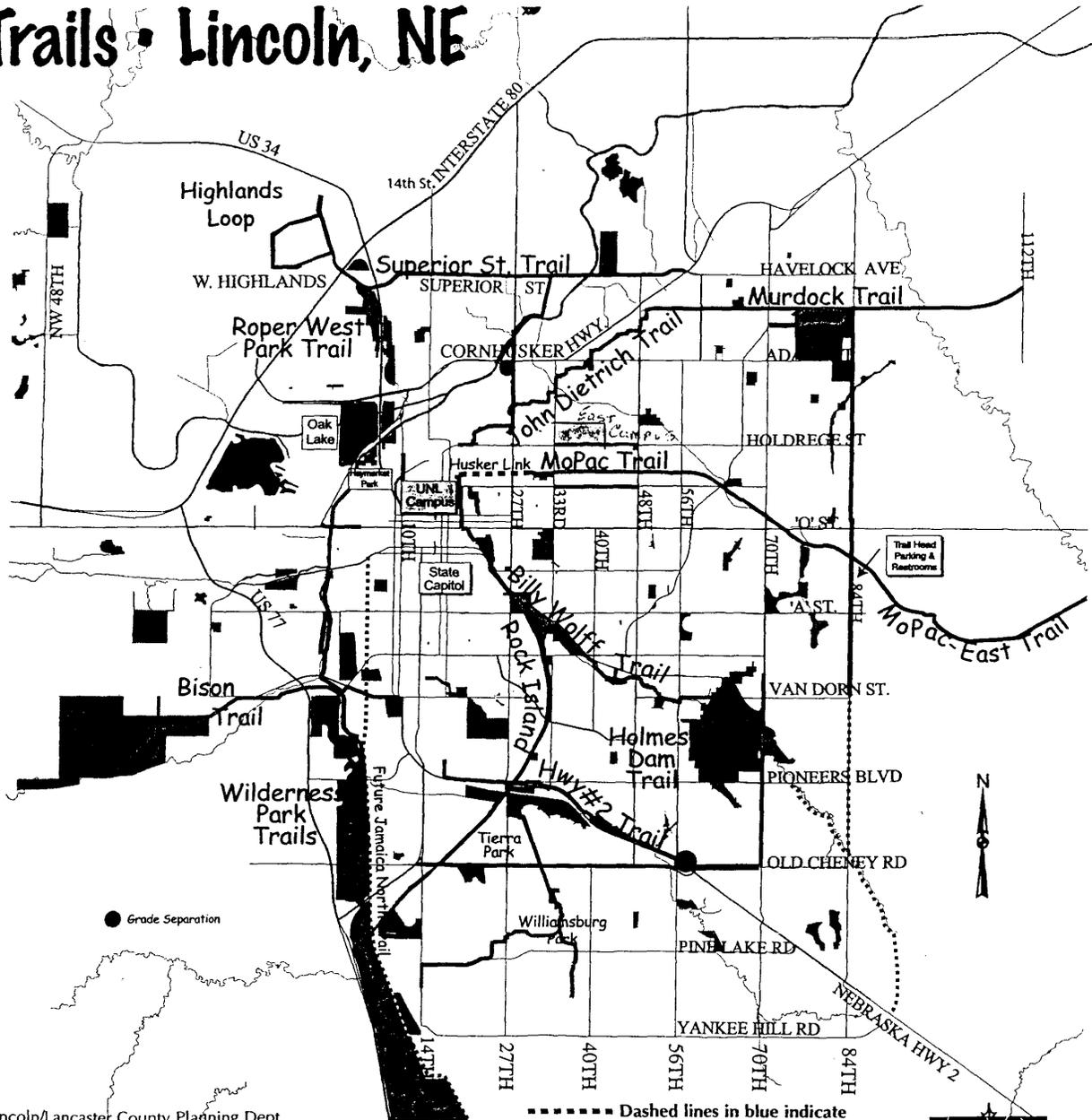
DLM

VENDOR *C2530*
 DEBIT *1000*
 DATE *5 D*
 ASC *3-03*
 GR *11501*

NATIONWIDE DISTRIBUTORS OF FOREST PRODUCTS

PLEASE verify all freight deductions with original receipted freight bills.

Trails Lincoln, NE



© Lincoln/Lancaster County Planning Dept.

Marked in blue are the locations of the two campuses of UNL. Note the trail does not go to East Campus, It misses the campus by about 4 blocks. For that 4 block distance the bikers would need to go by City Street. This is farther on City street than going around Lincoln Lumber on city streets.



Great Plains
Trails Network

COPY



Commissioners:
Jan Gauger, Chair
William D. Blue, Vice Chair
Francene Blythe
Merrill C. Thompson
Orville Jones, III

Executive Director
Larry C. Potrats

P.O. Box 5327 • 5700 R Street • Lincoln, NE 68505

EXHIBIT 5

October 2, 2002

Mr. Lynn Johnson, Director
Parks and Recreation Department
City of Lincoln
2740 "A" Street
Lincoln, Nebraska 68502

Re: Husker Recreational Trail

Dear Mr. Johnson:

Terry Genrich of your staff has contacted us about the City of Lincoln's desire to acquire right-of-way along the southern boundary of our Northwood Terrace Apartment complex, located at North 23rd and "Y" Streets, for a city recreational trail. We are very supportive of a recreation trail which would be a wonderful amenity for our tenants, however, we are not in a position to dedicate any land along our south property line for a trail right-of-way.

Land along the Northwood Terrace south property line is used for tenant parking; the parking lot consists of two rows of 30 spaces each and a center aisle. Our staff architect has examined the site plans for Northwood Terrace and determined that if the minimum city requirements for parking lot design are met, there is an excess of only roughly four feet along the south property line. (We have not confirmed this number with an actual site survey.) It is our understanding that you are seeking a right-of-way of 8 to 16 feet. We cannot afford to give up an entire row of 30 parking spaces which represents one-third of the spaces available at our Northwood Terrace Apartments. Parking is at a premium at Northwood Terrace. Currently, the complex has 78 apartments plus a daycare facility, and only 96 parking spaces. If Northwood Terrace were being built today, the City of Lincoln would require us to build 1.75 parking spaces per apartment or 136.5 spaces plus additional parking for the daycare. Northwood is already far short of the ideal number of spaces.

*Terry Genrich
and
Lynn Johnson
Why did
you increase
to 20' wide
27.77
A.H.*

Mr. Genrich suggested that we explore the possibility of either leasing or purchasing the Textron/Cushman parking lot to the west of Northwood Terrace, which was recently put up for sale, as replacement parking for the 30 spaces we would lose if we granted the city a

(TDD) Telecommunication Device for the Deaf: (402) 467-3454

Telephone: (402) 467-2371

Fax: (402) 467-5900

Email: Info@L-Housing.com

Mr. Lynn Johnson
October 2, 2002
Page 2

trail right-of-way. We have long been interested in that property for supplemental parking and have contacted the listing agent. However, it appears that the asking price of \$250,000 greatly exceeds what the Housing Authority can reasonably afford to pay for a surface parking lot. An additional issue is that the parking spaces on the Textron/Cushman property would be very inconvenient to most of our tenants. Entrances to the far west building adjacent to the Textron/Cushman property are on the east side of the building; tenants would be forced to walk around the building to get to the parking lot. The center and far east buildings are even farther away (see enclosed site plan). Although we plan to continue to seek potential parking from the Textron/Cushman property, we would consider that parking to be supplemental parking only and will not be an acceptable substitute for the loss of 30 spaces along our south parking lot.

We regret that we are unable to be of greater assistance in assembling the trail right-of-way for this very worthwhile project. Please feel free to contact Beverly Fleming of our staff at 434-2610 if you have any questions or wish to further discuss the issue.

Sincerely,

Larry G. Potratz
Larry G. Potratz
Executive Director

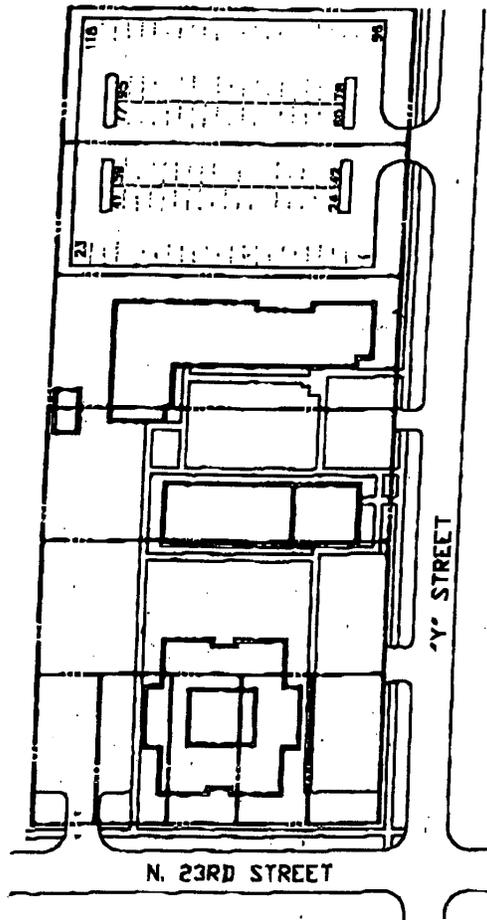
11/20/02 Mayor appoints his board. Board reports to the Mayor. In this case Honorable Mayor Coleen J. Ding as of 12/24/03

Take out apt. & walk through middle on lower level.

c: Terry Genrich
Enclosure

These young people doing the walking the average age probably below 30 yrs. old. D.H.

See Housing Authority of the City of Lincoln Balance Sheet March 31, 2001
Total assets \$ 50,919,446.00
Cash & Equivalents \$ 1,523,163
Investments (listed as current assets) \$ 20,177,938
Shows net profit of \$ 3,403,817
New Cash is \$ 2,701,101
Total Equity of \$ 48,670,381
3/31/2001



C1	SITE VICINITY PLAN	
SCALE: 1" = 100'-0"	NORTHWOOD TERRACE	

02

Storm sewer bond up for vote

602 4/6/2001

City council OKs bond

Asking homeowners for less than a dollar a year, the city council has approved a bond issue to fund a storm sewer program. The council will make a preliminary decision on the issue at its next meeting.

First, the council will vote on whether to issue the bond. If approved, the council will then vote on the amount of the bond. The council will also vote on whether to issue the bond in 2004 or 2005.

The council will also vote on whether to issue the bond in 2004 or 2005. The council will also vote on whether to issue the bond in 2004 or 2005.

Issue/3B

Coliforms-based ambulance company faces pay-for-performance services in Lincoln.

The council has agreed to award the ambulance contract to the company that offers the lowest bid. The council will also vote on whether to issue the bond in 2004 or 2005.

The council will also vote on whether to issue the bond in 2004 or 2005. The council will also vote on whether to issue the bond in 2004 or 2005.

annually in property tax.

But by starting bond payments in 2008, the city could avoid increasing the amount taxpayers pay annually for bond issues. City Finance Director Don Hertz said.

The city has \$74 million in outstanding bond payments. For each thing as libraries, law enforcement, and storm sewer. And the amount of a \$100,000 bond will pay \$100 this year. The bond amount is \$100,000. The amount of a \$100,000 bond will pay \$100 this year. The bond amount is \$100,000.

In the next year, the city would need to pay \$100 million. The city would need to pay \$100 million. The city would need to pay \$100 million.

Construction of the storm sewer project could begin in late 2001 with completion in 2002 or 2003.

Ironically, the council discussed earlier Monday the future of city infrastructure, including the idea of a storm-water utility — instead of town's water. The city would assess a citywide storm water fee, using the money for new construction, upgrades or replacement of storm sewers.

Council members aren't near the point of saying "yes" or "no" to the idea, but Jackson questioned whether decisions on storm water improvements should be taken away from voters.

So did council Vice Chairman Jeff Dornbier.

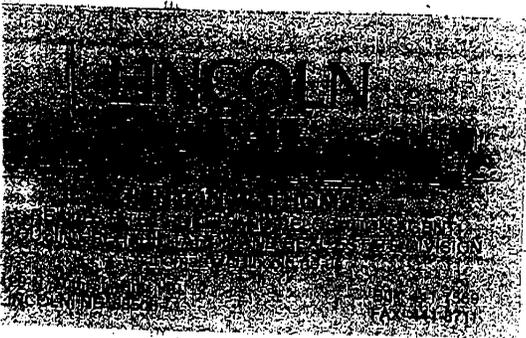
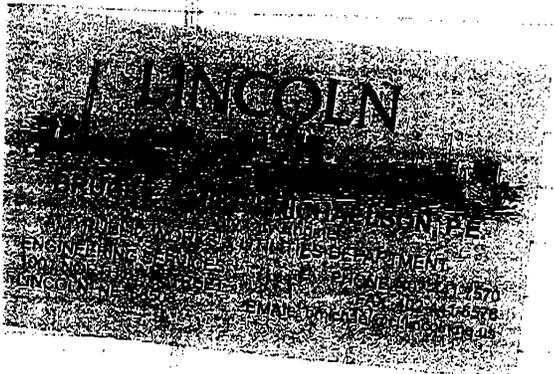
"I would normally give up some of the community's oversight," he said.

Jack L. Johnson at 413-7223 or jlj@journal.com

Jim Vesger - (position Mike retired from)

Al Imig - 441-8400 - Director

↑ Talk to him 8/30/2000





LINCOLN LUMBER COMPANY

Lumber Division
932 No. 23rd Street
402/474-4488

P.O. Box 30373
Station A
Lincoln, Nebraska 68503

Millwork Division
2201 Dudley
402/435-5073

Sept. 17, 2002

Terry

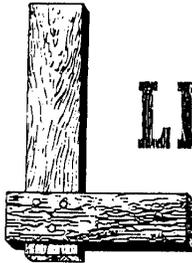
As a follow-up to your answer to my letter, I would like the following:

1. The site plan needs to include the property to the west which is now available for sale and zoned correctly for a parking lot for this housing complex.
2. I want some information on the age breakdown of the residents of the building. Do they have any handicapped people. I see the activity over there all the time and it looks to me like the people are basically young and as such would have no trouble walking an extra 60 feet or so.
3. If they wish an entrance to the west, one can be made that is affordable, feasible and convenient. Bring a set of blueprints for the very west building so we can discuss this option.

Sincerely


Don Hamill

First in Quality—First in Service



LINCOLN LUMBER COMPANY

Lumber Division
932 No. 23rd Street
402/474-4488

P.O. Box 30373
Station A
Lincoln, Nebraska 68503

Millwork Division
2201 Dudley
402/435-5073

September 17, 2002

Terry Genrich
Parks & Recreation
2740 A St.
Lincoln, Ne. 68502

Dear Terry

When you come to the meeting on Wednesday, Sept. 25, would you bring me a site plan of the city's housing at 23rd & Y. I would like this to include measurements of the entire area, the building measurements and how it sets on this lot and the parking lot dimensions.

Who is the director of the housing and have you talked to him about this bike trail.

Sincerely

Don Hamill
President & owner

First in Quality—First in Service

Lincoln



Nebraska's Capital City

November 15, 2000

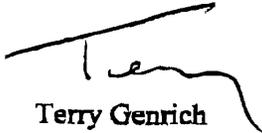
Mr. Don Hamill
Lincoln Lumber
932 No. 23
Lincoln, NE 68503

Dear Don:

You had requested a list of individuals that walked the railroad corridor yesterday. They were the Mayor, his assistant – Ann Harrell, Elaine Hammer with the Trails and GPTN, Nancy Loftus and Gale Breed with GPTN, John Benson and Eileen Bergt with the University, Tom Price, Wynn Hjermsstad – Urban Development, Lynn Johnson – Director of Parks and Recreation and myself.

I'll be calling you soon to set up a time when Lynn Johnson and I can come to your office and talk with you about Husker Link. I do hope to have some answers regarding the drainage issues at that time as well.

Thanks!



Terry Genrich
441-7939



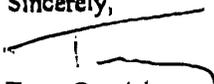
September 17, 2002

Don Hamill
Lincoln Lumber Company
P. O. Box 30373
Lincoln, NE 68503

Dear Don:

I will bring with me next week, a site plan of the Lincoln Housing Authority property at 23rd and Y. The director is Beverly Fleming. I talked with her early on in this process about the location of the trail and moving her parking lot to the west of the complex. That is when she stated that there is no entrance into their buildings from the west and as a result, didn't want to move their parking lot. We can talk about it more next week.

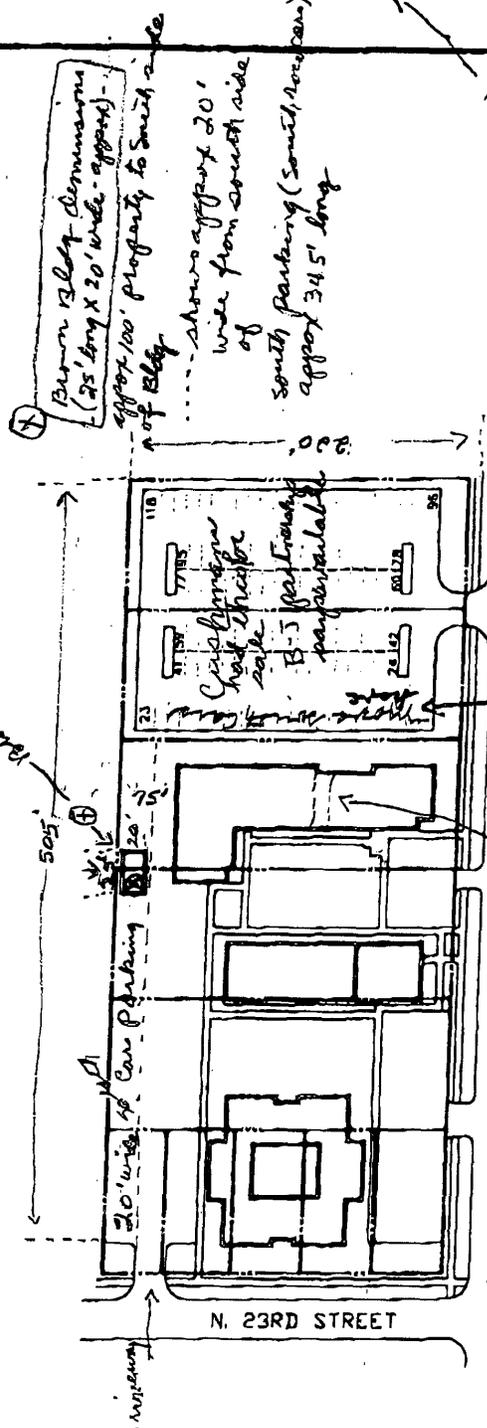
Sincerely,


Terry Genrich
Natural Resources and Greenways Manager

*D. H. says take
out one apt. & walk
three lower levels.
This not big thing
to take one apt out
or walk around south
of Bldg. D. H.*

ALTERNATIVE TRAIL # 2
 Path thru Lincoln Housing Authority Parking Lot.

← west
 Trail 20'
 Walk path 35'
 Path 15' x 20'
 from 100' property to south side
 shows approx 20' wide from south side of south parking (south access) approx 345' long



Lincoln Housing Authority
 Note Name
 D.H.

1. take out one apt walk from west proposed parking lot into complex
2. follow proposed path from west parking lot to go east to enter complex on south side.

By Don Hamill
 & LLC

C1 SITE VICINITY PLAN
 SCALE: 1" = 100'-0" NORTHWOOD TERRACE

North →

*Taking pictures of
business cards*

0-16 01



OLSSON ASSOCIATES
CONSULTING ENGINEERS

Aaron Buettner, E.I.T.

1111 Lincoln Mall • P.O. Box 84608 • Lincoln, Nebraska 68501-4808
(402) 474-6311, Ext. 234 • FAX (402) 474-5160 • E-Mail: abuettner@oaconsulting.com

**Sinclair
Hille
Architects**

program
consultants
for

**Nebraska
Department
of Roads
Transportation
Enhancement
Program**

M E M O R A N D U M

TO: Don Hamill
FROM: John Williams
DATE: 8/17/01
RE: Business Card

Attached is my business card per your request. I was with Terry Genrich on August 16, 2001 reviewing the City's application for a trail project.

Terry Genrich & these 2 guys were taking pictures of railroad to send in with application for federal money. From the 2.3 rd street island talks to them.

8/17

Program Consultants'
Mailing Address:

encl.

700 Q Street
Lincoln, Nebraska
68508

Program Consultants'
Telephone Numbers:

*Sinclair Hille
Architects
402/476-7331
Fax: 476-8341*

*Olsson Associates
402/474-6311
Fax: 474-5160*

*Greathouse Associates
402/475-7712
Fax: 475-7714*

John G. Williams
landscape architect

**SINCLAIR
hille
architects**

www.sinclairhille.com
williams@sinclairhille.com

T: 402.476.7331
F: 402.476.8341

700 Q Street
Lincoln, NE 68508



Engineers
Land Surveyors
Planners

Douglas J. Stevenson, L.S.

TAGGE ENGINEERING CONSULTANTS
112 W. 11th Avenue • Holdrege, NE 68949
(308) 985-4173
(308) 985-8164 (FAX)

↑ surveyor



Engineers
Land Surveyors
Planners

Douglas J. Stevenson, L.S.

TAGGE ENGINEERING CONSULTANTS
112 W. 11th Avenue • Holdrege, NE 68949
(308) 985-4173
(308) 985-8164 (FAX)

surveying for EA Engineering

*This is the man said storm
survey is complete*

D.J.

EXHIBIT T



LINCOLN LUMBER COMPANY

Lumber Division
932 No. 23rd Street
402/474-4488

P.O. Box 30373
Station A
Lincoln, Nebraska 68503

Millwork Division
2201 Dudley
402/435-5073

December 26, 2003

Mr. Vernon Williams, Secretary
Surface Transportation Board
1925 K Street, NW
Washington, D.C. 20423-0001

RE: Fiance Docker #34425, City of Lincoln, Petition
for Declaratory Order

Dear Mr. Williams

In my reponse I noted that I was having a meeting with Mr. Robert Miller, CFO of OL&B, and Mr. Arman Nielsen, Secretary of OL&B today. We met at 3:45 today, Dec. 26, 2003.

It was the concensus between the 3 of us was that the City had plenty of ground in at least 2 places. They liked our option of going thru the Lincoln Housing Property at 23rd & Y, and adding the parking they lost to the bike trail to the ground west of the building. We walked around this ground, and they did not think the walking distance was that great. This is City owned property.

The other option is to go south at 24th St. to 'W', west on 'W' Street. From the corner of 24th and 'W', all of the land on the south is owned by the City of the UNL. Lincoln Housing has an apartment building at 24th to 23rd & 'W'. From 23rd & 'W' going west, the land is all owned by UNL. The area is spacious with plenty of room for a trail.

None of the 3 people liked the proposed trail passing off the front of LL building at 23rd & 'W'. It destroys use of the building.

Decision and conclusion by all 3 people. The City should use another alternate routes that are really, available.

Sincerely

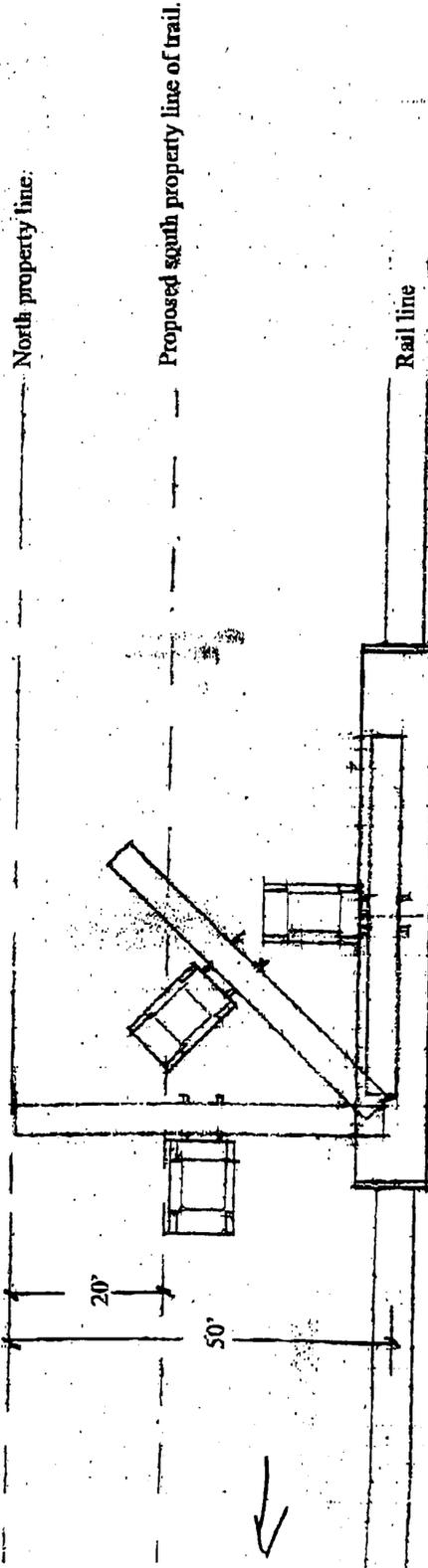
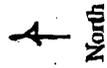
Don Hamill
Don Hamill

First in Quality—First in Service

Whittier
12/11/03
12/19/03

Lincoln Lumber
Rail Terminal between 22nd & 23rd Street
Lincoln, Nebraska

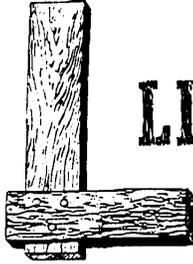
scale 1"=20'



12/19/03

*Drawing shown on site Whittier st.
between 22nd & 23rd rd at
on north side main line
Drawn by Mr. Richard Robins
1721 Evergreen
Lincoln, Neb. 68510-4137
ph. 402-480-5750*

This drawing shows unloading 48' material by forklift from a rail flatcar. As the drawing shows it is not possible to unload the material without the north 20'.



LINCOLN LUMBER COMPANY

Lumber Division
932 No. 23rd Street
402/474-4488

P.O. Box 30373
Station A
Lincoln, Nebraska 68503

Millwork Division
2201 Dudley
402/435-5073

12/19/03

Exhibit U
page 2 of 2

1. Mr. Richard Robinson
1221 Evergreen
Lincoln, Neb. 68510-4137

phon - 402-488-5650

2. Mr. Robinson has over 30 yrs. experience doing Engineering drawings, architectural drawings and designing and building High Dollar Custom Homes. Mr. Robinson has designed and drawn blue prints for many Homes \$500,000 and above over last 30 yrs. plus.

3. Mr. Robinson present forklift exhibits were taken (pictures)

4. Drawing exhibits actual unloading, lifting, clearances, backing around as illustrated.

5. forklift runs over proposed south property line of trail.

6. 48' extends over top of R.R. ~~car~~ Car

7. When forklift does stop directly + too close to proposed south trail line.

8. This further proof this trail on Lbc property not a good + fair decision. Not fair at all, Unfair. Not safe, liability, Not practical, Common sense shows while looking at this drawing Lbc Car't unload R.R. Car efficiently, effectively, or profitably.

First In Quality—First In Service

INDEX OF PICTURES

- C1-21 Repair on main line and spur track between 22nd and 23rd.
- D1-16 Temporary storage of I-joists and other materials
- D17-24 Railroad tracks in winter of 1997
- D25-56 Railroad tracks 1998 showing ditches along side of tracks with open ditches, water standing. This is how the area looked before LLC purchased it.
- H1-4 Lincoln lumber after LLC purchase showing improvement in railroad track area. Open ditches are gone.
- H-5-10 Streets and paths around LLC showing suitable bike path alternatives.
- K1-24 Photos following alternate route #1 which goes around the blocks between 24th to 22nd. See detail of this route.
- ¹³
F1-20 Examples of how bike paths are handled in other parts of the City.
- P1-20 Area of proposed bike trail with the path outlined on the ground. Forklift demonstrating unloading of I-Joists and how they fit into the proposed bike path. You can see that the material overhangs the bike path, making for a very risky situation.
- B1-24 Shows the bike trail laid out on the ground following prints from Terry Genrich.
- M1-36 Shows the terminal area along ROW between 22nd & 23rd.
- A1-16 View of buildings and inventory at the 23rd St. and millwork locations
- July 1997 Lincoln Lumber By pass. Pictures of the activity at the 23rd St. location in 1997. Apparently someone in 1997 also thought a trail thru the yard was a bad idea.

C 1



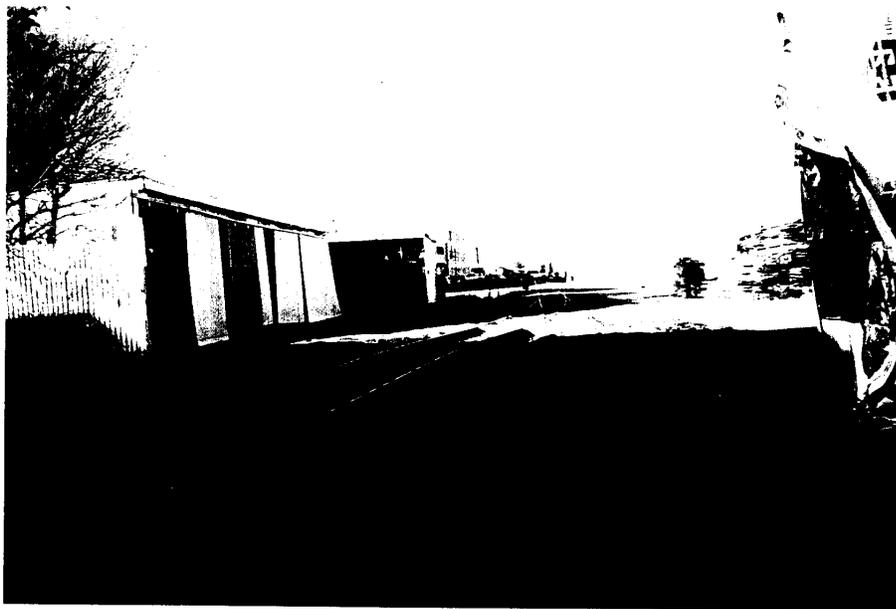
This picture shows the south spur track, south of the mainline between 22nd & 23rd Streets. This is before relaying of the track started

c 2



This is between 22nd and 23rd St., spur south of mainline. Const is in progress. This is where we unload our box cars.

c 3



This is south spur, south off of mainline between 22nd & 23rd.

C4



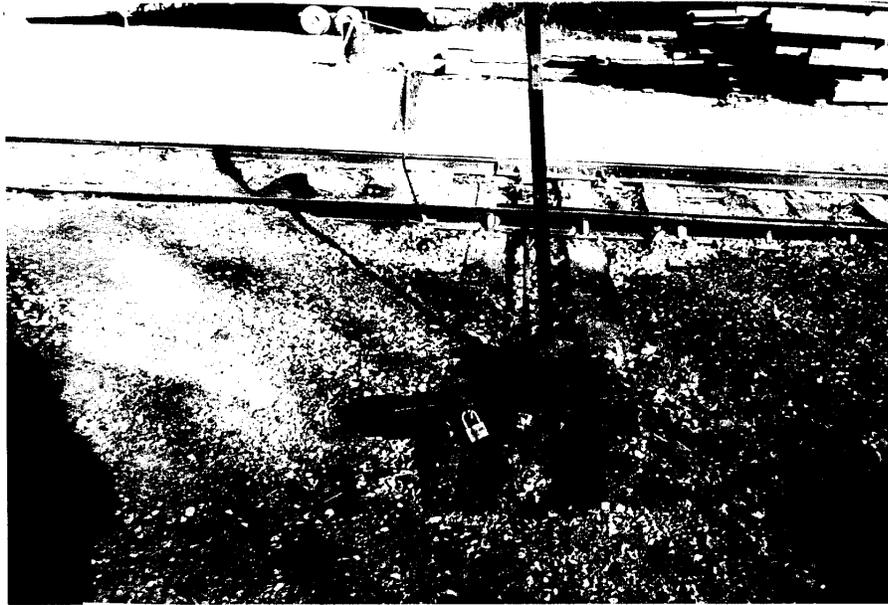
Mainline after construction between 22nd and 23rd St. This is where we unload long center beam cars. This is in the area of the north end of Whittier St.

C5



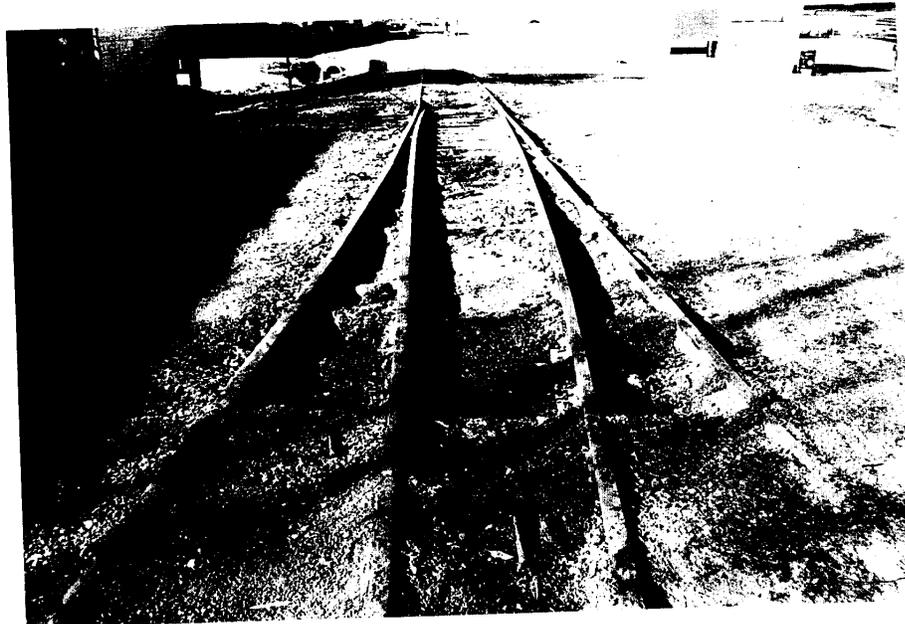
Before repair on the south spur south of mainline between 22nd and 23rd St.

c6



This is mainline between 22nd & 23rd and north of Whittier & Short Streets. Machinery is on south side of the tracks. Long ties were put in.

c7



The next step after picture c6. Between 22nd and 23rd after new ties installed and rails applied. Just east of Whittier/

C8

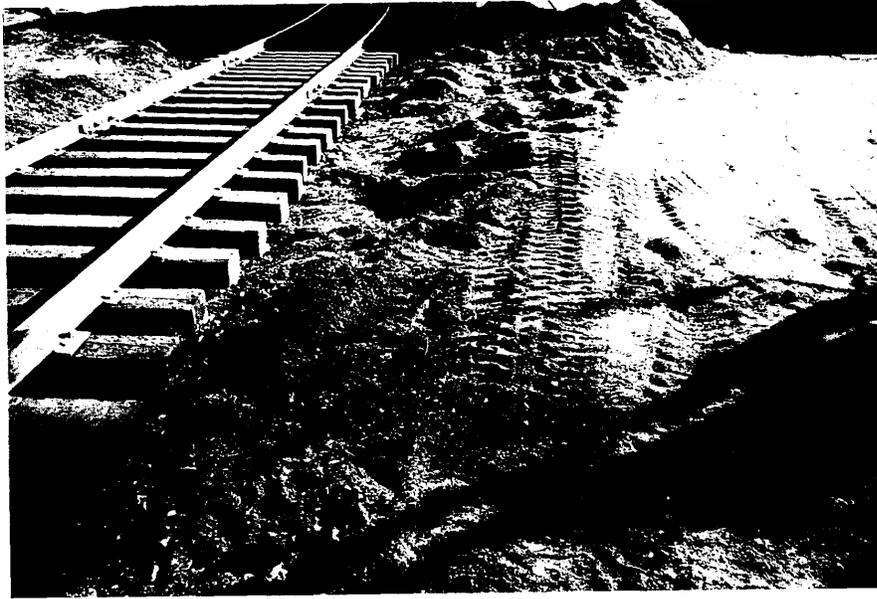


This is the finished product on the mainline between 22nd & 23rd.

C9

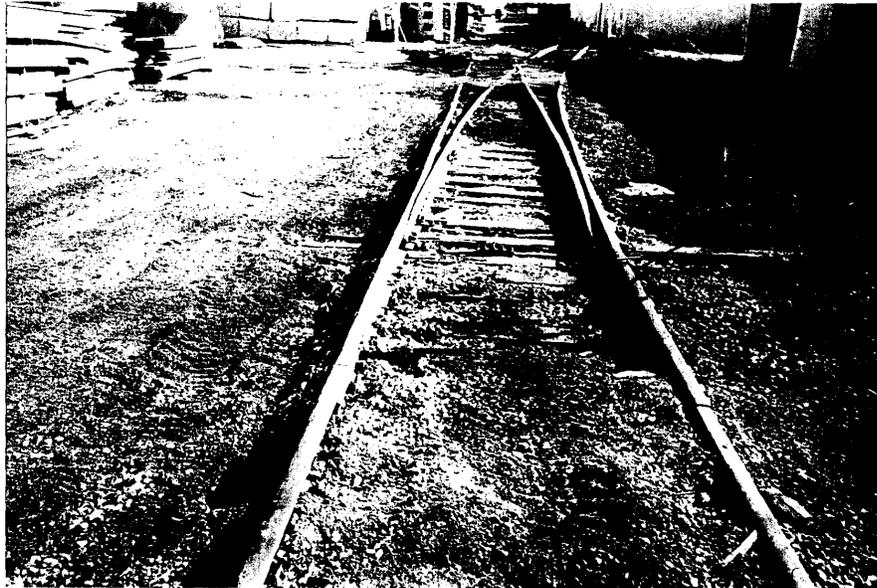


C 10



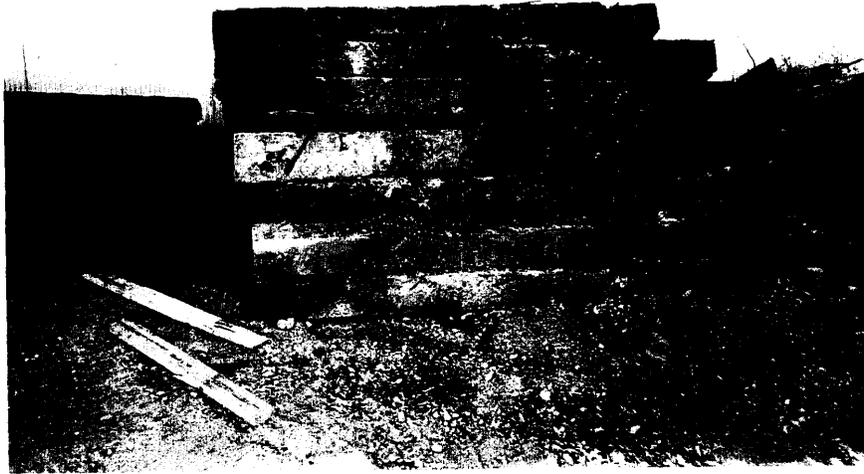
After repair, the final results of the new relay of track in terminal area between 22nd & 23rd, north of the area between Short Street & Whittier. This is the mainline. The proposed bike trail starts to curve south at Whittier. The proposed 20' to be taken out with the trail will absolutely distroy this railroad terminal area. We will not be able to unload on north side of main line.

C 11



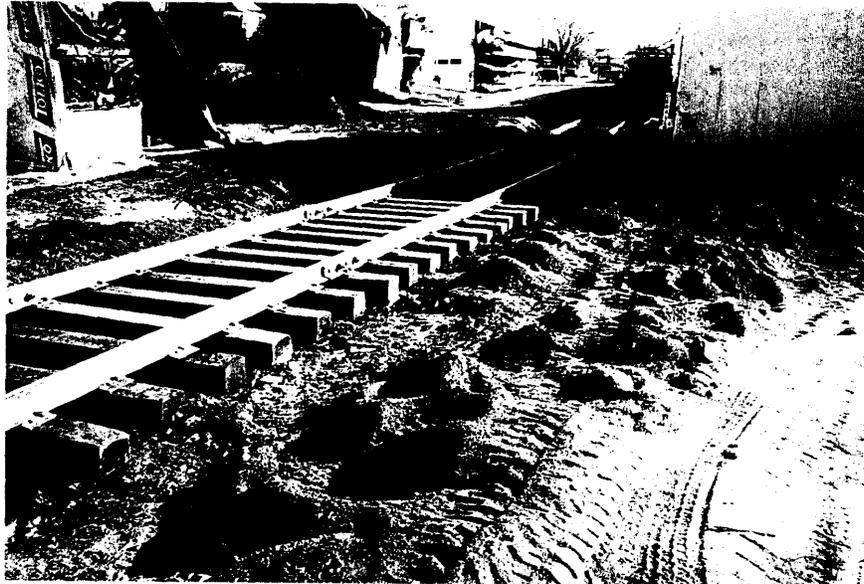
This is the start of repair before construction. The switch is between 22nd & 23rd St. on the west end of the south spur.

e 12



These are ties piled during construction between 22nd & 23rd St. Ties are to repair mainline and south spur between 22nd & 23rd Street in 2002.

e 13



After relaying new ties and rails, new spikes and new bolts were put in. This was done by OL&B in 2002 between 22nd & 23rd. This is the south spur off mainline.

C 14



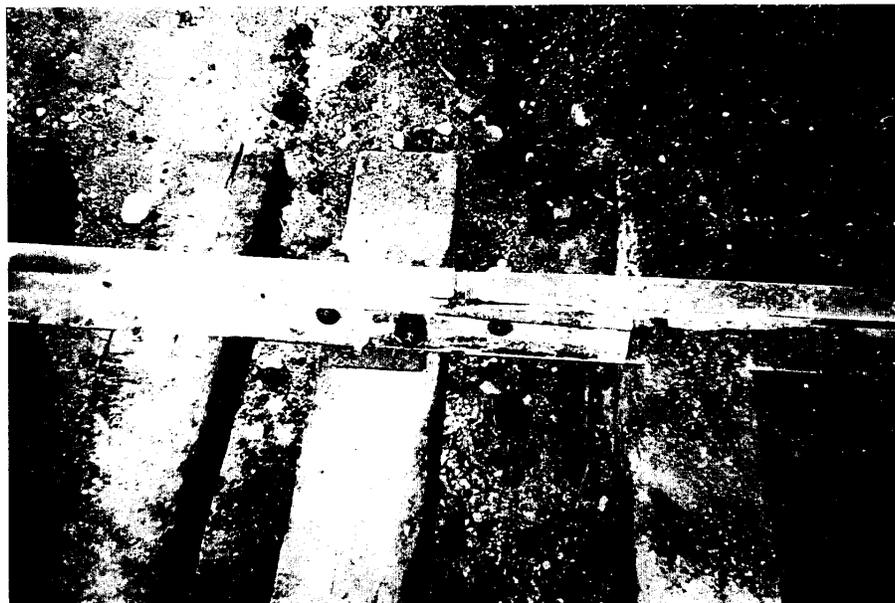
This picture is after relay work was almost done. This is north of Whittier and Short Street.

C 15



The mainline before new relay was begun between 22nd & 23rd. This is the area north of Whittier and Short Street

C16



Pictures show small section of results after work is complete with ties replaced, new bolts and spikes replaced. Area is north of Whittier and Short Streets.

C17



C18



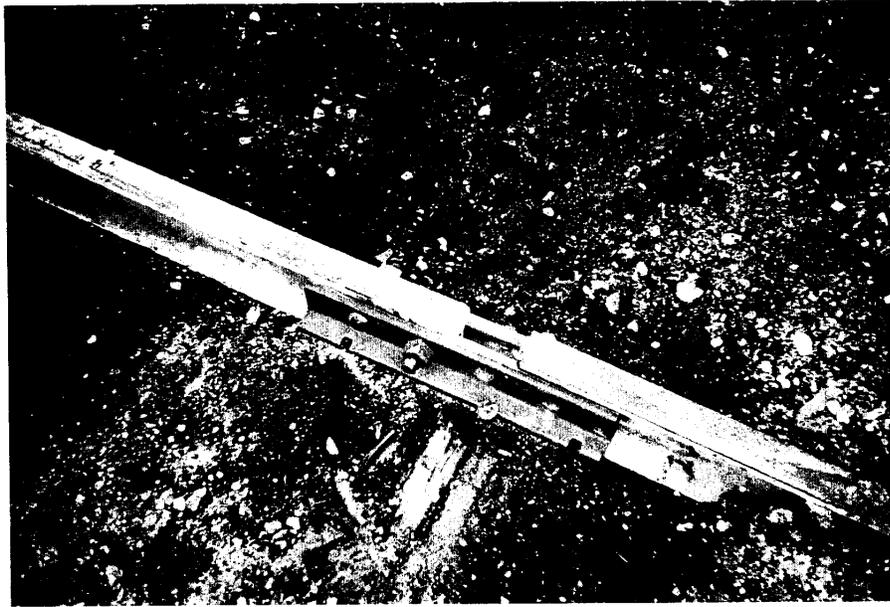
Starting to be almost done. North end of Whittier & Short Streets. OL&B Railroad did the work. This is typical of the mainline and south spur. This is what we expect to do on the north spur between 22nd & 23rd.

C19



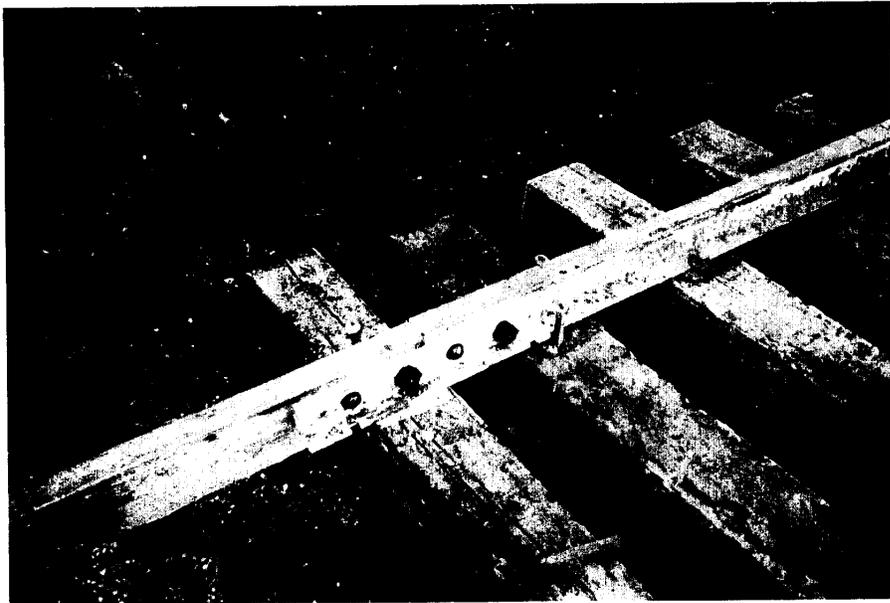
South spur track after job is complete. OL&B Railroad did the work and it was a good job.

C 20

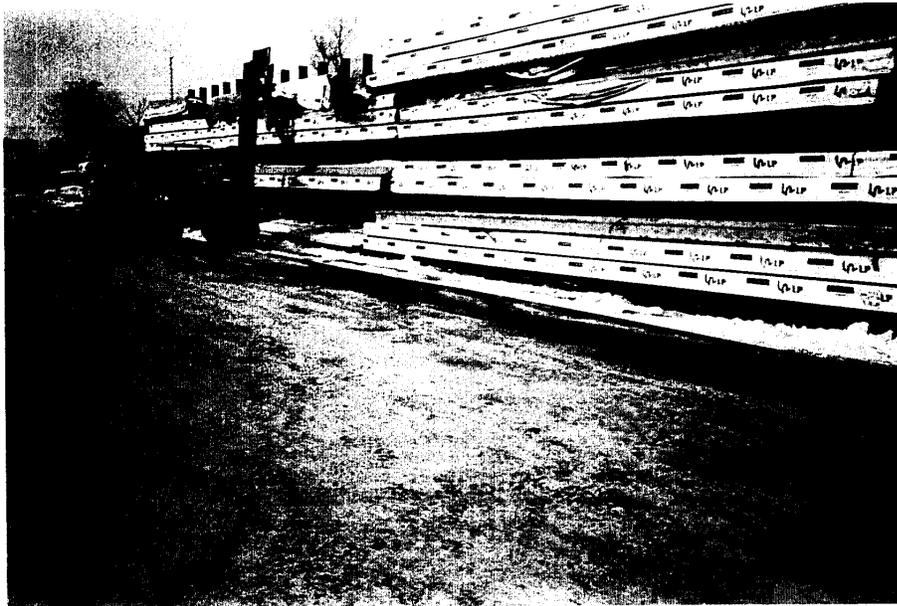


Both pictures north of Whittier and Short Streets on mainline. The top picture is before repair started, the bottom picture is after completed.

C 21



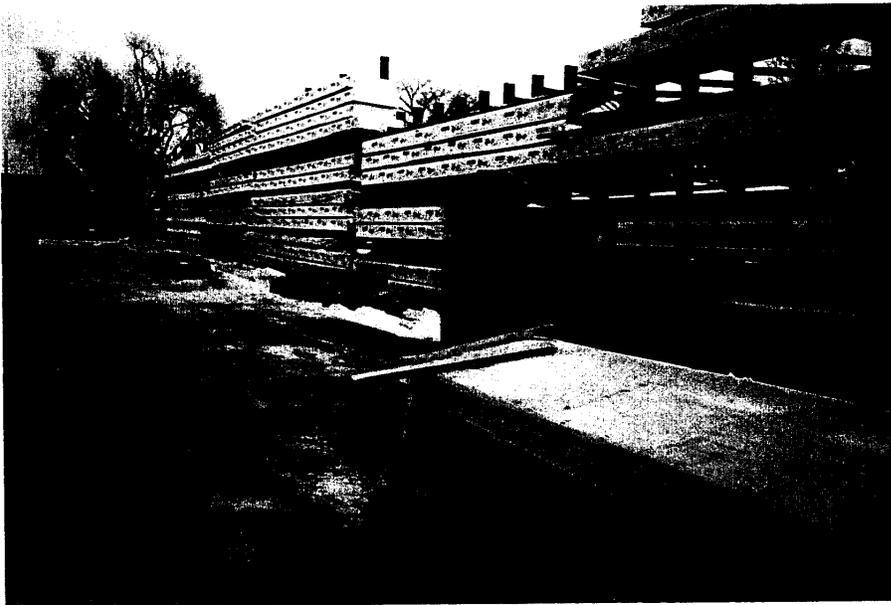
1-D was after
24-D was before
main tracks



This 1-D was after the 1-D
The before was 25-D
Conclusion etc has improved etc

View of I-Joists west of 23rd St. Note the forklift we use to handle this material.

2#
1-D



I-Joists and other material setting in north yard east of 23rd St.

This picture is
at 40 D The right side
The right side is hope
& front to the

#3-D



Proposed trail center to left of road.
From front to back, 50' (approx) on
the left side, behind 23rd St.

View of main warehouse on west side of 23rd St.

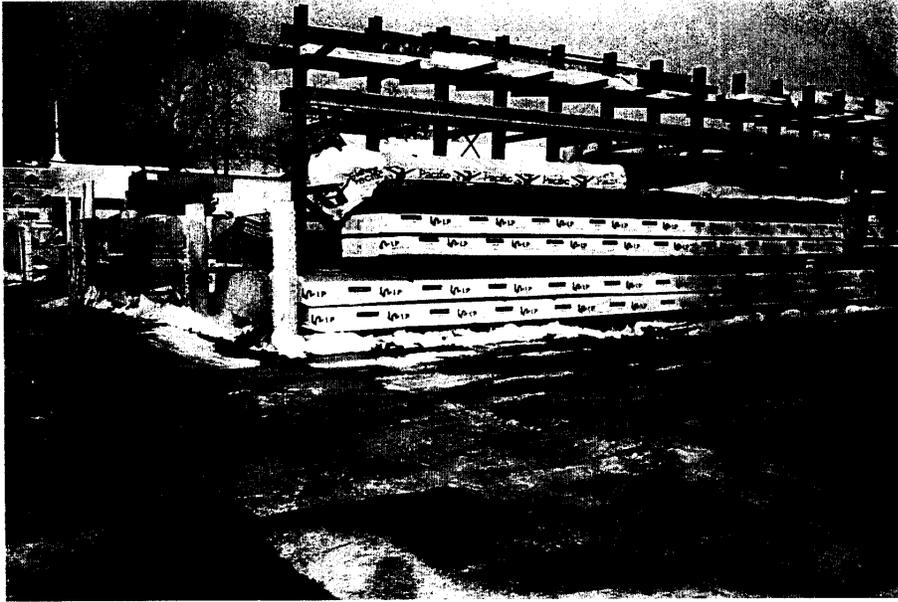
#4-D



To left of office, so can't see way to
4-D # show side walk with
this is much better road than that
to left of office
to left of office

View of office on east side of 23rd St.

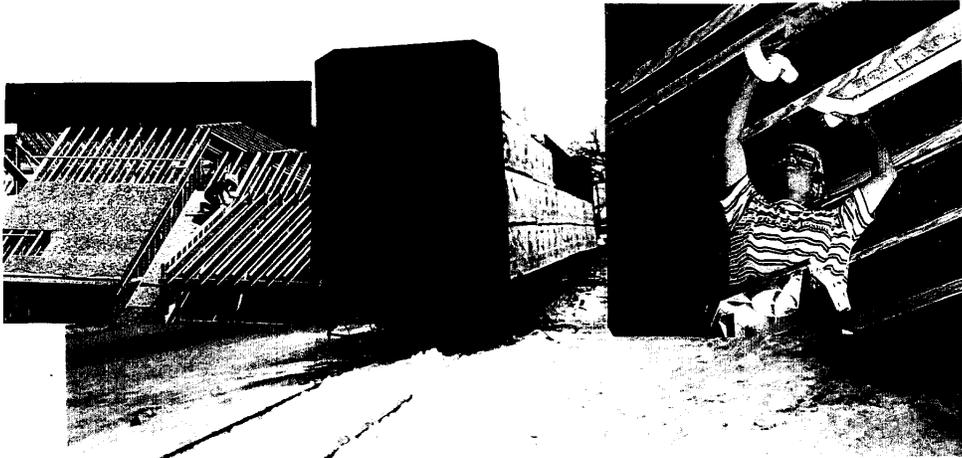
5-D



This is between 3rd Street and 4th Street
on Chicago St. Chicago St. is east of 23rd St.
Chick. 5/1/94 Bated 5/1/94 in amount of 6065 E.
Note see 40-D. Official Chicago St. for 23rd St.

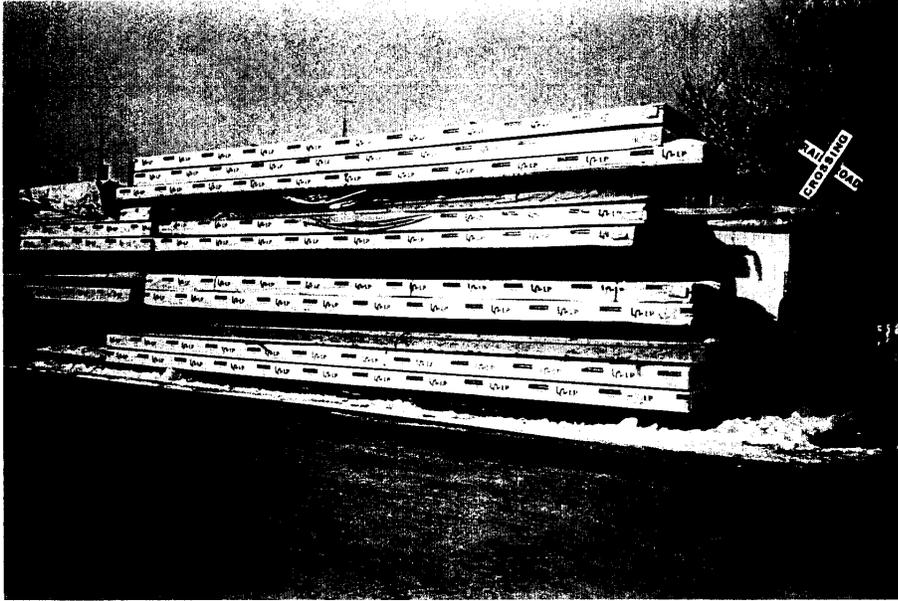
Rack holding LP I-Joists. This rack is east of 23rd St.

6-D



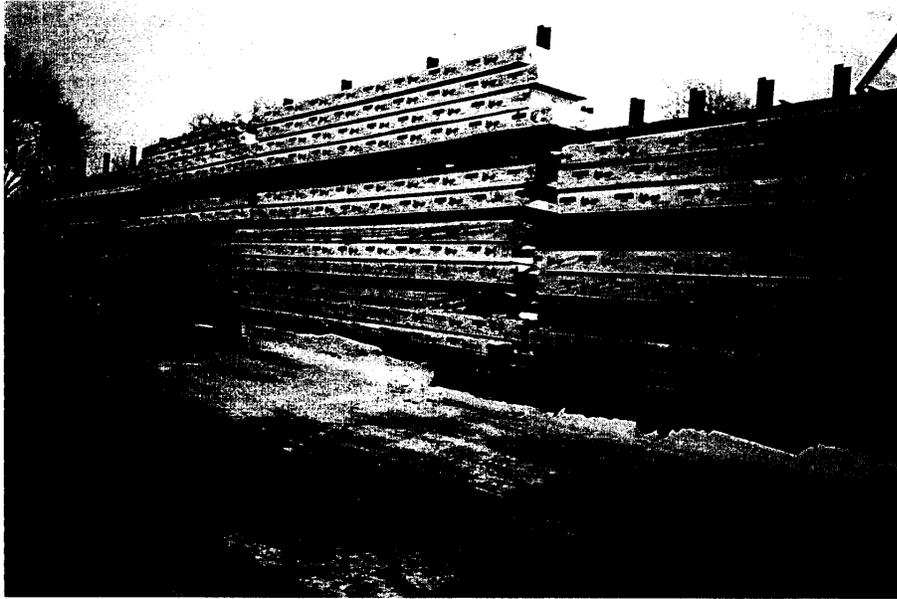
Rail car that our I-Joists come in on. See insert showing close up view of I-Joists

#1-D



Rack of I-Joist setting west of 23rd St. Note low shed for storage. Proposed bike trail is where low shed is and in front of low shed.

#1-D



View of I-Joists west of 23rd St. They are waiting delivery to jobsite.

See Car in photo. 2500 Highway to the left.
 South of Highway. Go across the Trail R.
 Path. approx 50 cars in line.



View of dimension lumber wrapped and stacked in north yard.

City Streets Office Mail (2006) on right of
 white post office car. Closest to the white
 LSC (post office) trail (road) at white
 junction.



View of north yard showing stacked dimension lumber and edge of umbrella shed.

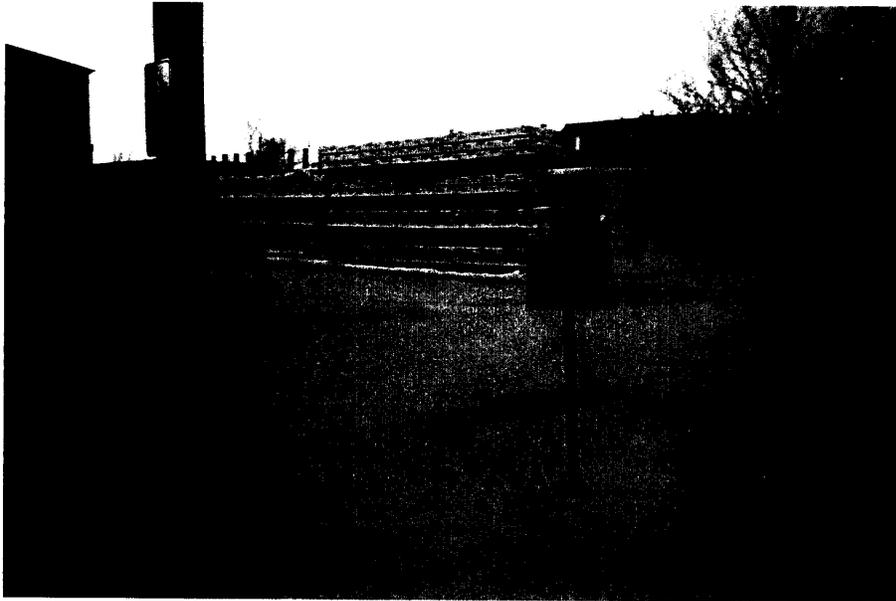
11-D



The area is a lot of grass & trees.

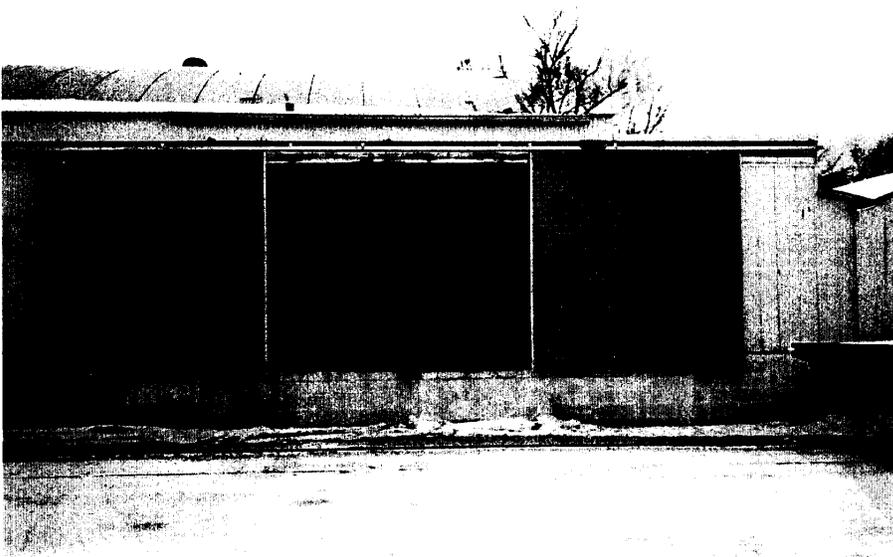
View of 23rd St. looking north from the office, showing west side of street

12-D



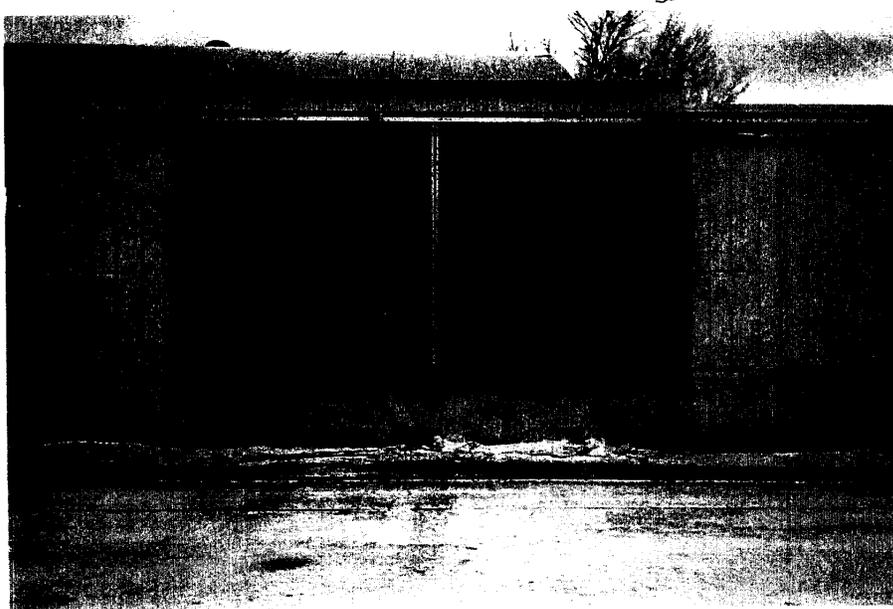
*More of area is a lot of grass & trees at
edge but dangerous for trail path
situation*

the building showing 14-D
for the concrete inside
see the chimney stacks
on floor



Views of sliding doors showing ramp for unloading building material inside the warehouse.

14-D



City could easily move south row of
 cars to west side. ...
 City controls this in meeting with ...
 Dept.



15-D shows ...
 of cars (approx 50 cars) that ...
 will go ...
 proposed ...

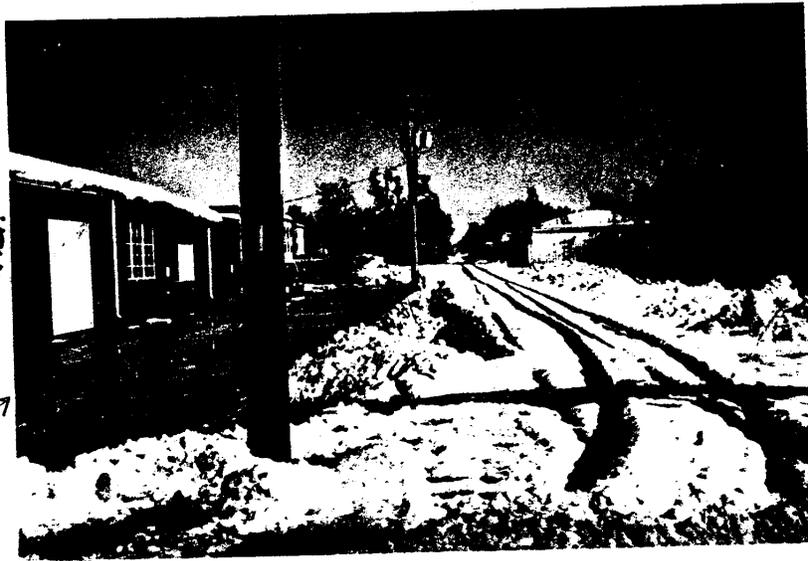
Parking lot of housing north of railroad right-of-way.
 Note number of cars the closeness to to right-of-way.

16-D



View of railroad track looking west from end of main
 warehouse, about 1/2 block west of 23rd St.

See spur 17-D
Tracks going
East, from 22nd st.



View of the railroad tracks looking East from 22nd Street

18-D



View of the railroads tracks looking West from 22nd Street

19-D



✦ View of 23rd Street looking South from the railroad tracks

20-D



✦ View of 23rd Street looking North from the railroad tracks

21-D
Before 1-D
on left side of Main
Track



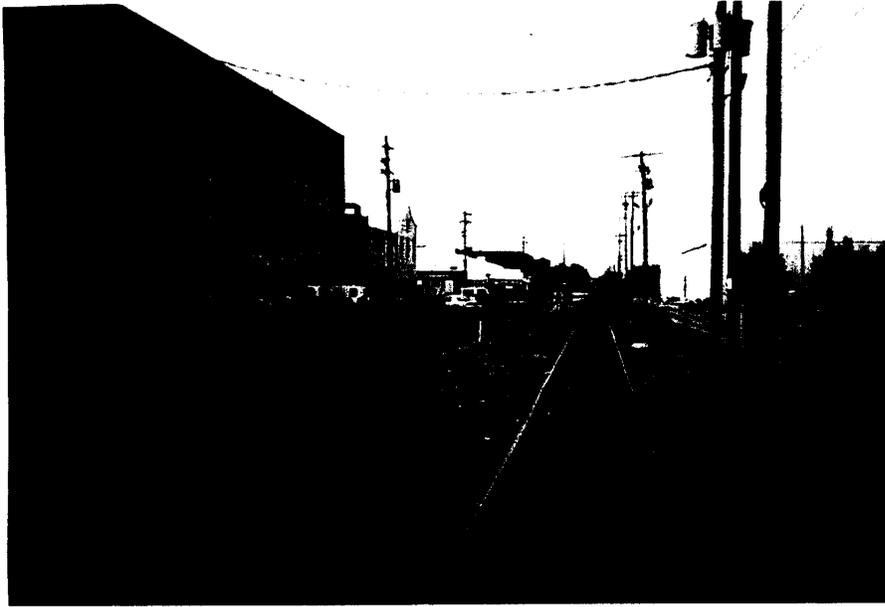
View of the railroad tracks looking east from 23rd Street

22-D



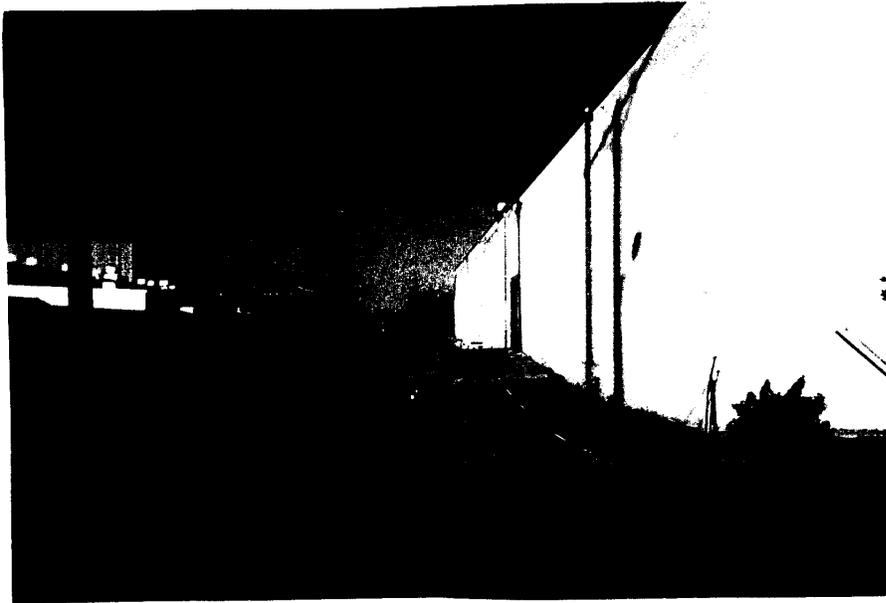
View of the railroad tracks looking West from 23rd Street

23-D



Facing west from 22nd St.

24-D



Facing west from 21st St.

L&C had thought of new building
building approx near west end of
white - 1. 1. 1. 1.

27-D



Drainage ditch at 25th St.
Typical of street drainage.

25-D



North side between 24th & 25th, Note the brush which has not been cut

28-D



Drainage ditch at 26th Street
25-D thru 36-D are typical of before the opening of the drainage ditch. 1-D & 2-D are typical of after the opening of the drainage ditch.

26-D



Drainage ditch at 25th St.



30-D
Drainage ditch between 23 & 24
of the northern side of the drainage basin



31-D
Between 27 & 26th



32-D
Drainage ditch between 26 & 27



32-D
Between 24 & 25th. Note brush, weeds, etc.



Washout at Short Street. Note undercut under rail line



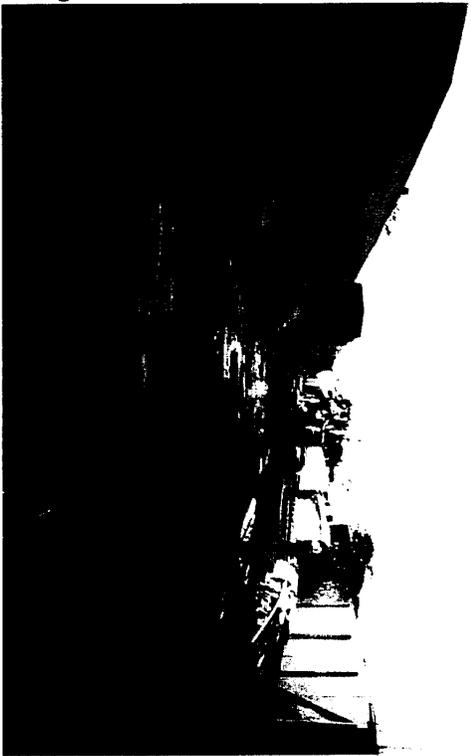
Entrance to culvert at 26th



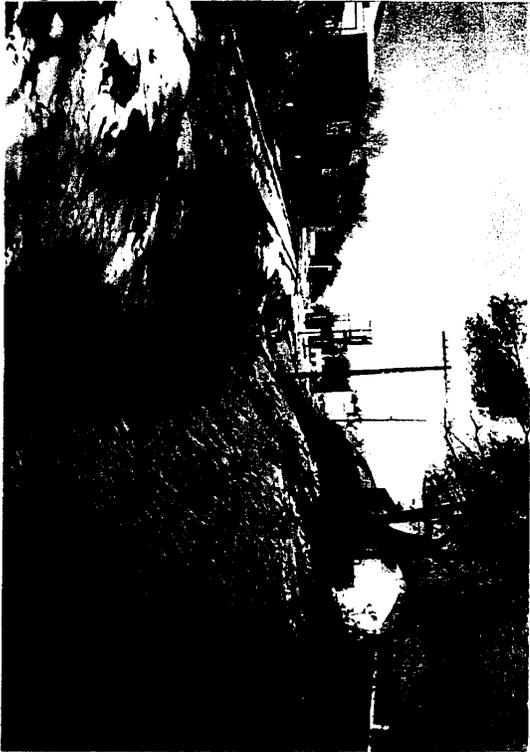
South side of track, east of 23rd St. where drainage enters culvert under 23rd St.



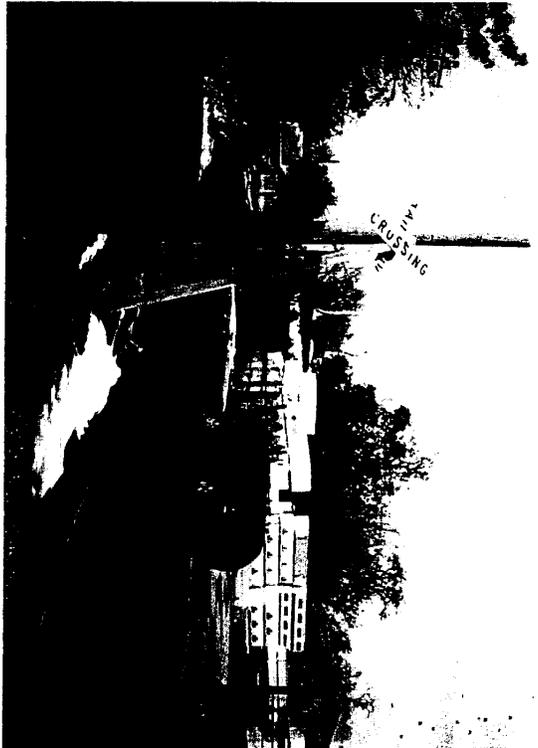
Railroad switch between 24th & 25th showing water.



Drain Grates - one on each side of
23rd St., draining water from 23rd
into drainage system



Drainage ditch east of 24th looking
toward 25th



Rail crossing sign rotted off &
propped against pole



Drainage ditch between 23 & 24th
looking east from 23rd



41-D
Culvert at Whittier which drains gutters & Whittier St. and surrounding area into drainage ditch



42-D
Culvert at Whittier St. Note side drainage culvert entering ditch



43-D
Flooding on Short Street as a result of drain blockage



44-D
Flooding at 24th Street



45-D
Drainage ditch at 25th looking west



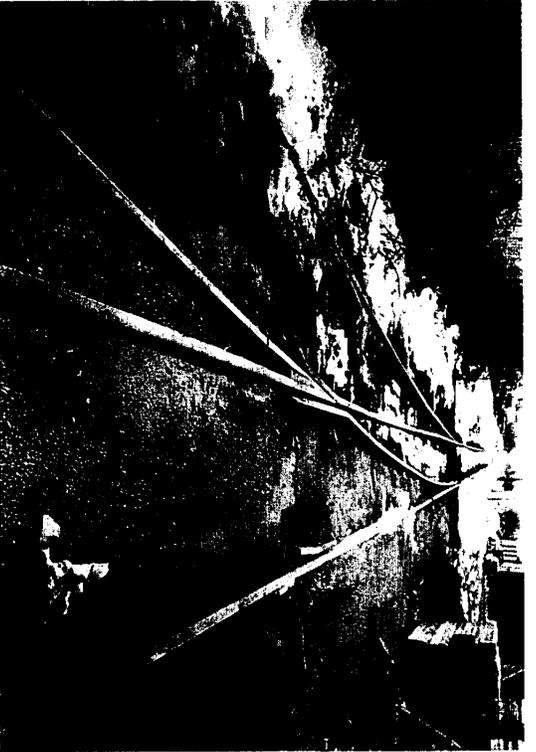
47-D
Drain tile entering ditch at 24th. This is example of several instances of drainage from alleys, streets, roofs and gutters, etc.



46-D
Drainage entering culvert at Whittier St.



48-D
Washout at Short Street



19-5
Broken & blocked sewer runs under these cracks



50-0
Between 25th & 26th. Ditch is 6' wide and 3' deep

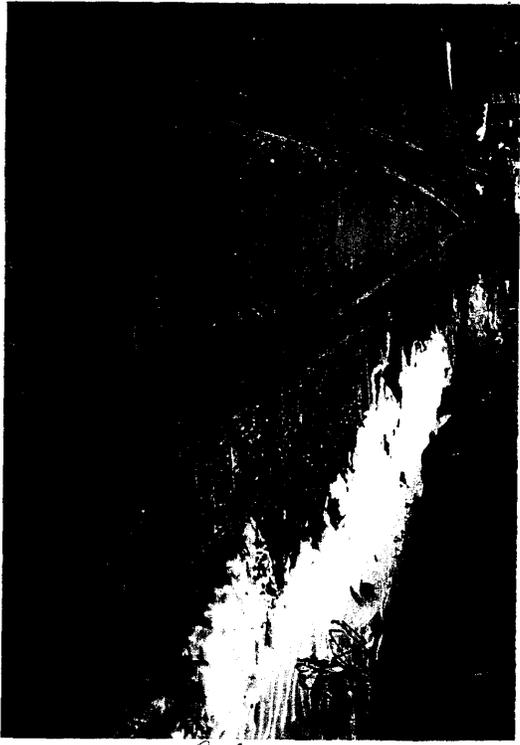


27-0
Between 23 & 24



51-0
Between Short St. & Whittier

53-D



There is a covered sewer line along the tracks in area of broken line.

53-D



Running water between 27th & 26th St.

54-D (explains in year 2000 replaced (new) (new) lines etc)



Fence at edge of ditch has running water. Brush is along the edge of ditch

54-D



Between Short St. & Whittier St.

1-H



A view of the old right-of-way east of 23rd St. showing the area after the culverts were installed.

1-H to Town 23rd St 2-4-77
The ditch is in long 17 ft one
110 ft total

12-H
No loading
be two



A view of the sput on the west side of 23rd St. on the south side of the mainline. Note doors which open onto an interior ramp for unloading cars inside warehouse.

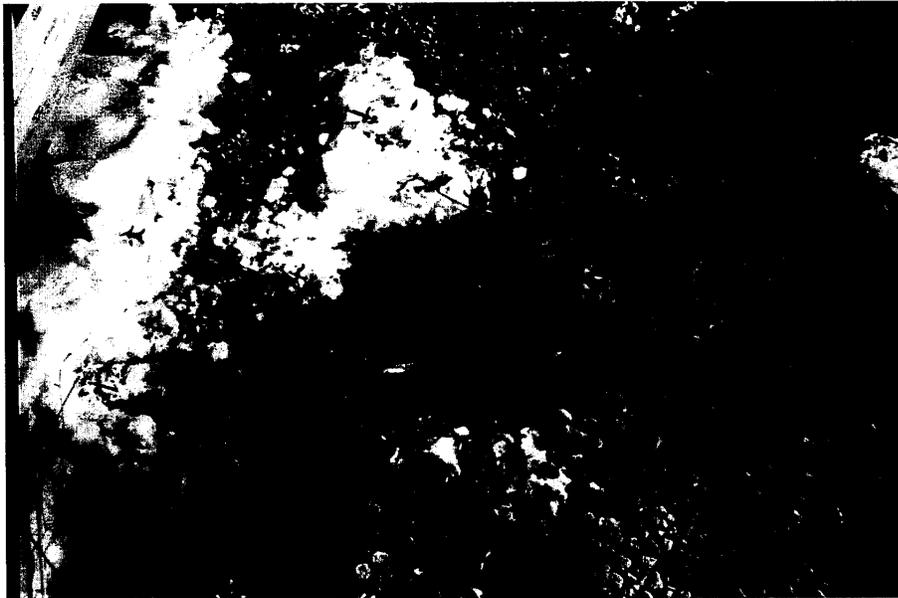
of finished R. R. spur (New)
South of 23rd St. between 22nd & 23rd
Completed by the railroad

Photo between 23rd St & 24th St
B-H
↓



Between 23rd St & 24th St. Street looking west down the old UP line. This shows the right-of-way after we installed culverts in what were open ditches used for storm sewer drainage.

4-H



A grate over the storm sewer at 23rd St. located in the right-of-way.

4-H. between 23rd St & 24th St
Part of storm sewer drainage
in part in 2001. 47, & 2001. 2001.

5-14



27th & 'Y' Streets where the bike path will use the traffic to cross. This picture is looking east from west side of intersection.

6-14



'Y' street looking east from 22nd st. The buildings are the housing complex run by Lincoln Housing Authority.

*1/2 block N of
S. 9th & west 1/2 block*

7-H
Aerial view of the area in 1900
10. 4. 1900 p. 17.



Cushman's tower and the land on
either side of the street
during the 1900s.

'Y' Street looking west from 22nd St. The building is part of Cushman's.

8-H



'Y' Street looking west from 24th. The red brick building is a church and the only building on the south side of 'Y' St. in that block

T.P. is an example of the double
wide sidewalk along
26th St
9-H



'Y' Street looking west from 26th, showing the
alternate bike trail proposed by Lincoln Lumber.

10-H



'Y' Street looking west from 25th Street



i K

This is standing on approx 24th street and the
railroad tracks looking north. This start of
proposed trail near Lincoln Lumber Company.
Note this picture No 1# They propose going
north on East side of street (right) to opposite
the white car which is an alley north
of L & C yard. They cross street head for
white car & continue west down alley.



2K

Go North on right side or East side
of street (over the green grass to alley
opposite the white car), then the
trail goes west across street to white
car & west down alley.



3K

The white Car is removed and trail
proposed goes west down this alley,
and on North of lumber packages &
Continues west one block.



4 K

Continuing west down alley
& going to 23rd street where
red car is in the distance



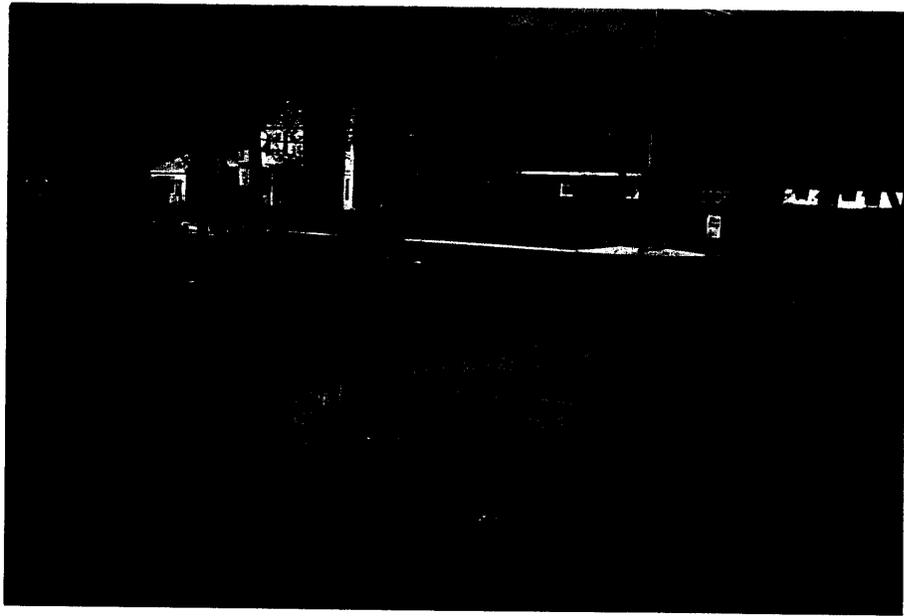
5K

approaching 23rd street, one
needs to be Cautious, Careful, Careful
as 23rd street has a lot of traffic
and some of this traffic is fast.
The City proposes going across street
west where red car parked & turn south
or left down side walk. SBC proposes
turning right at end of this alley and
going North 1/2 block on East side of
the street. Right turn is safer yes & yes.
This is now SBC best alternative for trail



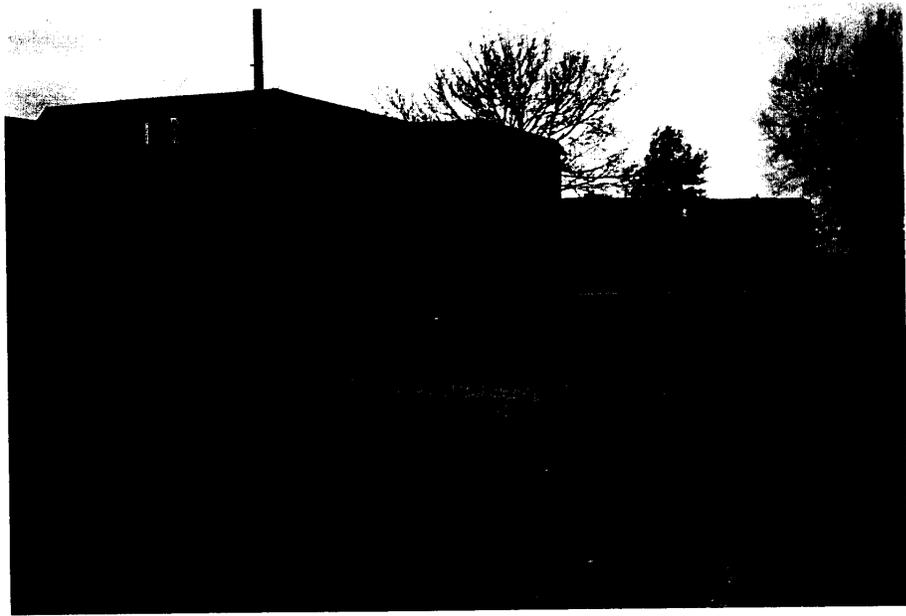
6K

The best alternative for the trail is now going North on east side of street and we have not crossed in front of any traffic. This decision to turn right or North is the safest trail path - yes & yes. The building (Red brick & brown roof) is Church, a very good, extremely active Church, one our Company is very proud of the trail would pass in front of this Church. This Church helps the trail safety. At stop sign we propose going left or west one block.



7K

No. 7[#] Show open intersection.
Safe intersection. Naturally red diamond
shaped stop sign. as I recall the sign
below says buss stop. I like the
City busses, school busses on this street
in some respects (adds a lot more traffic)
because they help with safety, helps
a lot. So trail is on a safe path as
proposed by LFC to stop sign, then we
proposed turning left, or going west across
the street and the trail going by red fire
hydrant & continuing on west.

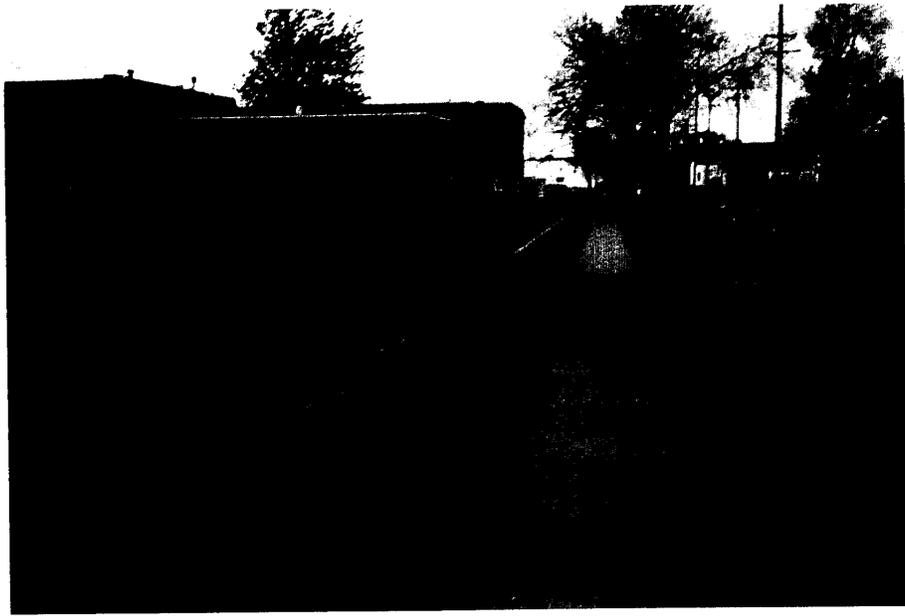


This is Nice intersection, I personally have a lot of confidence in this corner, it's open, Lincoln Housing authority is big complex, nice green grass and they too cause safety, absolutely they help with the safety. They are a good influence on our neighborhood - yes & yes. So go west on the sidewalk shown, north of housing & south of Y st. Go one block. Note the ^{appearance} ~~appearance~~ it is ~~best~~ beautiful intersection - very pretty.



9K

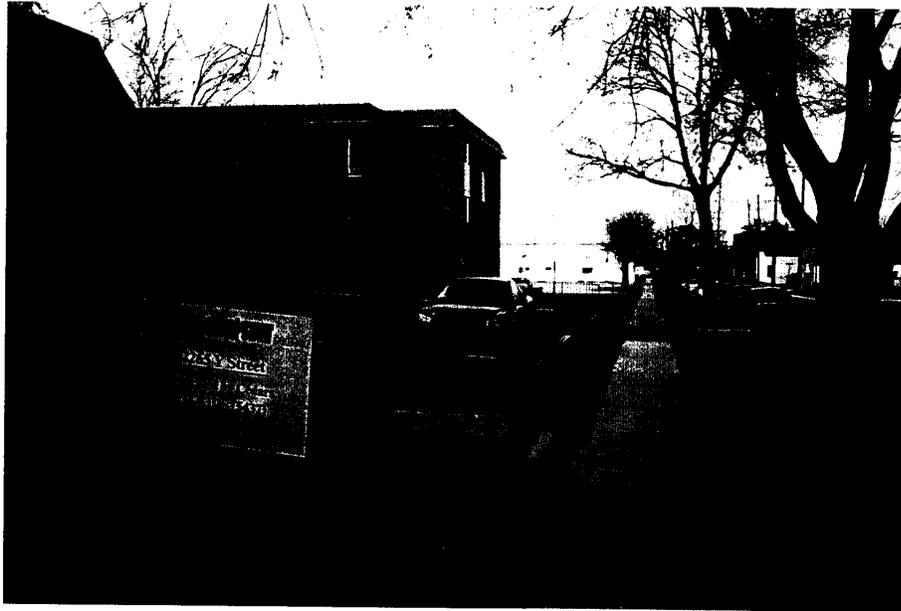
We have crossed the intersection that open, has a stop sign, has curbs cut down already for the trail. This proposal is going to lower the cost a whole bunch. Note Husker Link Trail exhibit dated 9/14/01 ^{marked TB-HLT} in back section of exhibits provided by Terry Gonrich states subtotal project + total project costs to be \$394,349⁰⁰. Further applicants match 26% in the amount of \$102,531⁰⁰. Federal funding @ 74% or \$291,818⁰⁰. A copy of TB-HLT dated 9/14/01 with ✓ (check marks) to left black line under item, if you add up these costs it totals \$41,900⁰⁰. In my opinion this is a waste, this goes behind this bldg + parcel to Y st and shows the estimated costs to construct. Going down Y st (Y st great street all way from 27th this is typical picture above) will not cost but very little. This is like the 33rd & Huntington area where the bike path goes down the sidewalks. See picture F5.



10K

This picture is going west down
"4" St from 23rd St. There are no
obstacles. It is a straight to UHL.

See ^{2 (two)} arrow above with a tail to the right
this location where L&C suggests the trail
North of property line between L&C + LHA should
go west to almost Whittier St opposite. Could
use same drive way above. Now go to 14-M
see the same arrow \searrow with a tail on
the white gate pointing to location of alternative
trail proposed by L&C entering going 20' wide
North of aluminum corner post. Mayor Serg
respectfully has control by appointment powers
(she appoints the Board of directors for Lincoln
Housing authority - she is their Boss - Her
picture is on the LHA financial statement Balance
sheet + Income statement.



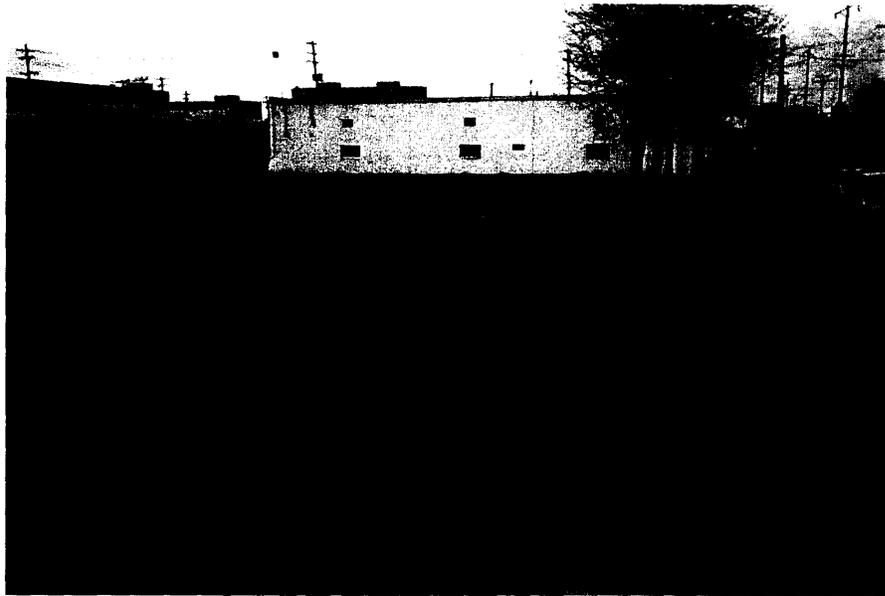
11K

Continuing down "Y" street from
picture 10 K.



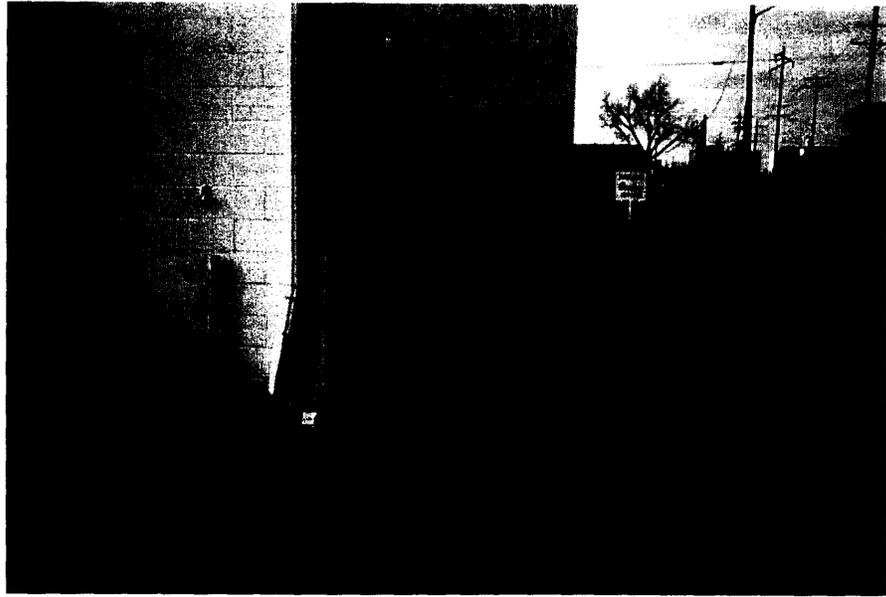
12 R

Continuing west down "Y" Street to
22nd.



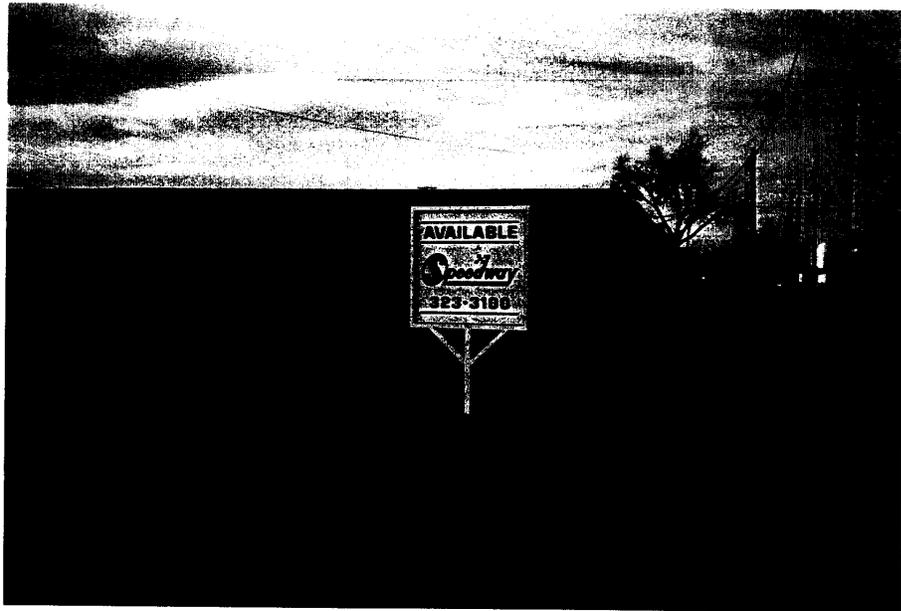
13 K

Continuing west down Y Street
on way to 22nd which is past
white bldg.



14K

Continuing west on "Y" to 22nd St. The sign in the distance is on the corner of 22 & Y. You can see that "Y" carries very little traffic & it is well lit. This makes this route safer in the early morning & evening hours.

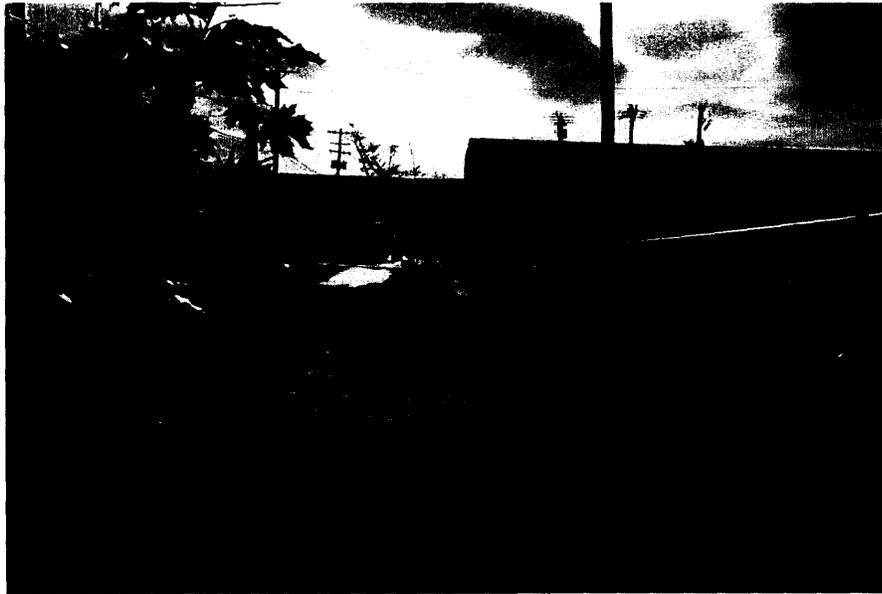


This is the corner of 22nd & Y looking west. Note the sign on the corner that says "Available." This same sign is in the next block, just past the red block & close to the street. The land that is available is bounded by 22nd on the west, "Y" on the north, Lincoln housing on the east & railroad on south. Most of this is vacant land & would make a nice park.



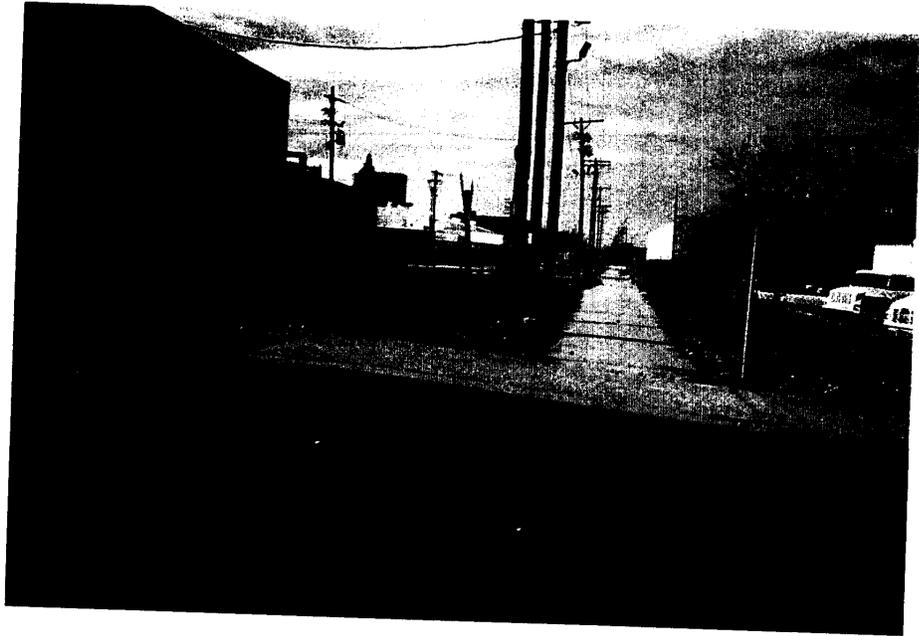
12 K

This is 22 & Y intersection & looking south. The bike path could cross 22nd and go south on the west side of the street. There would be no reason to cross "Y" street which is the busier of the 22d & Y streets at this intersection.



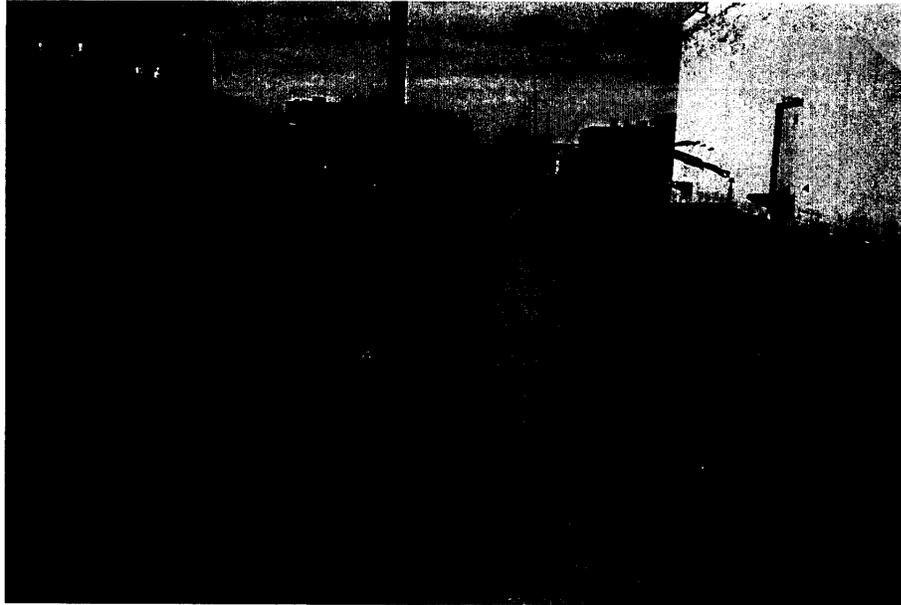
17K

Bike path continues south to the rail road right of way which is just in front (north) of the bldg ahead. This bldg was Cushman's main plant. Note the overhead walk way which goes to a Cushman warehouse.



18 K

Proposed bike trail turns west at this point. Note the fence encroaches onto railroad land. It should line up with the white block in the distance. This fence was put in by Cushman's on their leased land, and it will need to be moved.



← See orange
downhead
door ramp
19x

Existing concrete path put in by
Cushman's for their convenience in
moving people & machinery between
their bldgs. The property line is at
the edge of the bldg. This is a
continuation picture 18K. This is past
the fence in 18K.

Between ~~21st~~ 21st & 20th st North side main tracks

See three (xxx) + (arrow) trying to communicate
approx area of new + future terminal on North
side (No bldg west of ~~the~~ white bldg - open land
area approx 20th st arrow pointing to
and xxx's trying to help with location



20 K

This is the vacant land just west of the housing. This would make a nice park and a place to run the bike trail. See alternative for bike trail. This land runs from "Y" to the railroad & from the edge of the housing to 22nd St. There are some small bldg along 22nd & the trail could go between them or around them. See next picture - 21K.



21K

This building is west of the vacant lot in 20K. The intersection in front is at 22 & "V". Note space between bldg to run a path if they wish or they could go to sidewalk north of bldg.

2-

This picture
22K taken
12-17-03
by R.H.



22K

This shows the parking lot of the housing looking east toward 23d. The fenced in area to the back of picture is the L&C across 23d St. An alternative would be to use the area along the fence where the cars are as the bike trail. Set up an additional parking area west of the housing. See picture 23K.

also see 13-M for 2nd trail alternative suggested by L&C. Be to left of fence shown. Save cutting of several feet of front of white bldg. This oil matte (hard surface parking already as of now). This parking lot oil matte (if cars removed) would carry the L&C proposed alternative trail 75% or 80% (approx) from 23rd st west. 24 K carries this same L&C alternative westward on to the land sign says available and then to 22nd st. 22K covers the difference between 75% + 80% to equal 100% westward 23rd st to almost (not quite) even an opposite whittier street. See grass & snow ~~west~~ to right of chain link fence. Please go to 35-M.



23 K

This is west of the housing.
Note the drive leading into a small parking
area which could be extended south to the
rail road line, and even west for a 2nd
row of parking. Per sign on 21 K this
land is available.

This picture
24K, Jackson
12/17/03
B.H. D.H.



24K

This shows the SW corner of the housing property looking west toward a red bldg on 22nd. The bike path could run along the north (right side) of the railroad ROW which is shown by the fence. See alternative bike trail map.

This alternative trail will work easily and with far, far lower cost. - This alternative trail suggested by D.H. just north of property line between 23rd st & 22nd st.

33rd & Huntington



Pictures 1-F thru 6-F show the bike trail area at 33rd & Huntington. The bike trail here goes down sidewalks that are marked with signs specifying that this is a bike trail. The trail does not go thru any businesses.



3 F



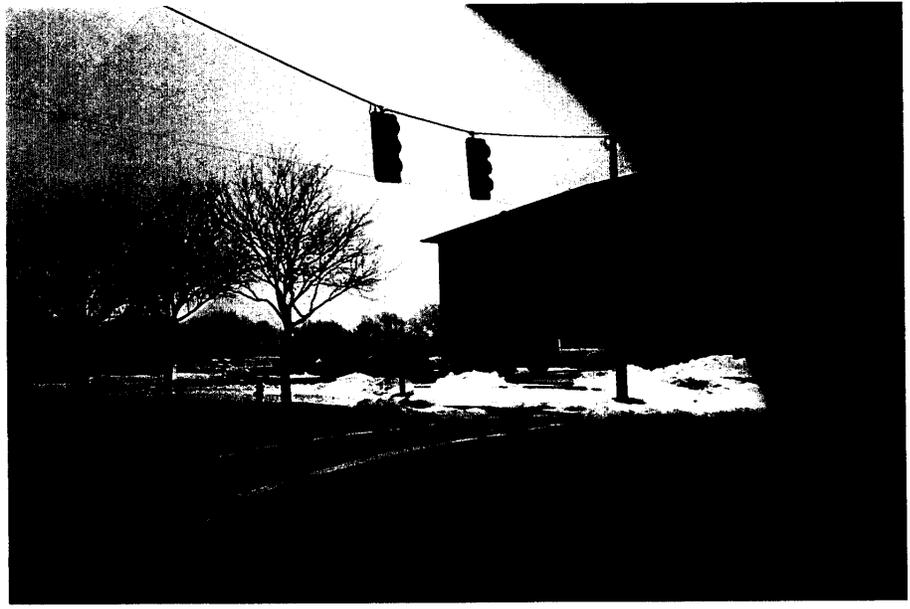
4 F





54

This is Campground
to the right



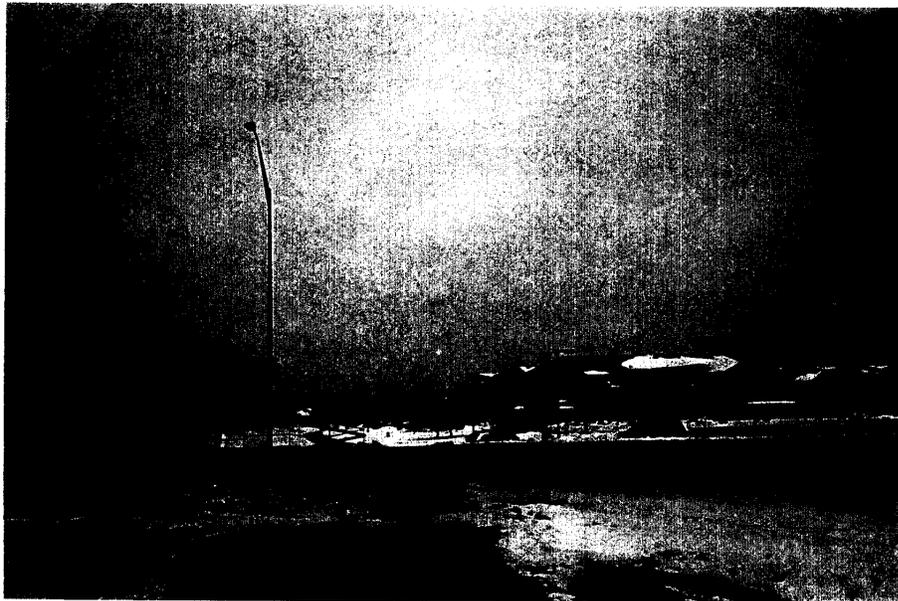
6 F

Pictures 7-F thru 10-F show a bike trail that crosses Old Cheney at 30th St. Old Cheney is a busy street and 30th is not protected by stop lights. Posts in the middle of the walk warn bikers to stop before crossing. The top picture shows the bracket imbedded in the walk onto which the posts are mounted. This trail goes thru the middle of a commons area in a housing development. No rail road anywhere around.

7F



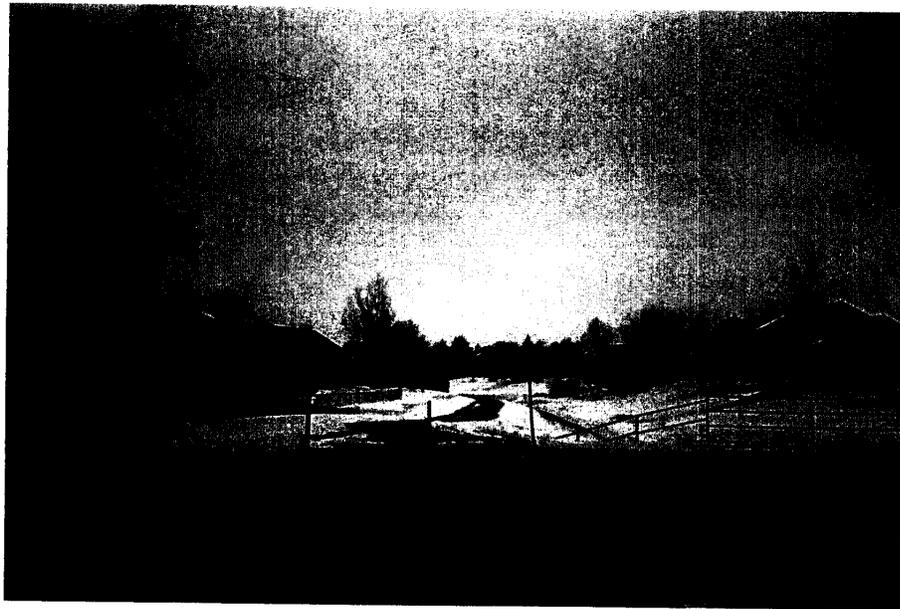
8F



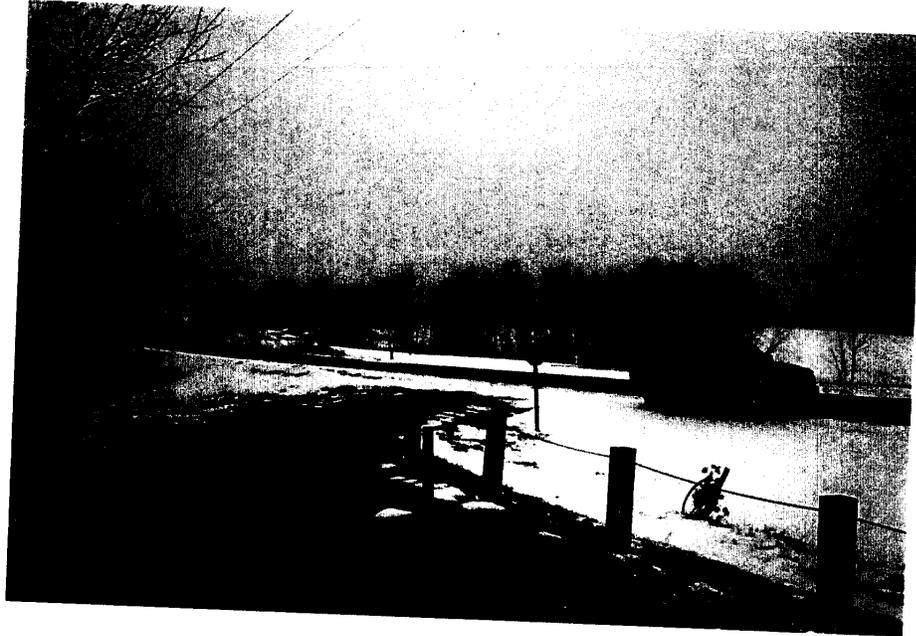
9 F



10 F



11F



98th & 'A' - pictures 11F to 13F
This path is out in the country. It could be an old
railroad right-of-way, but since it has been finished,
it is hard to tell. No houses or businesses anywhere
around.

98. 班 α A

12 F



13 F

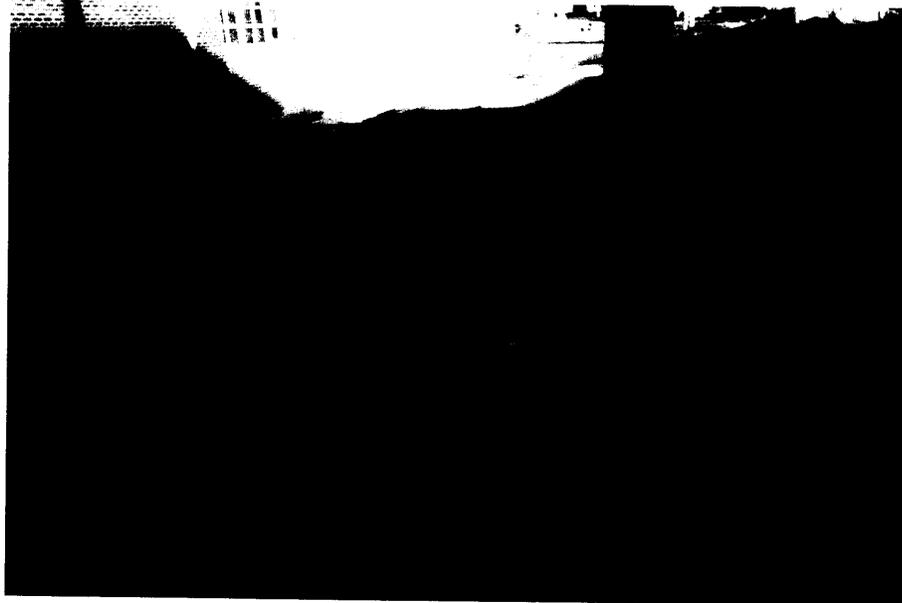


P 1



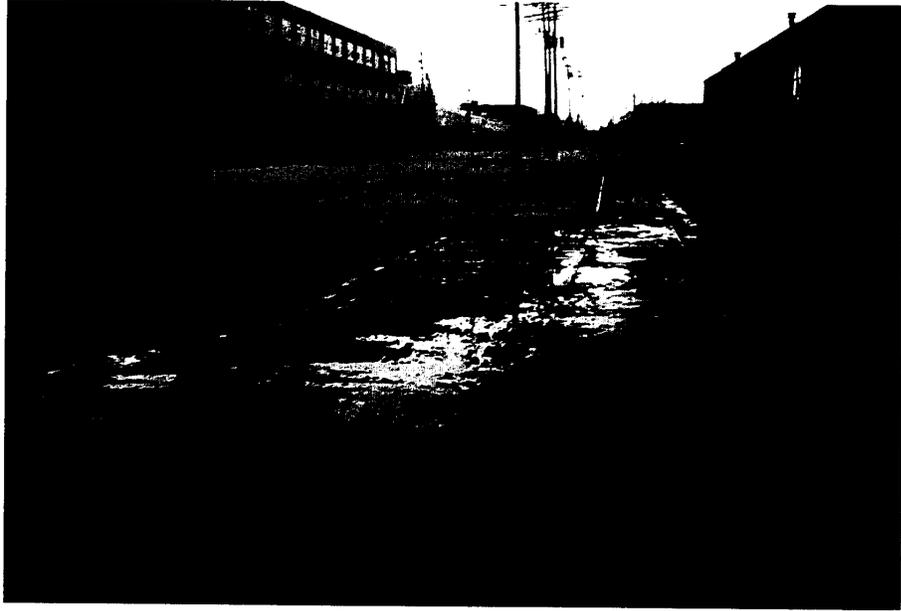
The red mark on the top picture (under the drain spout) is the pin marker, per Olsson & Assoc. There is another such marker at the east end of the red brick building. The bottom picture shows the red line of the bike trail. The green line shows the middle of the bike trail. Note that the power pole is inside the bike path. On Friday, Dec. 19, 2003 I visited with the representative from Olsson & Assoc. By that time our trail markers, as LLC had staked them out, were in place. They agreed with the measurements that Olsson & Assoc. had come up with. At its widest point the bike trail is 28' from the north rail, and at its narrowest point is 7' from the north rail.

P 2



*This pole is just east of
22nd st. North red brick bldg
South Main line. The pole in P-2
Make 3 poles inside trail.*

P 3



This shows the bike trail going west along the south side of the red brick building. Note the wood markers with the spur in the middle of the trail. Again, it shows how close it comes to the building.

P 4



This is a close up view of the path beside the red brick building. Note the spur track between the edges of the bike trail.

P15



Looking west from about Whittier St. along RR right-of-way past the red brick building. Note the short wood pieces that mark the outside line of the bike trail. On the north side of the bike trail, they are very close to the building.

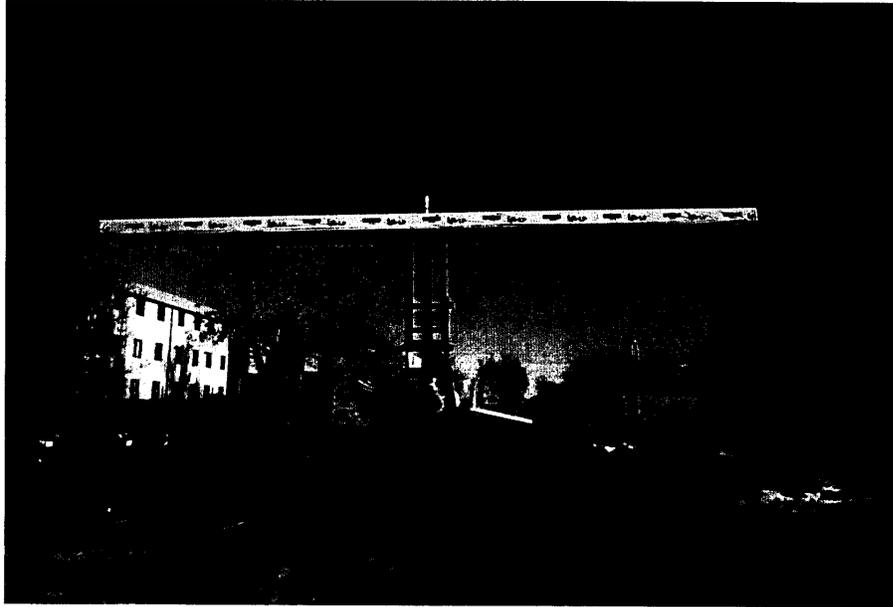
P16



This picture is looking east from 22nd St. along the railroad right-of-way. The green line is the center of the bike trail. On each side there is a red line that marks the outside edges of the trail. Note the bike path goes over the top of a spur track which we had planned to use.

*Two poles inside the trail
The red a green and flag this
represents the final layout
of how trail really is*

P7



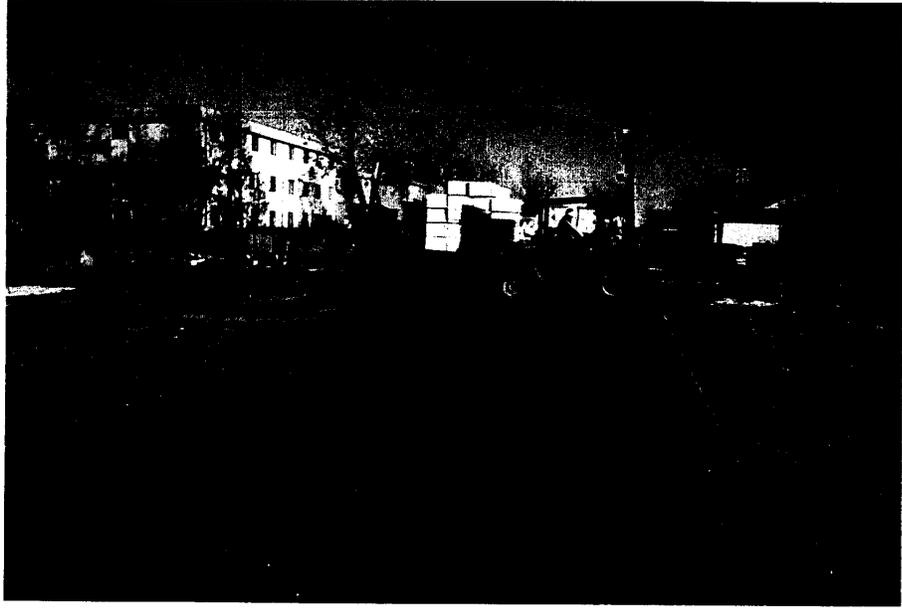
These pictures show a 40' I-Joist, one view with the I-joist on the ground and one view with the same I-joist at the level we carry it at when unloading the rail car. In both pictures you can see the railroad track. The red line with yellow flags along it show the outside line of the trail path. In both pictures the I-joist overhangs the bike path. What happens if this I-joist is dropped?

P8



P-7
 P-8 between 22 & 23 rd st
 North Maine line
 ← Green center line
 10' apart
 — Red center line

P-9



In these pictures LLC is showing the position of the forklift and the I-joist during the unloading procedure.

P-10



P-9 & P-10 between 23rd & 22nd St
North Main line

P 11



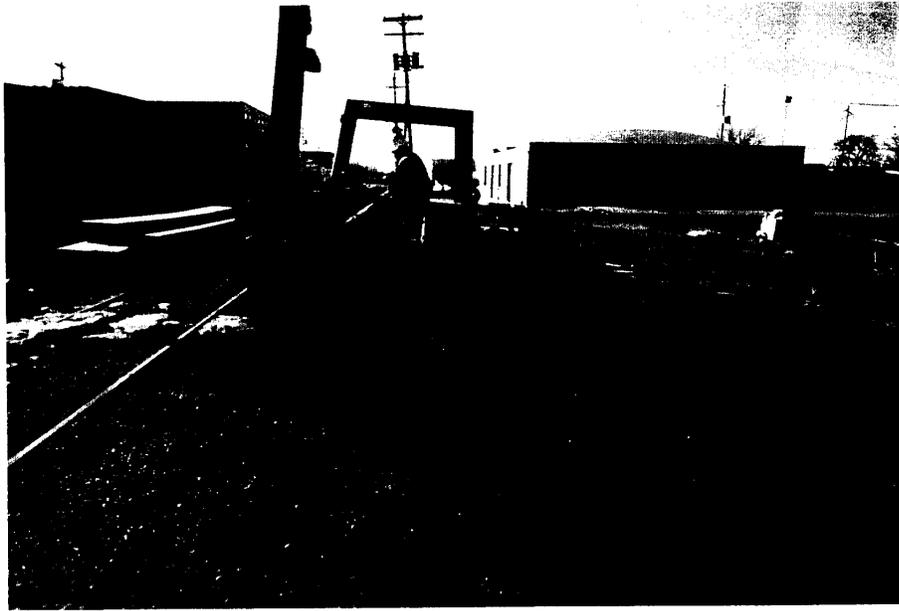
In these pictures, we are again showing the forklift maneuvers to unload building material. In this case the material is dimension lumber.

P 12



P-11 & P-12 between 22nd & 23rd st
North of main track line

P 13



Additional pictures showing unloading as in P 9 thru P 14.

P 14



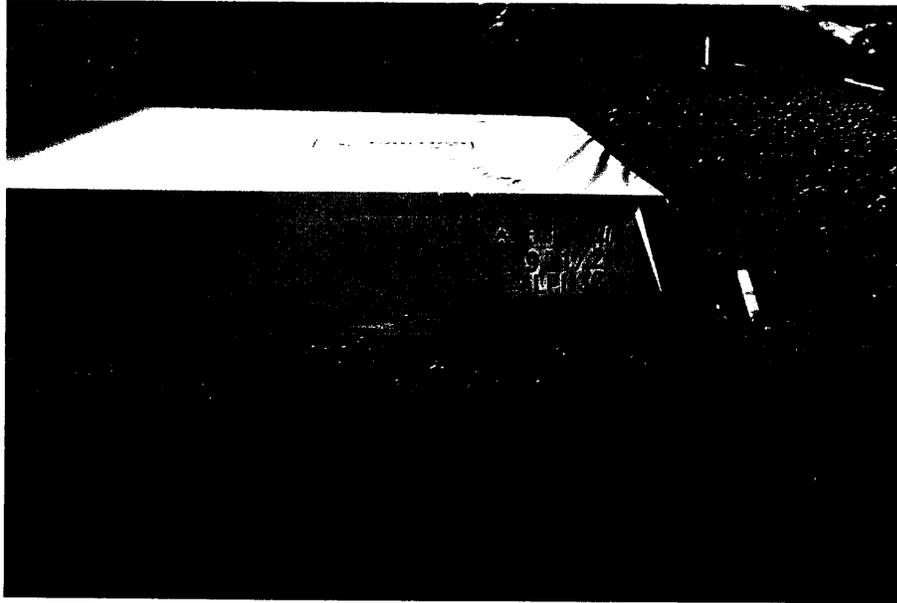
P-13 & P-14 both North of Main Track line
between 22nd & 23rd st.

P 15



Pictures of the wrapped I-joists setting on the ground. Note the sizes (9 1/2" x 40' and 9 1/2" x 44'). The LP stands for Louisiana Pacific who manufacturers these I-joists.

P 16

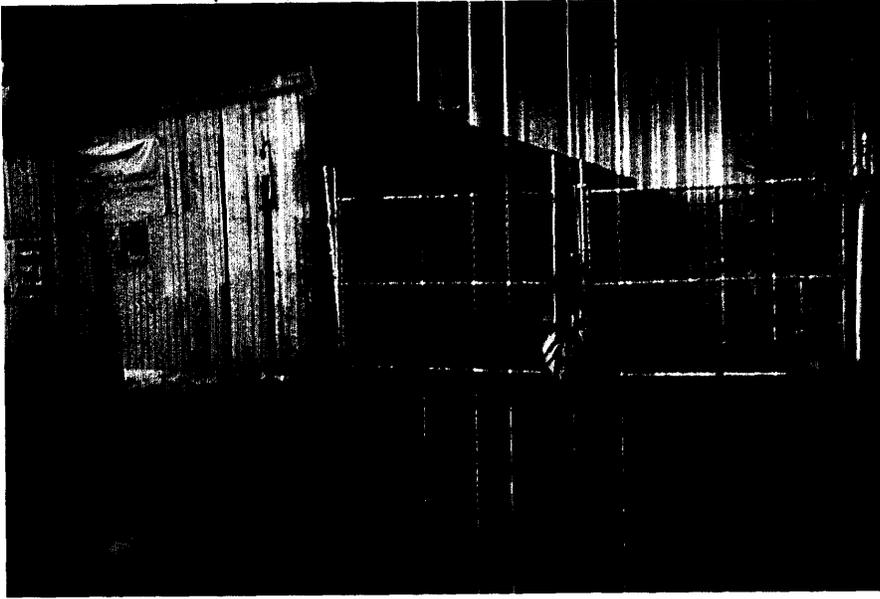


*They show serious, serious over hanging of trail
 P-15 & P-16 on proposed trail North main track
 between 22nd & 23rd st*

P 17

← approx 28' back from center of main line as blue pen line

line is 28' N of center of main line



These pictures show the low shed for temporary storage of materials that need to be inside such as pine boards. The long I-Joist racks back up to this shed. The shed is low enough to swing the I-Joist which is being carried by the forklift over the top of the shed and position the I-Joist to set on the rack. The wrapped packages at the end of the shed are dimension lumber which is brought in by rail and stacked until we can get it shipped. This area is located on the west side of 23rd St. and on the north edge of the railroad right-of-way.

P-17 & P-18 are on 23rd St, North of Main line R.R. Storage North of reg line shows where proposed distribution *

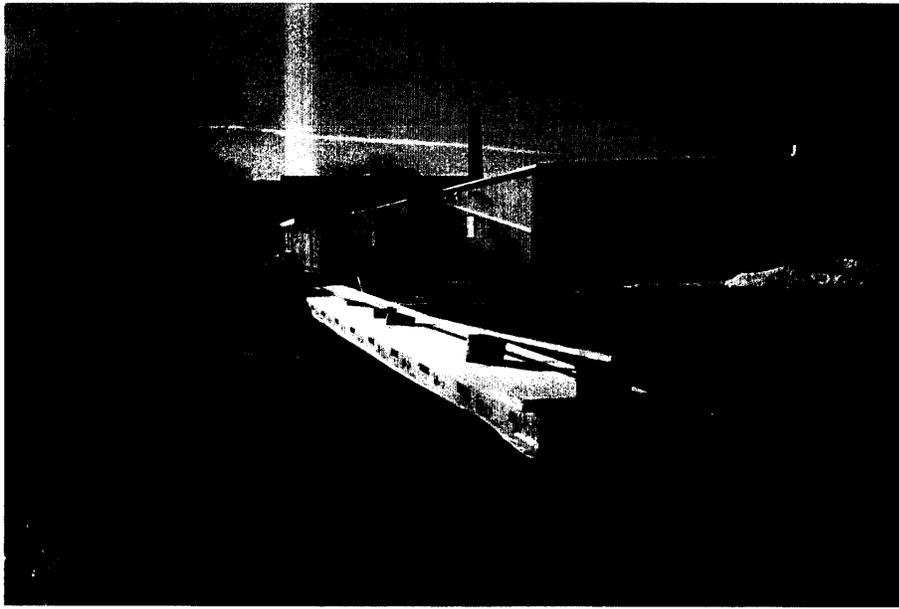
P-17 & P-18 show
allows vertical pointing
down to be "exact" south
boundary of proposed trail

P 18



P-17 & P-18 are on 23rd St, North of Main line R.R. Storage North of reg line shows where proposed distribution *

P19



This picture shows a 44' I joist laying across the mainline at Whittier St. The purpose of the board is to show how much the ground slopes down. The board is level as determined by use of a carpenters level. At one end the board is directly on top of the package. At the closest end, it takes several boards to level out the package. The ground slopes downward away from the mainline by that much which makes operating a forklift more difficult and makes it more likely that the load will slide off.

P-19 + P-20 located between 22nd x 23rd st
south of main Railroad line
P 20



Photo shows area with stakes and flag on south side & north side when you look west.

Photo 1-B (between 22 + 23rd st) shows the main line. This is a very close photo. Main line and area around the 22nd st.



1-B shows a close-up of the main line on the north side of the main line. Between 22nd and 23rd st.

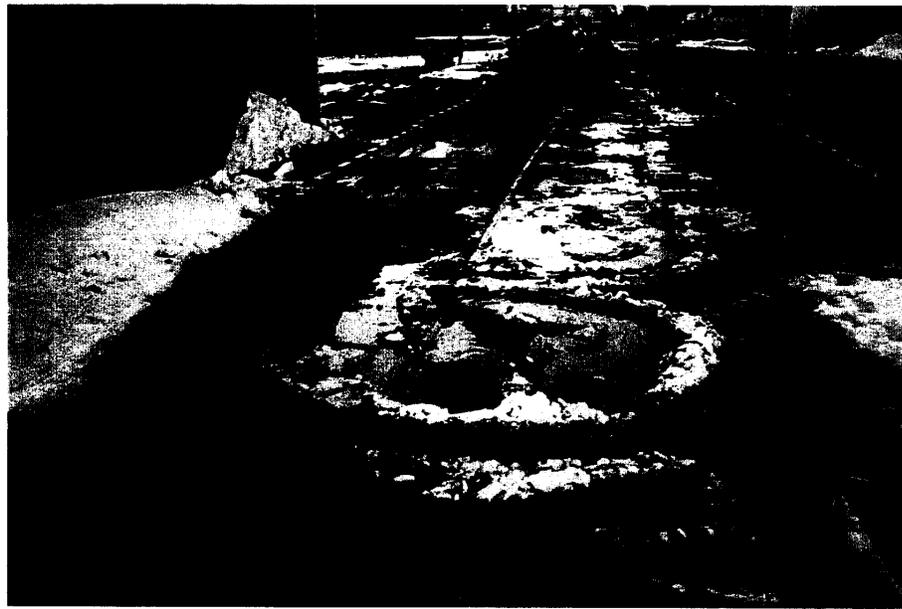
This shows 1-B between the yellow flat board sidewalk and the main line. Like a foot wide. This looks like the area between 22nd and 23rd st. See stakes and red flags on south side.



21-20 Twin to white at terminal X and the arrow in 2-13. The intent is to show twin terminal between 21st & 20th st, on the north side of the main line. See the Jeff body of Tophon letter-termination page.

2-B between 22 + 23rd st, north of main line and just east of 22nd st. EIC used the proposed rail way, shows the direction & location of the main line.

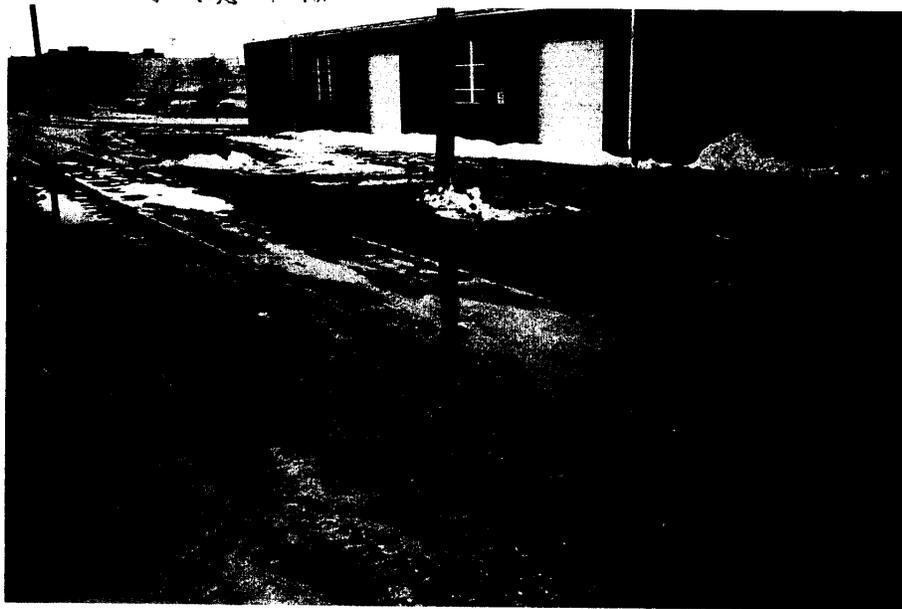
3-B



Standing near
3-B 27th St Main
Main Line
South side of P. R. Track
South side of P. R. Track

East 22nd beside red brick blue note bike.
trail runs over top of spur already there
to go to first

22nd St
4-B
→



→ Middle
Proposed
Trail

Location - 22nd St & the Main line. This shows
the trail going front of two white overhead doors.
XX. By this pole near 22nd St it is 7' from south proposed
trail line to main rail - Too close!! X This pole is on P. trail

S-B

This totally fits in our Etc. Terminal in load area for unloading flat cars.



South side of proposed trail

North side of proposed trail

SB - Looking East

Location of S-B is between 22nd & 23rd west of 22nd st + north of main line

This is the north property line see concrete retaining wall of base

6-B



Looking East

6/B located 22 to 23rd st. west of 22nd st north of main line. This is north line of proposed trail woods see logs can see north end of trail in wood light hand camera.

location - just east of 22nd st, North of the main line is 7B

7B
 The ground between
 main line & B (H Co)
 are sitting & South edge of
 proposed trail head to
 22nd st is wasted

South
 edge of
 Trail
 proposed
 ←
 North
 edge of
 proposed
 trail
 ←



from front
 side of building
 to see with
 side trail
 12'4"

← from
 property
 North to the
 south edge
 of proposed
 trail 20'6"

↑
 Most of
 this bank is
 waste - sand
 locked

location - 22nd st, by fair people. Main line is
 to left of three... Red Bricks building
 with two overhead (white) doors see 4-B

8B

North
 property
 line
 wasted space
 land locked.
 ←
 North
 line for
 proposed
 trail
 ←



What Trail
 too far much of
 P.C. Value of
 land - Can't open it.

↑
 South
 edge of
 proposed
 trail

location of 8-B is east of 22nd little ea. of East side of Whittier street and
 (Between) → south of main tracks. These pictures → Don Hamill took 12/16/03.
 See where Blue barrel says this ground between property line
 and North wood blocks is wasted, this is land locked,
 because the proposed trail (see overview map colored green) fine
 black line down center of (green) curves down starting whittier street.

Sunny X + ⊗ suggests to change
 X on shown in 9-B where trail people
 Can't see the 22nd st. T. m. f. c.
 Two overheads do not what road
 is 1/2 miles or machinery going on coming out

9B

9-B is looking East. Follow rails East see exhibit marked
 B.M. 12-19/03 (2 pages) Rail Co. down to connect
 go east of 22nd st. connect this spur to main line beyond

9-B showing over in place
 Spur trail to page. This page
 trail goes over the top of blocks 20, 4, 11



View from 22nd st. looking East
 "NORTH SIDETRACK" - NEAR VAND STREET (spur track)
 East of 22nd st. north of Main line looking East. Note no material
 per photo 4 per mrs. Schuchman. Proof life has better

one. The south side of red brick Bldg
 10-B shows trail going over rails and
 blocking two overheads
 The 22nd st. is very close to

10B



inventory
 rotation,
 better management
 More selling
 etc. then
 they are
 doing
 life credit
 you
 D.H.
 This 9-B
 photo was
 taken 12/16/03
 by Don Hamel

10-B - just east 22nd street, north Main line, south of red brick
 Bldg. Increasing snow so can see proposed trail goes
 right over the top. The red brick Bldg will make it
 for trail to 22nd st cross unable to see cars, unable for cars
 to see trail people. Bad crossing

X what is going to happen when these doors are open and Eg. goes in or comes out - is this proposed safety?? as shown in this 11-B.



Picture taken 12/16/03
R.H.

12 B shows the spur Trackage that being designed and will be constructed. See design Co. (B.M. 12/19/03. Exhibits The design Company is The Rails Co. The design was drawn by President of The Rails Co. Bob Mitchell & furnished 12/19/03.

12 B



to Don
Hamill
J.H.

12-B - East of 22nd st., south of main line, North Red brick building on the right. The spur rail trackage is in poor condition thus it is left in place. This picture taken by Don Hamill 12/16/03. Robert W. Mitchell, President The Rails Co. Marked B.M. 12/19/03

Compare Photo 4 View 22nd looking west of Mt. Schuchman he says Note Mat'l this Mat'l is 4# is Not here for long ways as illustrated in 13-B.

13B

Not enough room left to unload center beam rail cars. This is Bad!!

yellow wood blocks south side of proposed trail



North side of proposed trail.

Location - Between 22nd & 23rd St. This shows layout of proposed trail looking west toward 22nd st. Land back some land permanently to right of the picture where wood pallet sets. See X → X This bldg. is going to block the view of traffic looks at how wide. Not enough room left to unload rail cars.

14B
 B.H. looked at overview of routes for trail and it caused me (this green - fine black line) to say we better lay out this trail and see what it actually looks like. At my opinion the fine black line is representing actual trail, if not why is it there. This is misleading the width to reader.



Note how wide this is from yellow wood north side to yellow wood block south side. Wide. No Unloading Room to south.

Note

14-B Shows a Car Crossing in front of trail. This shows one car length past the bldg. and front of red vehicle is right on the south edge of the trail immediately. So North edge brings the front bumper of this car quickly toward a trail person, Bldg shields/Hides

Note in this 15-B picture all bldg material shown in this photo. View from 2nd St looking East bldg material not present in 15-B or 15 double EE. Growing temporary piles

In 15-B look at how hard slopes
 1/2 171 ↓ during picture to line 15
 day 12-19. The 1/2 bldg material
 was in front of short turning tracks

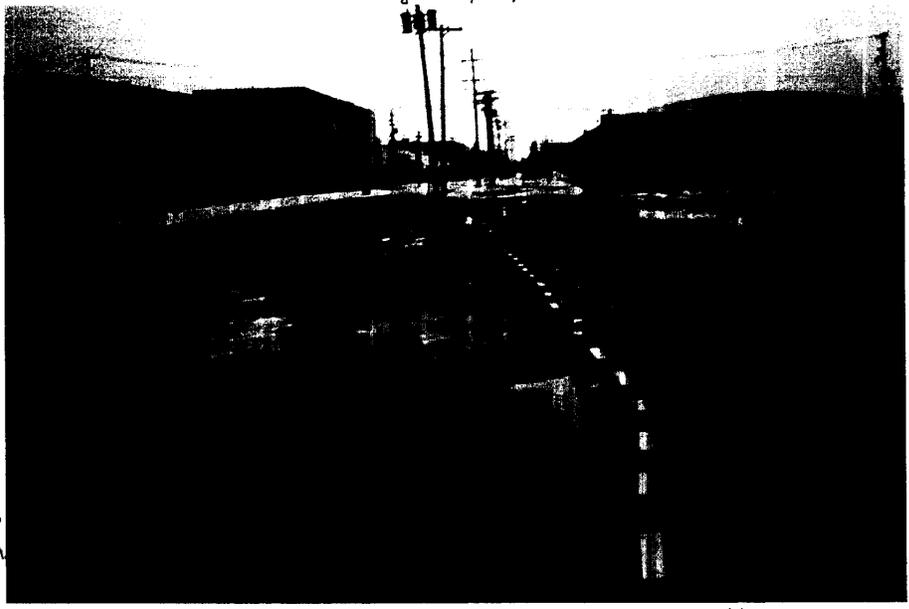


proves
 up fully
 situation
 changed
 movement
 being
 temporary
 year ago

X Inventory No. 12/16/03
 here see compare
 No. 4 Schuckmann
 #15 BB

15 B shows main line + estimated south wood for proposed trails line. SFC Rail car unloading area starts out in front of whittier being 28' and narrows to 7' going extreme west at 2nd street.

16 B



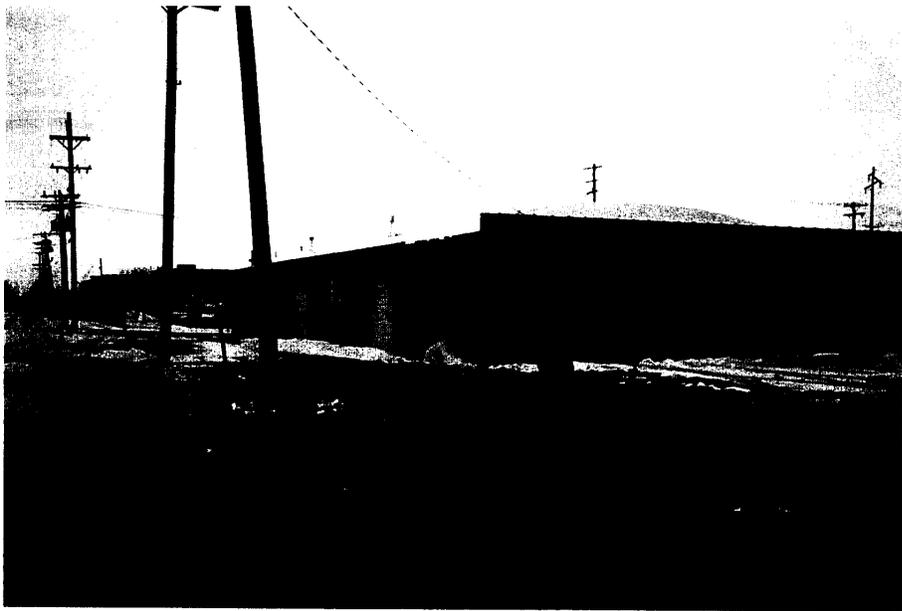
main rail line →

28' unloading
 area. SFC needs
 full 50' width
 cars 28' much
 too tight

No to minor
 & black line
 down of the
 trail, curved
 down 20'
 To much
 the lot 20'
 and curve down
 another 20'

↑
 Schuckmann
 #15 BB

17B



↑
Middle trail
wood

17-B x by three utility poles. These three poles will be inside & on the proposed trail. Proposed ~~trail~~ trail goes right over the top of our present (Partial) Railroad spurt

18B



↑
~~eliminating~~
eliminating
usage
entirely of
the spurt.
Unreasonable.

↑
middle
trail

↑
we will have 8'
more width down
at between
21st + 20th

x- forklift wheels — lines proposed lumber we just can't unload this way if STB allows the trail over our land. This same unloading problem exists down at between 21st + 20th street where we will put our R.R. Unloading Terminal on the North side. ~~exist~~

198



North wind blowing
Leaving down to
Mashed down to
Washed down to

Land level
Don't get to
see point
Trail

Looking west down center of bike trail, N of main
line, east of 22nd

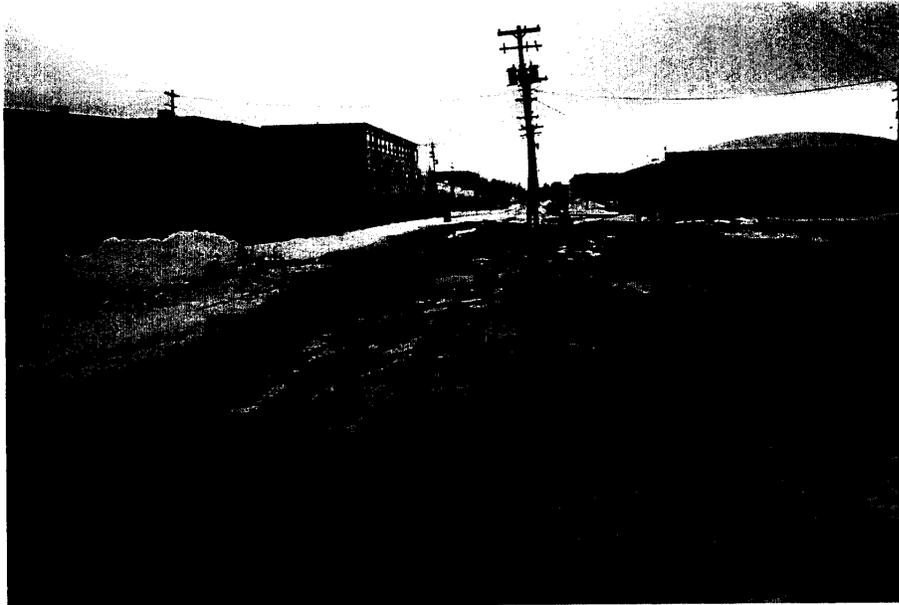
↑
Take

208



Looking East (see 198) from 22nd street over top
of L&C railroad spur covered with snow.

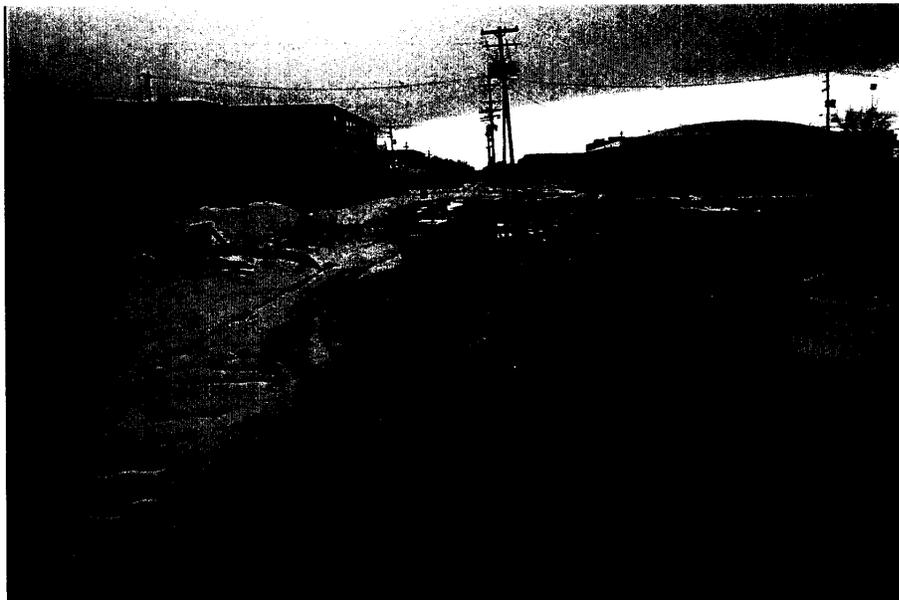
21B



←
Main line
track

main line tracks east of 22nd. Sea bike
path to right as it curves around red block.
Between 22nd & 23rd st. No unloading space
between main line & trail staked out (staked out on right.

22B

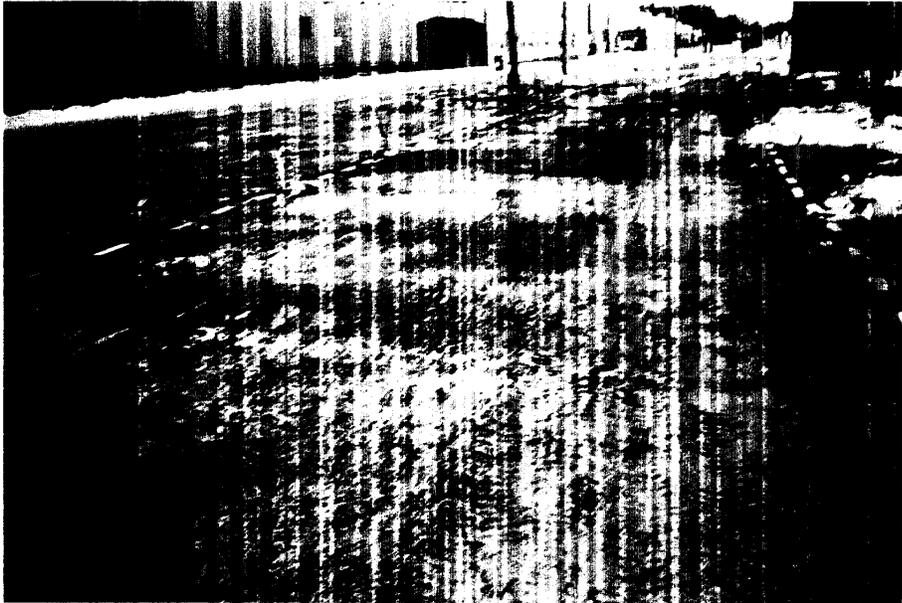


←
Main line
track

main line east of 23rd with bike trail
off to right. Between 22nd & 23rd st.

23-B was drawn from source. Map overview for routes of trail, looks from "Narrow", the bridge. Hiker/13iker trail (green) looks compared to how wide. The actual stakeout 23-B is.

Jan 23 - Note at 11:00 AM (see houses of route for trail slope on the previous thru causing the terminal load to be starting at whitethroat to become narrower and narrower going west



at near 22nd it becomes narrower to 7'. Again, the distance from south trail line to main rail line is just 7' feet. Look how close trail riders and walkers. Danger!! Danger!!

Bike trail between yellow boards east of 22nd where trail crosses under, looking west

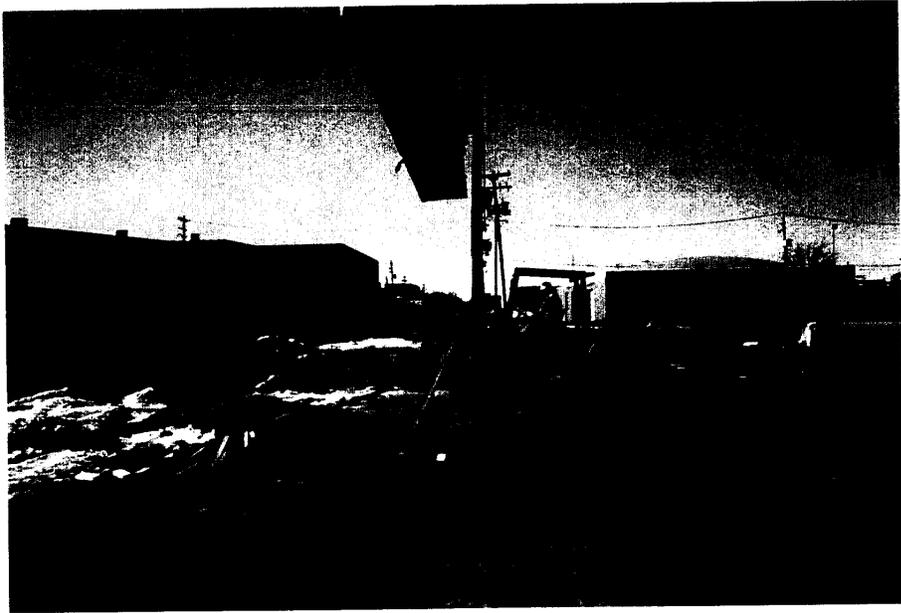
24
Should of 2 - wood with two red flag on the top to main line where we would unload 2'3" long rail flatbed car is approx 10' only 28'.



← location of main line rails

bike trail N of W. between St. and standing north of proposed trail picturing north side of trail wood blocks + south side of trail (wood blocks) see two stakes - red flag on top on south trail (have wood blocks) and see main line rails markers on right - Summary Not Much distance far too close between for railroad terminal unloading center 5:30 PM Rail Cars.

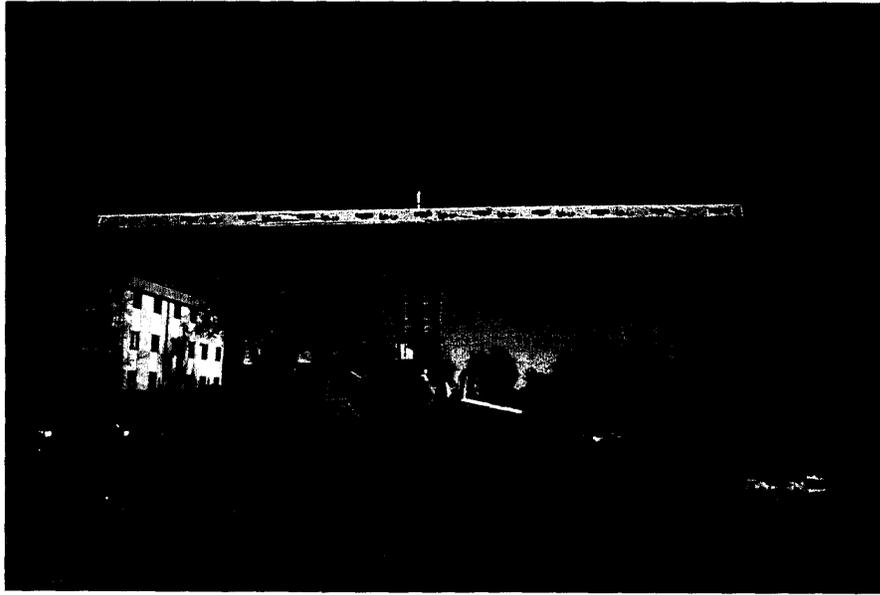
1-M



This is in our exact terminal area between 22nd + 23rd + just North of Whittier st. This height necessary to unload an I-Beam railroad Car load. You need to clear the car, Next one backs up with this in the air. One likes to back to the left and the right both. The trail and the people can't be run over. Load this high the forklift driver is not looking back as much as he would like (the high load, shifting of the load, and concern you don't upset) to perhaps so caution is needed. Note you need to be back from Railroad car to start with. We handle this load we have approx 28' to back around this picture taken under supervision of Don Hamill on Fri 12/19/03. Don Hamill

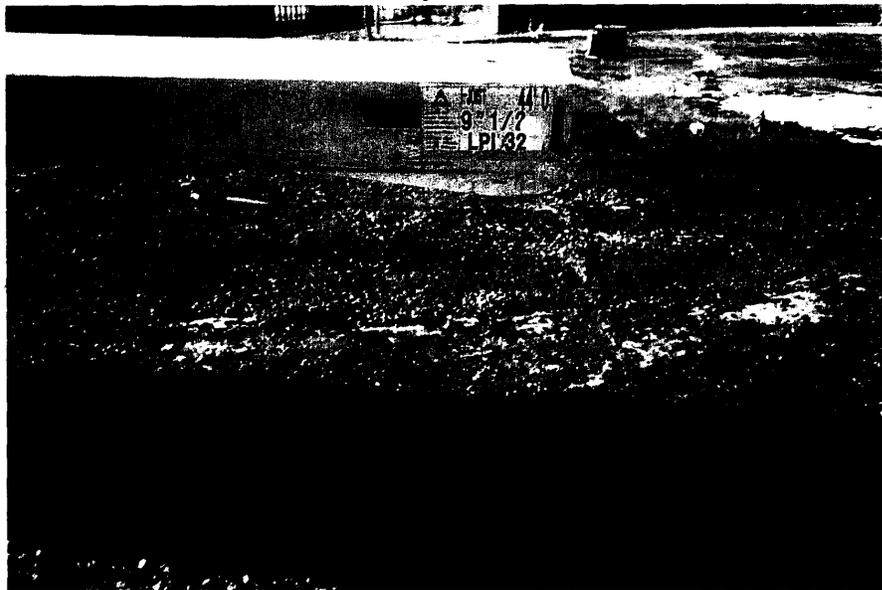
Note in 2-M we are hanging
 over the railroad car & the trail
 both. This 44'0" long on forklift

2-M



This 2-M picture is forklift driver backed
 to his left, front & north of Whittier street.
 This height to clear ~~that~~ rail car & need to
 back up as shown & we have 28' north rail to red
 line which is south proposed trail line.

3-M



3-M - Same as above in 2-M and note it is 44'0"
 long. We lowered package to this height and
 10' into the trail width.

4-M



4-M Note this we did a normal "back" and one can see three trail lines red, center green, & north outside red. Note how close to red lines the wheels are stopped at??

5-M

Note the wire
vertical line
→

Fork lift
is leaning
do turn
over



This will be some unload
process at 21st & 20th terminal,

5-M shows height to unload rail car, how close to red line wheelbase, Hang out over the trail - throw in frost, rain & old split rail, and such bad weather.

6-M

This Creates Unsafe Conditions for L&C and for Trail.
The liability is enormous.



6-M was taken 12/19/03.
L&C load is hanging over top of
the trail. The loads will hang over
the terminal @ Whittier + Terminal 21st + 20th st.

6-M shows height needed to clear R. Car
North of Whittier in terminal area and proposed
trail carefully laid out, conscientiously laid out,
2 red lines + one center green line. 2 red lines are
North + south sides of proposed trails also flags on red
lines + green line.

7-M

This concerns me + worries
me how are we going to
manage + control safety ???



7-M taken 12/19/03

7-M would also illustrate both terminals the
one north of Whittier and one north of main line between
the appor area for railroad terminal at 21st + 20th st.

8-M



This 8-M was taken 12/19/03
The inventory changes every
day. Normal day is 50-60-75 loads.

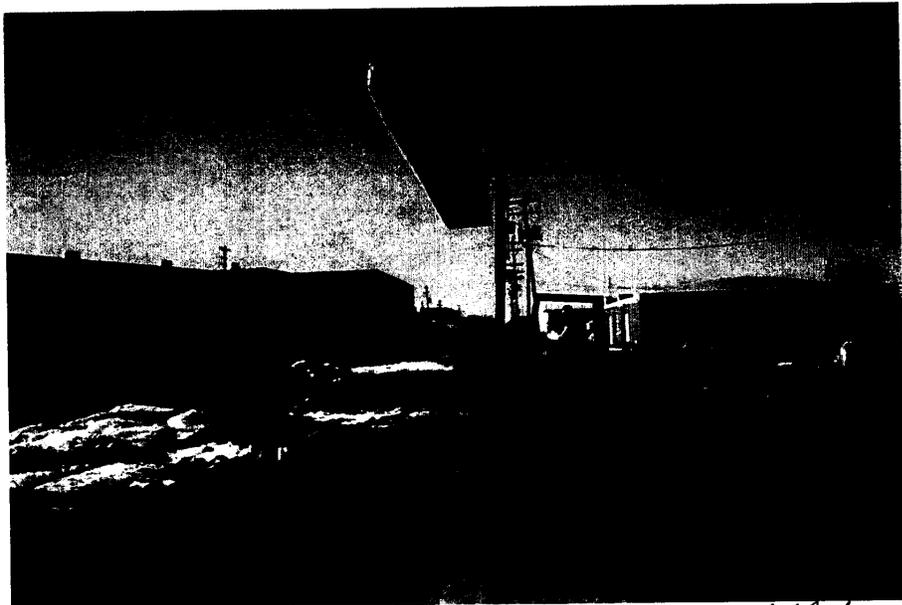
8-M illustrates I & C has to have forklift
room ~~for~~ turning + clearance to handle the
inventory shown left side of picture.

9-M ↓

Note slope the water heavy rain runs
over this area forklifts slide on wet mud, they

9-M
Left is
before
I & C improved
where
forklift
sets the
ditches
are gone
R.H.

Taken
12-19-03

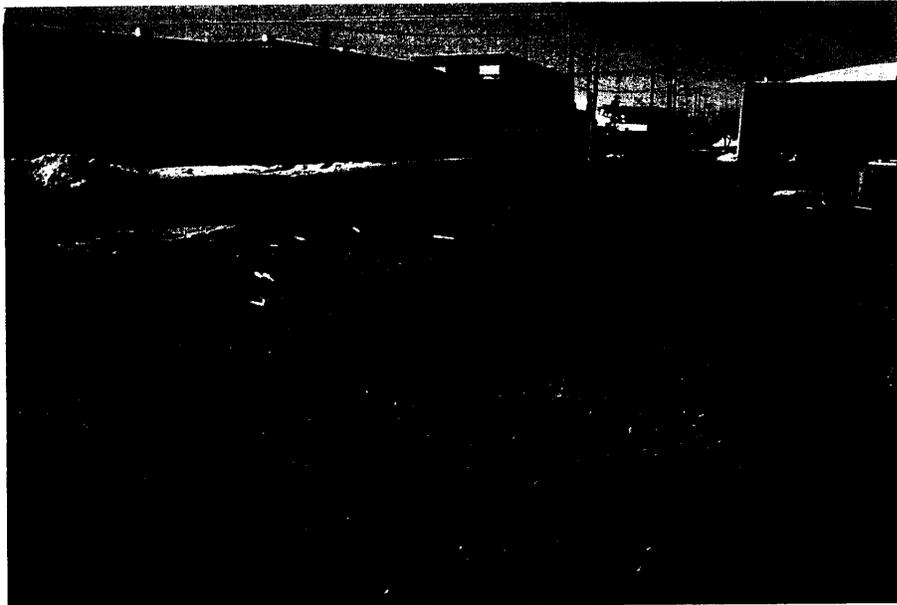


slide
on snow
they
slide
on ice.

9/M Taken
12/19/03
Car at both terminals

9-M shows how we approach side of flat rail car
at - 21-20 terminal + whittier terminal. This height to lift off

10-M

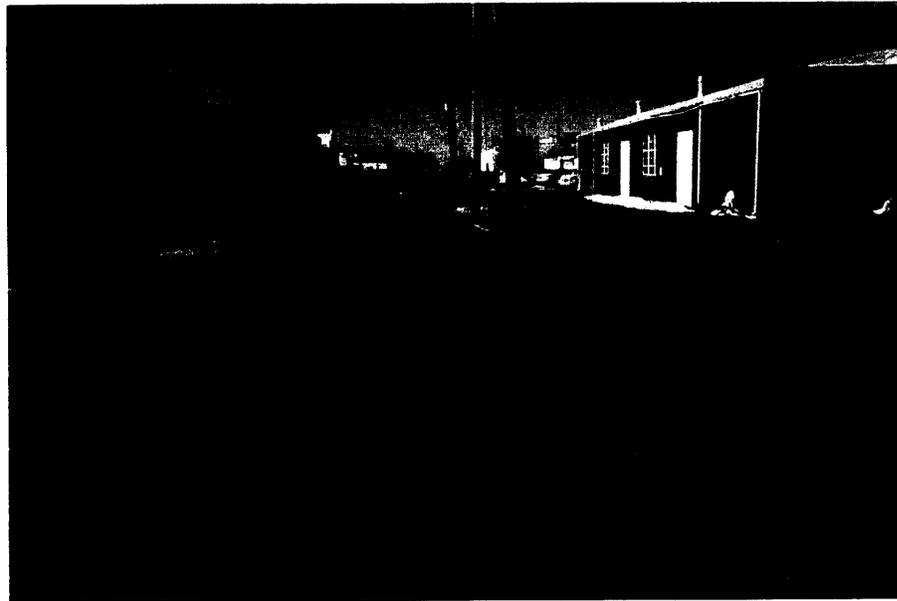


South side
proposed trail
→

↑ Red is North
side proposed
Green line
center propose
trail

Greenline Center proposed trail
10/M taken 12-19-03 looking west to 22nd st.
The proposed trail is 20' wide + Mr. Montage
this represent different impact on the railroad
land the proposed overview route (Exhibit ~~in~~ ⁱⁿ appendix A)
Please Compare 10/M City proposed green trail in the

11-M

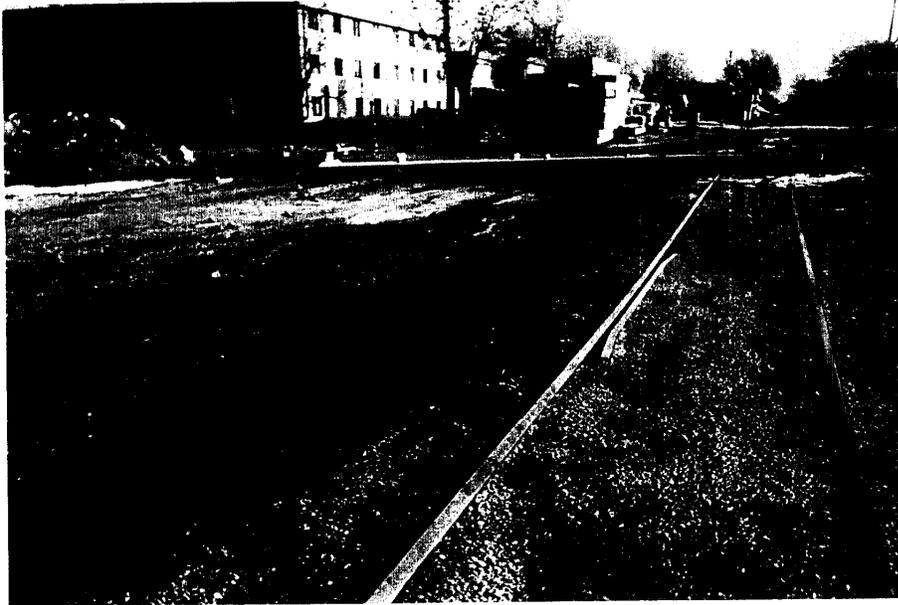


overview
of routes
for trail
map

11-M taken
12-19-03

Compare 11-M above overview of route for trail in City Colored
picture - ~~Compare~~ Comparison (both) ~~from~~ ^{from} Whittier looking west

12-M Show very reasonable, (be fair Dennis you say you saw inventory one day) very reasonable + fair



storage
use, 7
yes & yes.

⊕ Shows approx
16" to 18" slope
could upset
a forklift
carrying a
load???

↓ Newville - North of red line that has
2 yellow flags on three blue barrels - 12-M
the sign (BT partnership sign).
says this land is available all
the way to 22nd street. yes & yes.

12-M shows 40' long package that far too
long for & causing over lay on railroad and
the trail. Not sufficient room. Maps supplied
by city insufficient, lacking in showing over

13-M illustrates where proposed trail
could come from 23rd st west, along North property
line of F.C. Roway south of red object 3-
over where x x x (4) concrete wall enter
on where blue barrels to 22nd st. where
blue barrels sign says available.



Crowding,
Handling
of Inventory
problems
their maps
don't
illustrate
danger
that
12-M
&
13-M
clearly
show

13-M Shows proposed trail red, green, red & flags.
The two blue vertical lines & x x x (4) where city could use own
land. x x x (4) North of trail proposed come from 23rd st west toward 22nd st.

Red line on bldg to ⊕ line at right is ^{Proposed} trail entrance per Aerial View Trail Map marked green

W-1
H-1
A



See ⊕ above gate city proposed trail entrance at 23 rd st. on to the railroad land

See ⊕ lower right hand corner an alternative to 23rd to 22nd st. and going west.

W-1
H-1

In 14-M this south line of proposed trail (see V + red vertical line) City proposes cutting off south of property line.

Between these two blue lines would be the proposed 20' ~~to~~ goes over property of + move fence line to west side of property. available
 Do their reply they may say go toward brown bldg (1) can question there is to be on the west side of the foundation can move it to the west.

14-M shows two blue vertical lines between these two blue lines the trail could enter on to their own property go south of bldg in background head for red object again and exist between two blue lines

←

⊕



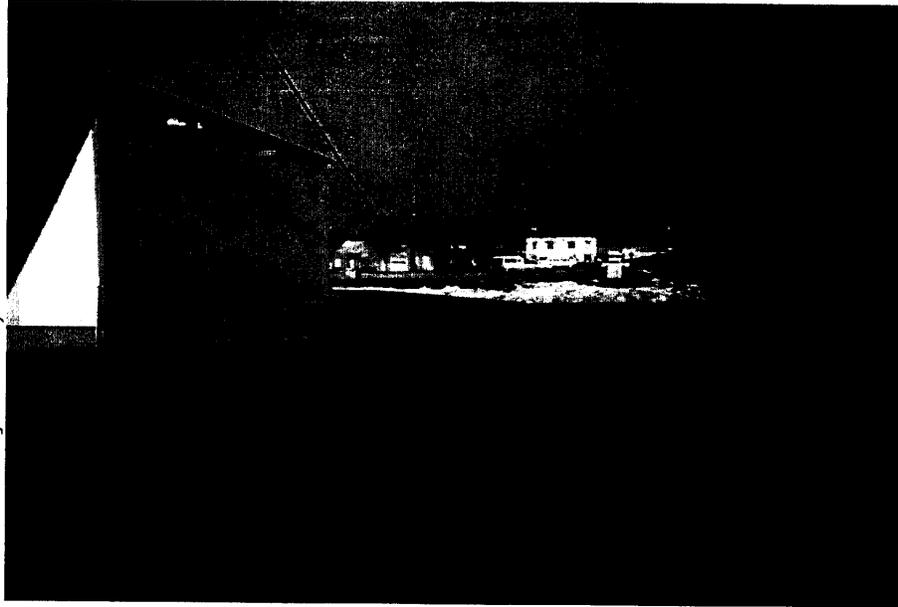
shown in Exhibit 13-M where XXXX(4) is shown.

Important ↓

15-M How the ditches existed "before" F&C improved the railroad grounds ⊕ this illustrates north of main line where we have eliminated ("after") the ditches and made it really nice.

we hauled a lot of Inventory out of this area on 12/19/03 estimate 75 loads (pu trucks + big trucks)

19-M shows before the improvements
 21-M
 Compare to good finished results of
 6-M, 8-M, 13-M, 12-M + 16-M. D.H.



18-M taken 12-19-03

18-M looks north from Whittier street viewing into our terminal area 24-23rd st. a lot of forklift pictures taken here beams 40' + 44' long on left



19-M taken 12/19/03

Proposed be north of this area D.H.

19-M shows main line going East to 23rd st give a look at Inventory and yard in front of the inventory whittier approx to 23rd st approx 1:00 P.M. 12/19/03

20-M



21-M

20-M is before and 21-M is a before
of our Continuous on going Improvements when finished
for comparison



- Compare To
- 7-M
 - 6-M
 - 8-M
 - 9-M
 - 10-M
 - 11-M
 - 12-M
 - 13-M
 - 16-M
 - 17-M

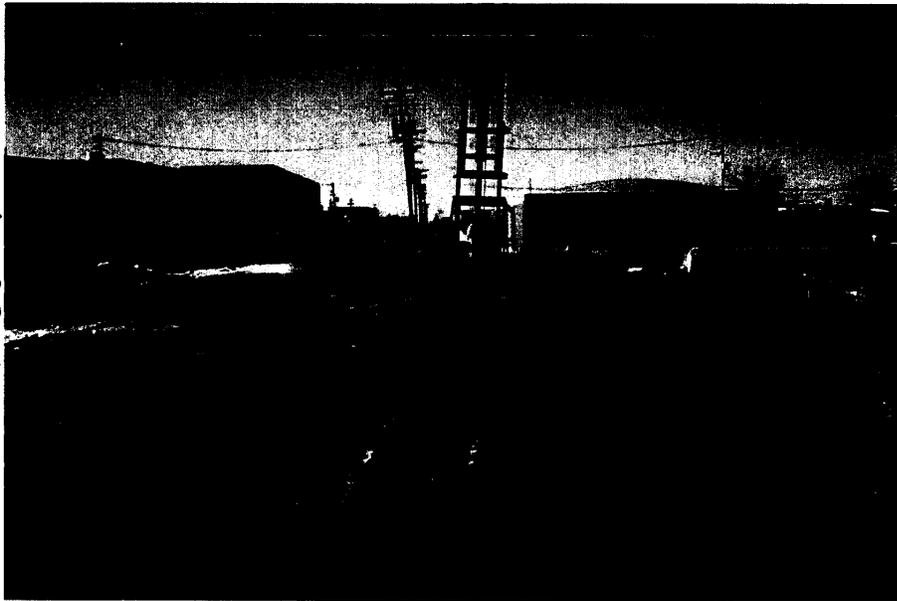
22-M



22-M + 23M between 22nd st + 23rd st.
south of the main track line
pictures taken 12/19/03 Illustrates
Ibc needs the full 100' wide + 50' ^{needed} ~~width~~ ^{clearance}

23-M

Ibc + the railroad
~~it~~ it is proved by
23-M + 22-M forever
all needs - 2 years



North
side of
Main
line.
We need
whole
50' of
width
all
for safe
efficient
profitable
Business
& Railway
operations
(Both)

24-M



Location south main line and approx 19th st.
see overview of routes trail colored map.

24-M taken 12/17/03. Trail proposed
this shows being used (so Gate comes open + closed
by UNL) trail + sewer people consider this traffic
see arrow on right of 24-M shows snow tracks and
use all way down over tracks and head north. you
say Cushman has moved out and no use not so.
Proposed trail shows switching over to south side of main line
at 21st. So trail per this picture you would have
use competition.

Picture taken 12/17/03.

25-M



25-M shows rail road ties of UP and that they rotten and had needed taken out. Taken out & repaired off + on last 12 months. picture taken 12-17-03

picture taken 12/17/03

line Communicates spreading out determinations in later planning
approx



line Communicating spread out from picture
approx

Inventory storage to the left or East to 22nd st

Inventory storage to right or west to 19th st,

26-M shows approx location looking south (see poles) of LC future terminal railroad unloading area between 21st & 20th streets - showing North side. See arrow to main railroad line.

27-M

27-M + 28M taken approx 12/17/03

See T. Senrich evidence says
Coming down on south side of
Main line in one place + shows
North side on trail map ????



← This is south side Main line
at 21st. Prop. busway intersection
lots use + traffic

This is south
side of main
line at 21st.

27-M to any other
the use, S.H.

27-M shows looking south at from 21st st.
See gates to now UNL property the snow shows
usage (snow tracks). The trail ~~proposes~~ proposes
turning south toward this gate see overview

Note cars are parked
full on + continuous on both
sides of 21st. This 21st intersection
is being used alot. See 28-M + 27-M

28-M



Map
green line
curves
south
route
for trail
from
North side
to
South side
Note the
change
+ curve

28-M looks North from 21st + railroad sign of
Main line. F&C has spent alot of money for this
improvement of 21st + R.R. This where trail proposed crossing

29-M

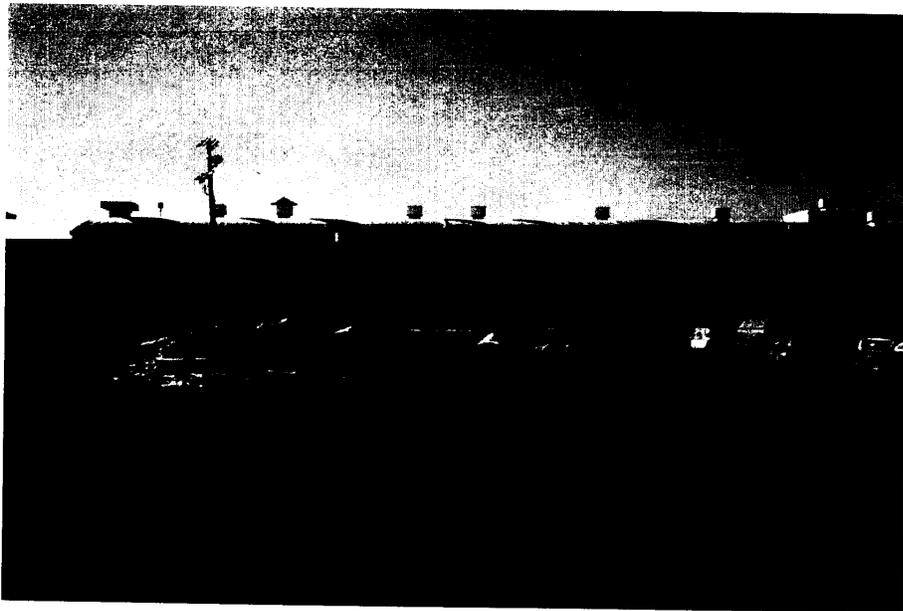
29-M + 30-M Taken approx 12/17/03



Picture Taken

29-M is present Inventory of railroad ties located at approx 19th st + where R.R. starts to curve North. These be used to continue the repairs +

30-M



Improvement to SFC R.R. operation

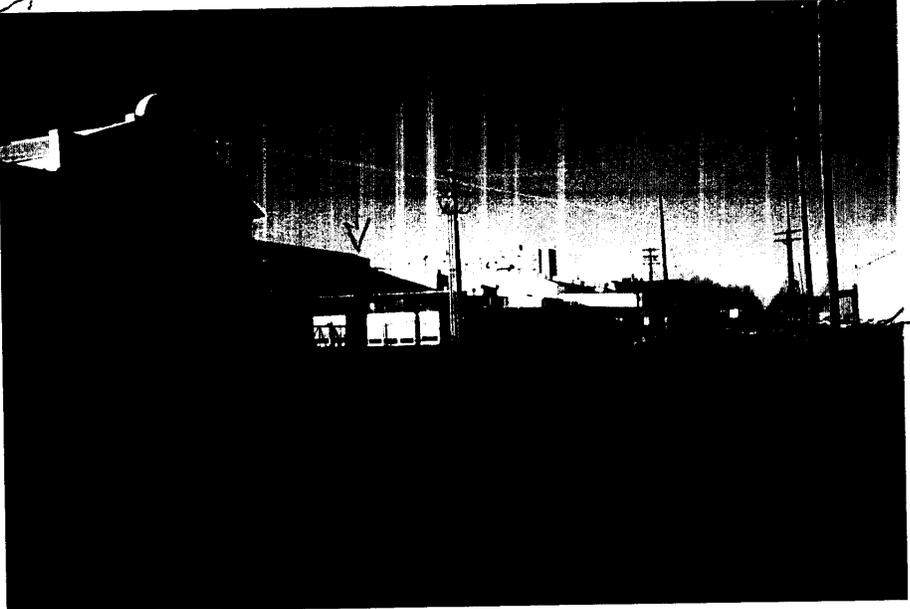
30-M Taken approx 12-17 or 12-18-03

30-M another picture looking South showing Terminal that be on North side in future. There be Railroad spurs planned for West end on North + spur on South side Main line West 22nd st. + Inventory west

west of this Terminal area - approx

31-M
 Terry Benrich F.O. 34425 (4. of e.)
 Page 4 of 10 from 22nd st. to 19th st., the trail
 would be located on south side of the tracks
 adjacent to University of Neb. property. It further
 he says I attach

→ Exhibit B drawings I have no drawings marked Exhibit "B"
 So I put a T & S - SUN (near lot 41 LF) It further shows
 the trail being on the North side of Main line 22nd
 to 21st. and no lines showing the crossing of 21st - gap.



Proposed trail goes west to 21st + turns per
 arrow left or south per Montage appendix "A"
 overview map of routes for trail and crosses 21st
 at the X. Go to left side of 31-M see arrow

→ This south
 tracks and
 points west
 32-M

X is 21st Crossing per montage overview trail map
 (See Colored overview map - green line) like this at 21st.
 Terry Benrich F.O. 34425 No. 4th sub (e) p-3 + p-4 "The Husker Link
 Trail could cross to the south side of the tracks at the public crossing
 either at 22nd street or 21st street, Mrs. Benrich T & S - SUN exhibit
 shows unconnected and leaves the reader

32-M This white bldg
 is between approx 22nd st
 + 21st, on North side of
 Main R.R. line. Serious obstacles
 for a trail.

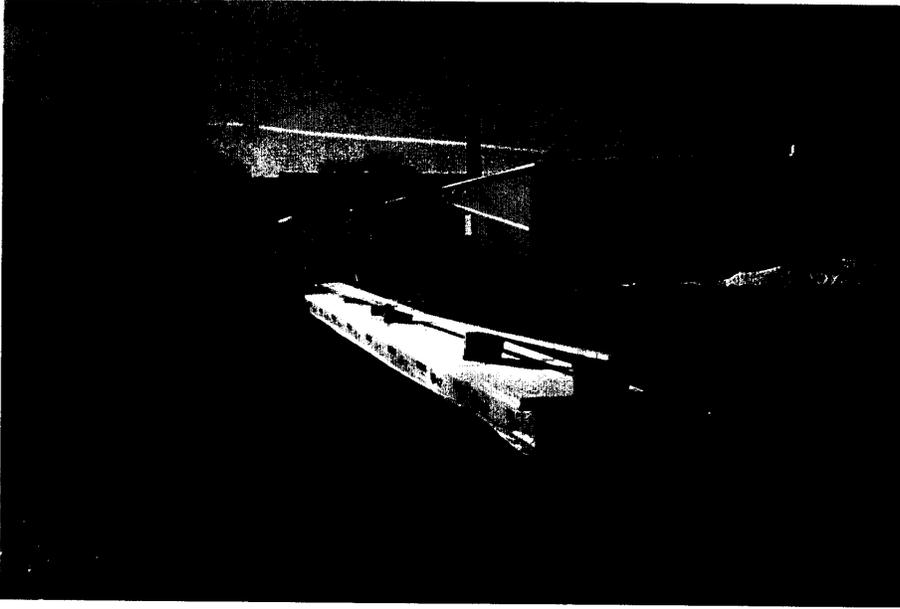


incomplete
 and with
 series of
 doubts.
 I question
 how much
 study and
 research
 was put
 forward by
 Mr. Benrich
 action.
 O.M.

32-M shows overhead door + a ramp. I believe
 I recall 4 O.H. doors + 4 ramps on this south side - white bldg

33 - M

33 - M shows 16" - 18" slope
the 2nd day of pictures.
North, white, at, north side tracks
over top of trail illustration



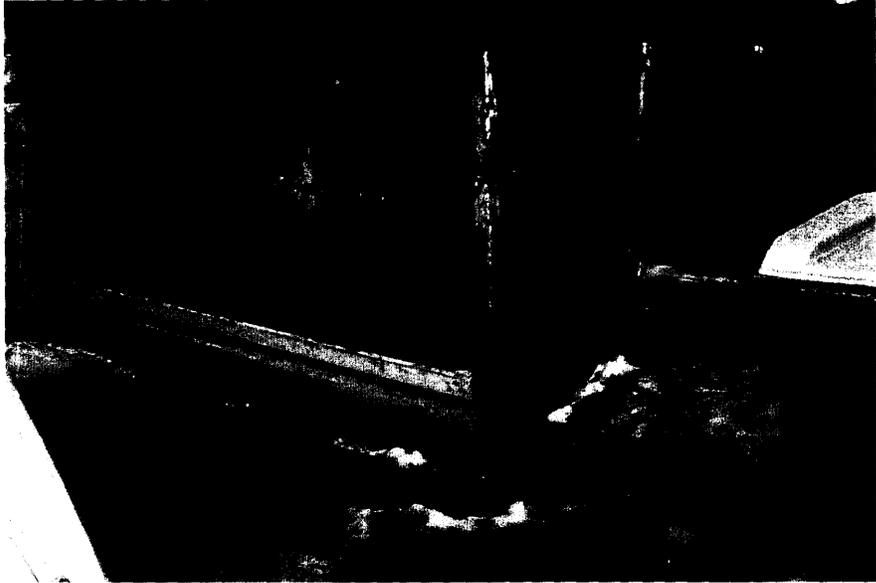
Can cause
up set
of loaded
forblift

34 - M



This bldg has forklift holes to move, no foundation, could be moved north, or to west on available property or west + north where it is now, wide open for 20' trail

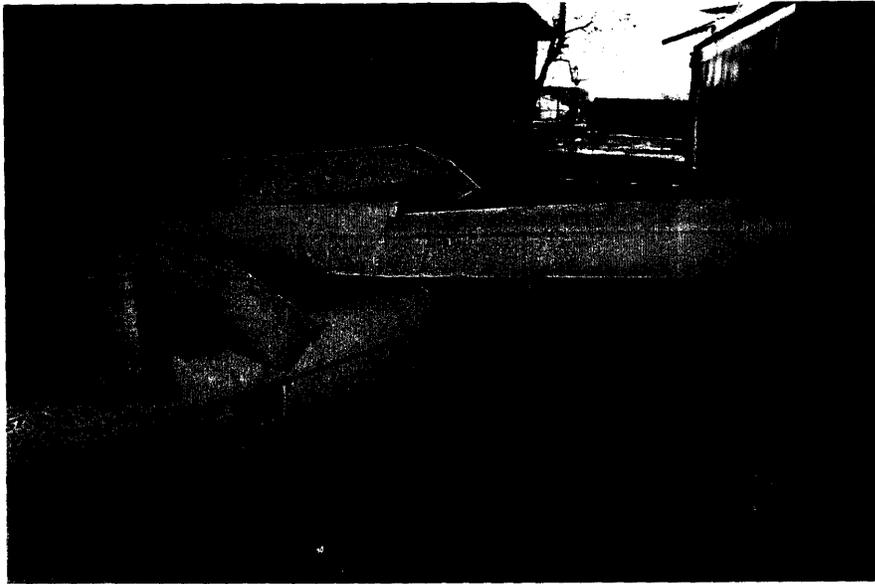
Compare 35-M, 10-K + 14-M. all located starting at 23rd st going westward to almost Whitney st in reply I suggest they will refer to Brown portable Bldg small. No foundation move it 20' north



36-M

This Brown Bldg + Red dumpster are on LHA + EFC property between 23rd st, + 22nd st (or 1/2 block East of 22nd st.).

35-M - taken 12/18/03 by D.H. I got on my knees and look at the bottom of this bldg 12/18/03 in P.M. Don't know



Plenty of area for Brown Bldg + Red Trash dumpster between EFC property + south side of LHA Bldg - yes + yes, D.H.

36-M looking west to red brick bldging + available land per sign. See Brown portable Bldg + sure it is red

37-M

location 38-M + 37-M between 22nd & 23rd on property line + East of red brick bldg. see the two top arrows pointing down one bottom arrow pointing up Conclusion: our layout proposed trail with red line on south, green line in middle and red line on the North prove out again with these facts to be correct. Yes Correct. Don't Hamill



middle and red line on the North prove out again with these facts to be correct. Yes Correct. Don't Hamill

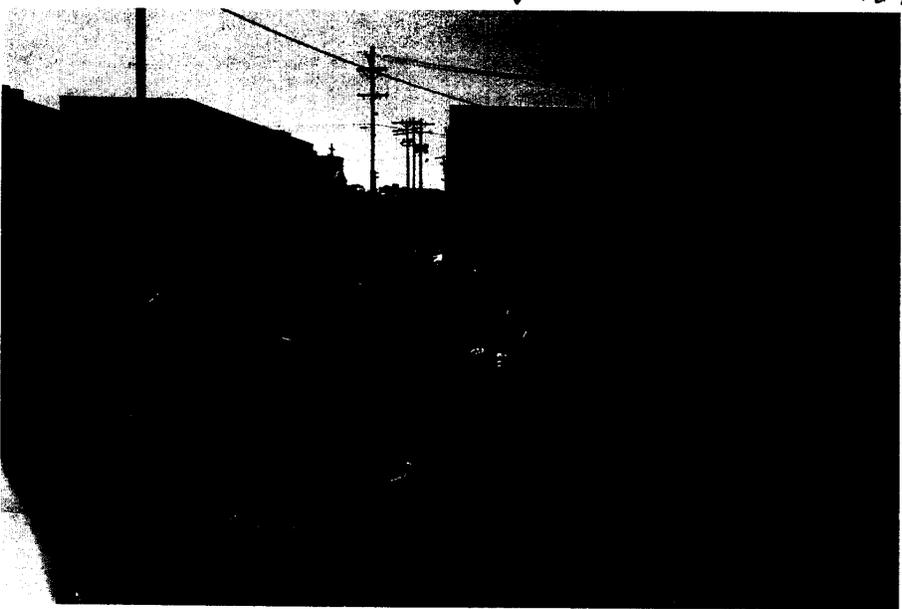
arrow show Olson & Assoc (point to) their pink flag on the S&C property line - proving 100' not 110'

City survey crew being Olson & Assoc. He told me we would (S&C) get a copy & knew that, R.H.

This one example of our S&C property line work and we agreed exactly with City survey crew. We did our work 1st on 12/17/03, 12/19/03 and once we had our flags already in place & we thought we were correct with our 100' width between 22nd & 23rd

38-M

38-M & 37-M are between 22nd & opposite north end of short street (approx) to where chain link fence stops. The whole length of this.



they surveyed after S&C was done & on Fri 12/19/03 they started their pink flags & our flags agreed & per our maps with the 100' width

1A
This is hub that
over (over) loaded with
traffic



trail goes in front of this
blog

25a St. + buildings. This is the hub

2A



L L trucks parked in front of
warehouse on west side of street.
office is to the right

3A



Both 3A
+
4A

13^d St. location (hub)

4A



truck
unloading

Lincoln Lumber trucks
in front, along street

5A



Both 5A+6A

vacant land on 23 St. City won't
let us use for parking so we have to park

along RR track

6A



7A

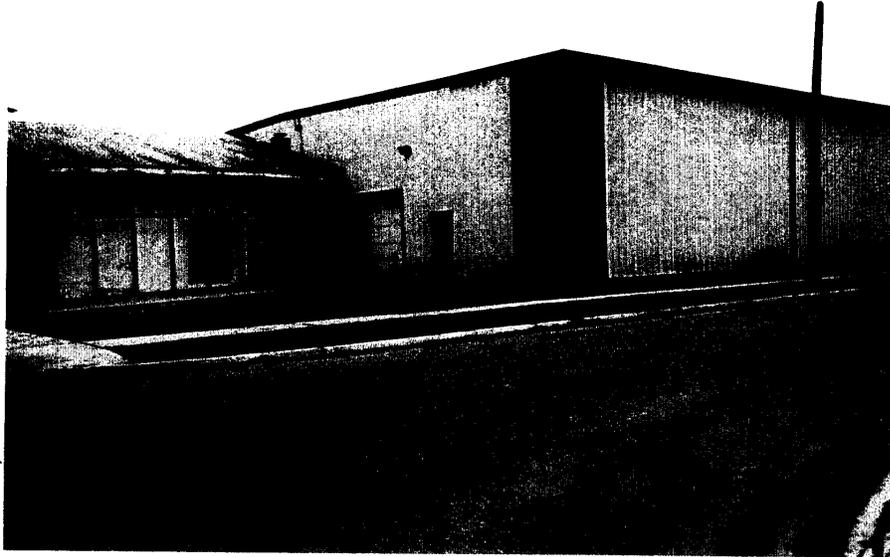


8fc
mellwork location on both sides
of street 22nd & Dudley for 7A+8A

8A

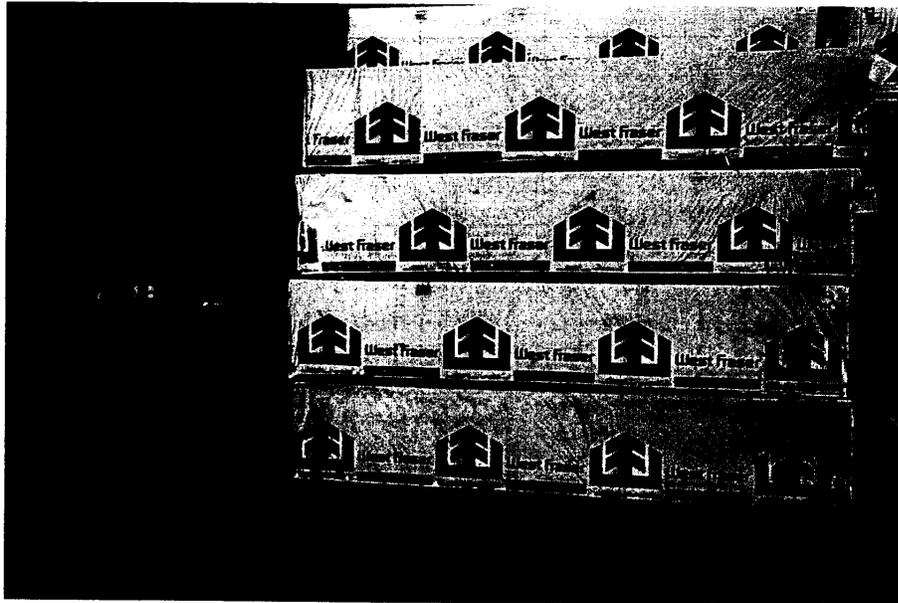


9A



Lincoln Lumber millwork
22 rd + Dudley

10A



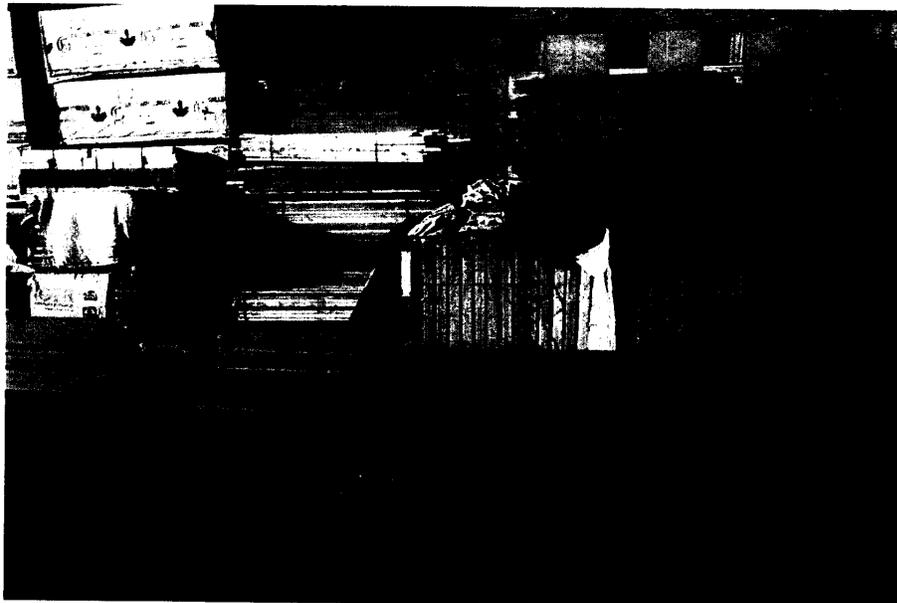
Typical inventory at 13d St.
932 North 23rd St,

11A

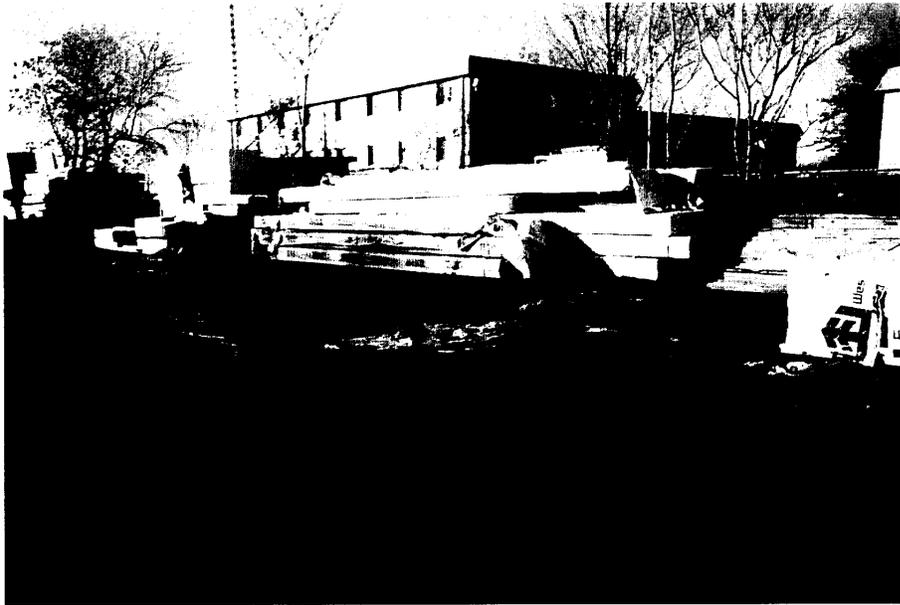


Both 11-A typical
12 A inventory at 23 St. location 932 North 23rd St
for both 11A + 12 A

12A



13A



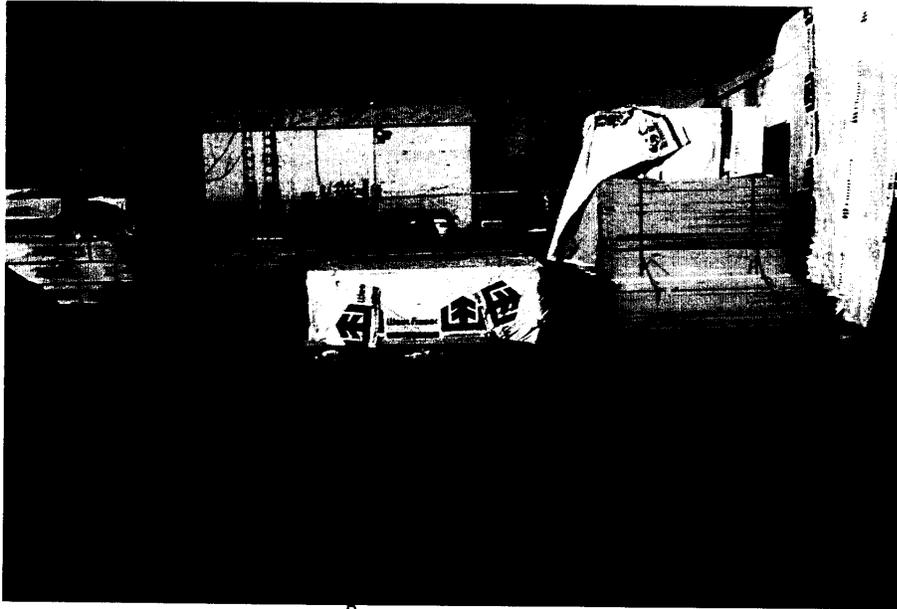
as of
12/19/03
for 13A + 14A

typical inventory at 932 North 23rd St
inventory at 23rd St. location

14A

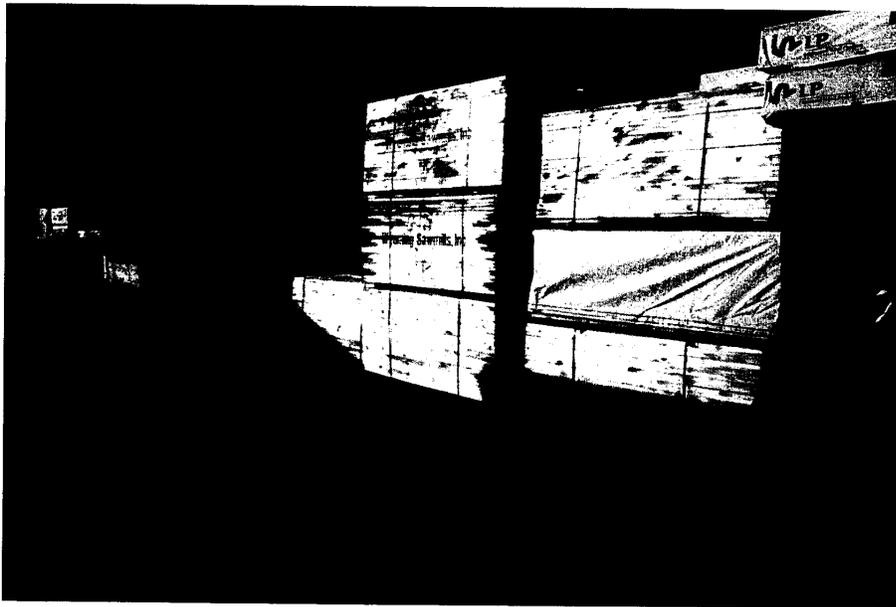


15A



15A + 16A
is as of 12/19/03 Typical
inventory at 03 St. location
location 932 north 23rd St.

16A



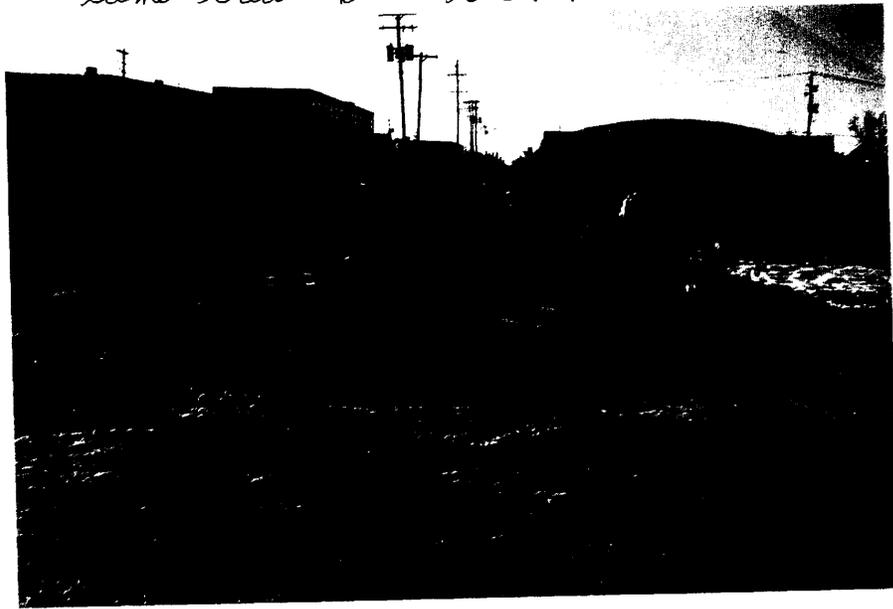
Red Licks Bldg



View of the ^{main line} tracks, looking east from 22nd Street

several years ago
photo #4 is same view. (R.L. Banks)

same view Dec 2003. The material is gone



New Trail / Rail Plan:

Lincoln Lumber Bypass

July 1997

Benefits of Retaining Rail Line and Re-routing Trail

- Promotes safety for trail users and Lincoln Lumber employees.
- No additional bridges or overpasses or underpasses along alternate trail route.
- Allows removal of railroad track from University campus and from 24th Street to 33rd Street, eliminating busy 27th Street and 33rd Street crossings and allows other proposed crossing closings to be accomplished.
- Provides a right-angle crossing of active railroad track in an open area with ample sight distance in both directions.
- Protects trail users from forklifts, trucks, and vehicles of building contractors loading and unloading in lumber storage areas.
- Provides extension of MoPac trail to UNL campus.

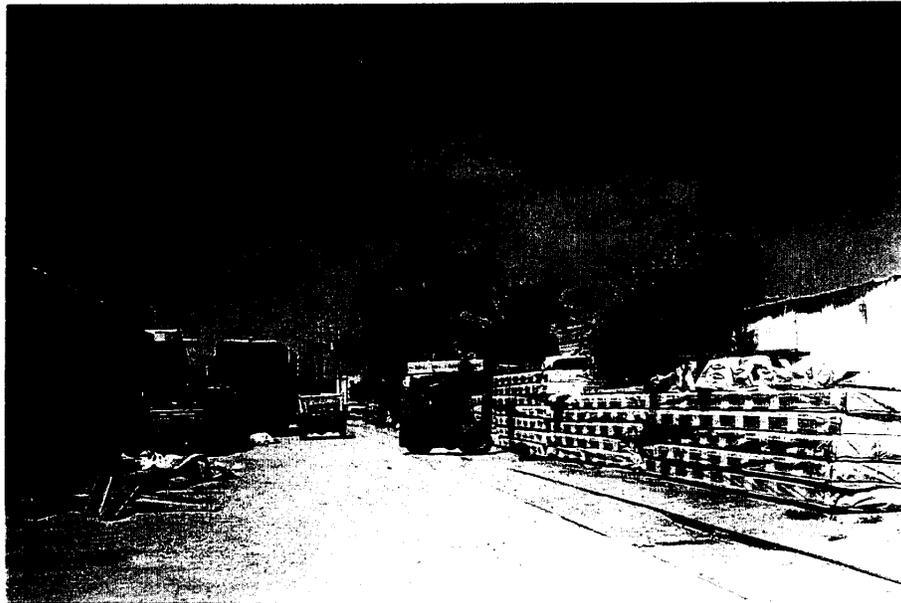
Economic Benefits

- Lincoln Lumber could continue a profitable operation and stabilize employment.
- Lincoln Lumber could proceed with possible expansion into the areas of selling sand and manufacturing and selling roofing shingles—which would increase the number of employees and help the Lincoln economy through increased revenue.
- Lincoln Lumber could remain competitive because it continues to receive materials directly by rail at a lower cost. Replacing rail with truck transportation would increase yearly costs by more than \$63,000.

**Lincoln
Lumber
at Work**



The proposed trail would cut right through this 23rd street crossing area. Looking west, we see a rail car ready to unload, a flatbed Lincoln Lumber truck being loaded with material and a forklift moving lumber along the track. A serious safety problem would be presented if the trail followed along the track in this area.



The forklift continues to work in this area and a small Lincoln Lumber truck is being driven westward along the track.



Looking north on 23rd street, we see a Lincoln Lumber truck being loaded with lumber and the forklift bringing a load of lumber from the east side of 23rd street toward the west along the railroad track.



As the truck on the west side of 23rd Street continues to be loaded, a forklift crosses the track from the north yard to work the south yard.

North
Yard

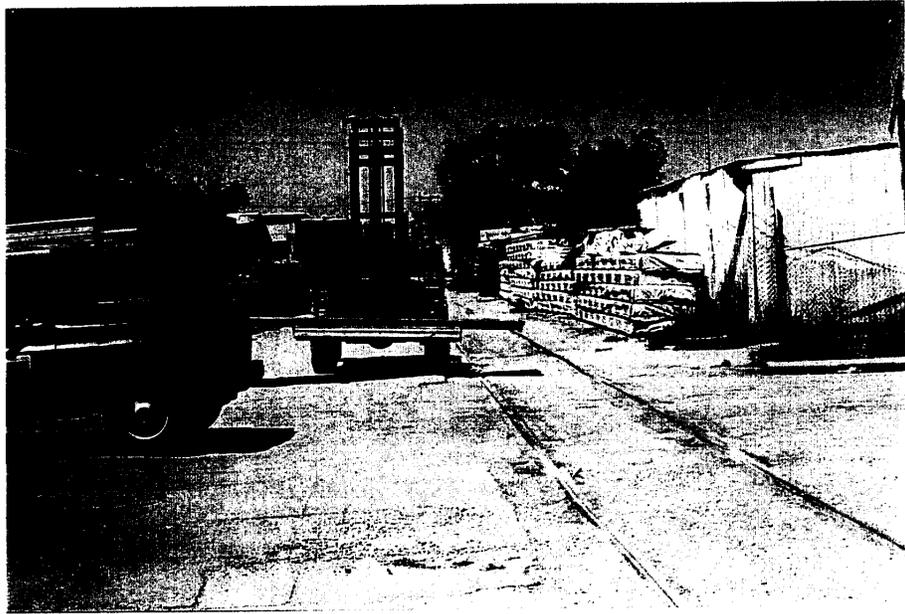


Lincoln Lumber's North Yard is north of the track and east of the 23rd Street crossing. The track to be saved will stub end near the large trees to the right of the photo and will not cross 24th Street. At 24th Street, the trail will move to pass along the north side of the right of way.



Multi-use Intersection at 23rd Street shows a yellow freight truck, the University Place StarTran bus and a Lincoln Lumber flatbed truck being loaded for job site delivery.

Trail
Riders

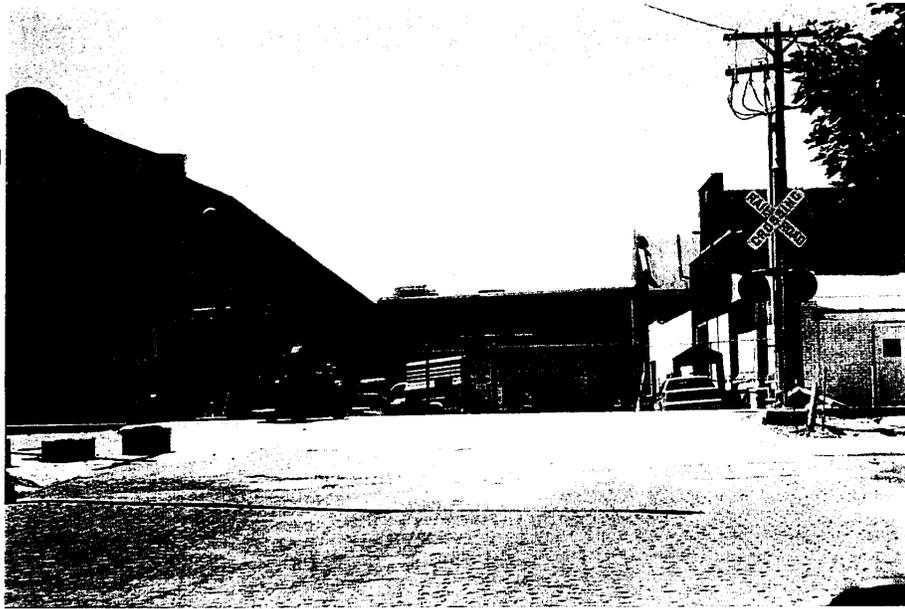


Looking west from 23rd Street, we see a forklift head eastward along the railroad track with a load of lumber, while a smaller Lincoln Lumber truck with a load of lumber is crossing toward the north to load in the north yard.

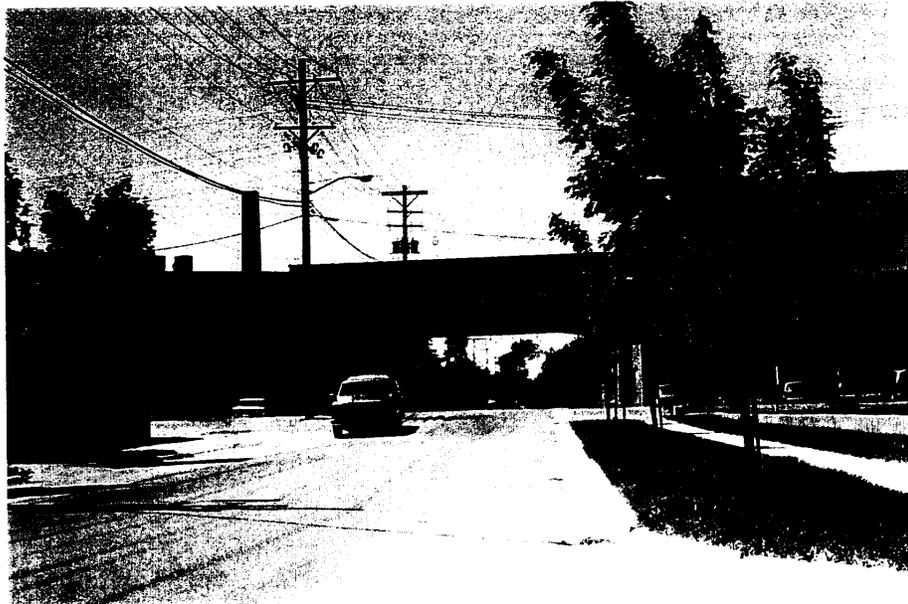


Traffic jams as a Lincoln Lumber employee (red hard hat) signals the driver when it's safe as southbound cars wait their turn to move through the area. Lincoln Lumber red trucks are stopped on both sides of the street.

Private
Crossing



This private crossing at 21st Street has flashing light signals to warn Cushman scooter operators of the approach of a train. 21st Street is blocked south of the crossing by a Cushman building.



The 22nd Street crossing is not protected by flashing lights. The street runs through to the south to a connection with Vine Street.

