

FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208

Phone: (312) 252-1500
Fax: (312) 252-2400
www.fletcher-sippel.com

ROBERT A. WIMBISH
(312) 252-1504
rwimbish@fletcher-sippel.com

June 3, 2019

247849

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

ENTERED
Office of Proceedings
June 3, 2019
Part of
Public Record

Re: **Docket No. NOR 42163**
Tri-City Railroad Company, LLC v. City of Kennewick, Washington, et al.

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is the **Consolidated Answer to Complaint, Motion to Dismiss Complaint, and Reply in Opposition to Petition for Preliminary Injunction of the City of Kennewick, Washington, and the City of Richland, Washington** dated June 3, 2019.

Should any questions arise regarding this filing, please feel free to contact me. Thank you for your assistance on this matter. Kind regards.

Respectfully submitted,



Robert A. Wimbish
Attorney for the City of Kennewick, Washington,
and Richland, Washington

RAW:ah

Attachment

cc: Parties on Certificate of Service

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42163

TRI-CITY RAILROAD COMPANY, LLC
VS.
CITY OF KENNEWICK, WASHINGTON,
AND CITY OF RICHLAND, WASHINGTON

**CONSOLIDATED ANSWER TO COMPLAINT, MOTION TO DISMISS COMPLAINT,
AND REPLY IN OPPOSITION TO PETITION FOR PRELIMINARY INJUNCTION**

Robert A. Wimbish
Bradon J. Smith
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 800
Chicago, Illinois 60606
(312) 252-1500

Lisa M. Beaton
City Attorney
City of Kennewick
210W 6th Avenue
Kennewick, Washington 99336
(509) 585-4272

Heather D. Kintzley
City Attorney
City of Richland
975 George Washington Way
Richland, Washington 99352-3548
(509) 942-7385

**ATTORNEYS FOR THE CITY OF
KENNEWICK, WASHINGTON, AND THE
CITY OF RICHLAND, WASHINGTON**

Dated: June 3, 2019

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42163

TRI-CITY RAILROAD COMPANY, LLC
VS.
CITY OF KENNEWICK, WASHINGTON,
AND CITY OF RICHLAND, WASHINGTON

**CONSOLIDATED ANSWER TO COMPLAINT, MOTION TO DISMISS COMPLAINT,
AND REPLY IN OPPOSITION TO PETITION FOR PRELIMINARY INJUNCTION**

OVERVIEW

As set forth herein, the Complaint of Tri-City Railroad Company, LLC (“TCRY”) against the Cities of Richland and Kennewick, Washington (collectively, the “Cities,” separately, respectively, “Richland” and “Kennewick”) must be dismissed for failure to state a claim for relief under 49 U.S.C. § 11701(b) and the Surface Transportation Board’s (the “Board”) regulations at 49 C.F.R. § 1111.1. Furthermore, TCRY’s preliminary injunction request seeks to have the Board – (1) override recent Washington state court decisions concerning a pending eminent domain proceeding; and (2) usurp the role of the involved court in determining whether pending condemnation proceedings would be preempted as a matter of federal law (specifically, ICCTA),¹ applying relevant agency and court case law, such as TCRY – Declaratory Order.²

TCRY’s Complaint is, in actuality, only nominally directed at the Cities. Rather, it seeks to enjoin judicial prerogative on the thinly-veiled contention that the state court

¹ the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 83 (“ICCTA”), codified at 49 U.S.C. §§ 10101, et seq.

² Tri-City Railroad Company – Petition for Declaratory Order, Docket No. FD 35915 (STB served Sep. 14, 2016) (“TCRY – Declaratory Order”).

overseeing the Cities' eminent domain proceeding (the "County Court")³ is not entitled to interpret relevant ICCTA precedent, including the scope of the Board's fact-driven decision in TCRY – Declaratory Order. Moreover, the Complaint erroneously contends that the Board alone has, or should declare itself to possess, exclusive jurisdiction over the issues currently pending in the County Court. Contrary to TCRY's false claim that the County Court is intruding impermissibly upon the Board's exclusive jurisdiction, the agency consistently has expressed its preference as a matter of policy and efficiency to defer to a duly-authorized tribunal to adjudicate for itself whether or not a particular state law action would be preempted under ICCTA. The Board should adhere to its concurrent jurisdiction views here.

For these and other reasons, the Complaint must be dismissed, and the Petition for a Preliminary Injunction must be denied. To the extent that TCRY continues to believe that the disputed eminent domain proceeding is preempted, TCRY should present its ICCTA preemption arguments in state court, or, in the alternative, seek leave of the state court to present them to the Board under either a reopening of TCRY – Declaratory Order (if appropriate) or a new docket.

BACKGROUND

This proceeding relates to longstanding plans of the Cities to undertake an extension of Center Parkway, a thoroughfare of great significance to both municipalities. Currently, Center Parkway extends at its northern terminus at its intersection with Tapteal Drive in Richland roughly 700 feet southward to a point that is immediately north of a railroad line that is owned by the Port of Benton, Washington (the "Port"), and over which TCRY, BNSF Railway Company ("BNSF"), and Union Pacific Railroad Company ("UP") all currently operate. The Cities desire to extend Center Parkway southward to a connection with North Center Parkway in

³ Benton County Superior Court, State of Washington.

Kennewick, at the intersection of North Center Parkway and West Gage Boulevard. The Cities' interest in the Center Parkway project and the benefits completion of the roadway extension would deliver to the public were chronicled in the Cities' filings in TCRY – Declaratory Order, selected portions of which are attached hereto as Exhibit A.

A southward extension of Center Parkway would, under current circumstances, cross a portion of a Port-owned railroad line at a location known as Richland Junction, where the roadway would bisect a roughly 1,900-foot siding track (the "Siding"). The Cities understand that, in the past, the Siding was used to facilitate the interchange of traffic among TCRY, on the one hand, and BNSF and/or UP on the other. The Cities also understand that the Siding is no longer used for such purposes (and will not be so used again in the future), but that TCRY claims to use the Siding at times to hold freight cars for staging and other purposes. Absent any other arrangements, the proposed Center Parkway extension would limit the Siding's effective capacity, as the Board noted in TCRY – Declaratory Order.

The Port, BNSF and UP have not objected, and do not object, to the Cities' Center Parkway extension plans, including the proposed bisection of the Siding. On the other hand, as the Board well knows, TCRY has objected, contending that the extension would unduly interfere with its rail operations. The Board ruled that the use of state law eminent domain authority to secure a crossing of the railroad line at the proposed location would be preempted under ICCTA due to the impact upon the Siding. TCRY – Declaratory Order is very clear in two respects. First, the STB's preemption decision is very fact-dependent. Second, the Board's decision turned upon concerns over the impact of the roadway extension on railroad capacity.

The Cities returned to the drawing board after their 2016 setback in TCRY – Declaratory Order. With the assistance of experienced railroad consultants, the Cities propose to

fund a reconfiguration of the Siding that would – (a) relocate the Siding footprint a few hundred feet to the north/west; (b) replicate, and indeed enhance, the capacity of the Siding beyond its current configuration; (c) by such relocation, remove the Siding a safe distance away from the Center Parkway crossing; and (d) eliminate concerns over interference with capacity and TCRY operations.⁴ The alternative plan is feasible, and the Cities have committed to secure the necessary funding. The Cities have vetted this new plan with the Port, BNSF and UP,⁵ all of which have been receptive to the proposal. TCRY opposed the revised plan, although TCRY has not provided a clear or consistent basis for its continued objection.

In proceedings before the County Court, the Cities described the revised crossing proposal, maintaining that TCRY – Declaratory Order: (a) did not *categorically* preempt the exercise of eminent domain authority in connection with a rail line crossing at the proposed location – only the crossing as it was then proposed; and (b) was a case decided on its specific facts, which, in light of the Cities’ Siding reconfiguration proposal, have changed materially.⁶ The revised crossing proposal takes carefully into consideration, and eliminates, the Board’s concerns for Siding impacts. As such, the Cities have requested that the County Court allow the eminent domain case to proceed.

⁴ See proposed crossing and track reconfiguration PowerPoint proposal from July 2017, attached as Exhibit B.

⁵ The Cities understand that, for more than a year now, BNSF and UP have become by far the predominant users of the Port-owned rail lines. This was not always so, but BNSF and UP have decided to handle traffic on their own to customers located on the Port’s lines and on connecting track owned by Richland (the Horn Rapids Spur). The Cities’ understanding of the relative traffic volumes handled by BNSF, UP, and TCRY, respectively, is taken from evidence recently introduced into the record in Port of Benton County, WA – Adverse Discontinuance of Rail Service – Tri-City Railroad Company, LLC, Docket No. AB-1270 (TCRY Reply in Opposition at 15-16).

⁶ But for TCRY’s unsubstantiated opposition, the Cities would not need to invoke eminent domain authority at all.

TCRY has taken issue with the County Court's holding that TCRY – Declaratory Order does not categorically preempt Center Parkway eminent domain proceedings. TCRY argues that the County Court erred by allowing the condemnation proceedings to continue, arguing that TCRY – Declaratory Order stands for the proposition that any effort to invoke state eminent domain laws to effect a crossing of TCRY's leasehold operations would be federally preempted, even if such a plan would avoid depriving TCRY of Siding capacity. The Cities disagreed with TCRY's overbroad interpretation of TCRY – Declaratory Order, but, more importantly, so, also, did the County Court.

Dissatisfied, TCRY pressed its categorical preemption argument by appealing the County Court's decision to the State of Washington Court of Appeals – Division III (the "Appeals Court"). In turn, the Appeals Court, in a Commissioner's Ruling served on April 18, 2019, upheld the County Court's decision. The Appeals Court ruled that the County Court had reasonably assessed the scope of TCRY – Declaratory Order, and that the County Court had not erred in holding that – (a) the Board's preemption analysis in TCRY – Declaratory Order turned upon concerns over impacts to the Siding; (b) the Cities' new proposal could eliminate such impacts; (c) TCRY – Declaratory Order does not stand for the proposition that all Center Parkway crossing efforts are preempted – only those that would materially impair TCRY operations and rail infrastructure capacity; and (d) under the circumstances, the eminent domain proceedings could continue. In so ruling, the Appeals Court stated as follows:

In these circumstances, this Court cannot say that the [County Court] committed obvious error sufficient to support discretionary review under RAP 2.3(b)(1) when it interpreted the Board's decision as not to preclude the newly proposed plan. The Board's finding that "[t]he parallel track is the only location on the 16-mile line where these essential railroad operations can take place" does not necessarily mean that if the parallel track is moved and its entire length restored, those essential operations, currently and in the future, also cannot take place. Indeed, a reading of the Board's decision leaves a distinct impression that the Board was addressing only the plan at the original location when it

held the condemnation proceedings were federally preempted . . . And, this Court found no authority to support the proposition that once preempted, always preempted. In any event, the Railroad still has the option to present the new plan to the Board for a declaration on preemption, so that further proceedings are not useless.⁷

The County Court is certainly competent to adjudicate ICCTA preemption issues if it so wishes. Furthermore, the County Court has the discretion to refer any ICCTA preemption issues that TCRY may insist upon raising to the Board for guidance.

ARGUMENT

A. Answer

The Cities answer that they are not rail carriers subject to the jurisdiction of the Board, and that, in any event, they have committed no actionable violation of law warranting Board intervention or remedial action.

B. TCRY has not filed a proper complaint against rail carriers, and, as such, the Board must dismiss the NOR docket proceeding.

Pursuant to 49 U.S.C. § 11701(b), a “person, including a governmental authority, may file with the Board a complaint about a violation of this part by a rail carrier providing transportation or service subject to the jurisdiction of the Board under this part. The complaint must state the facts that are the subject of the violation.” In addition, the Board’s regulations for complaint proceedings require that a complaint “should include specific reference to pertinent statutory provisions and Board regulations, and should advise the Board and the defendant fully in what respects these provisions or regulations have been violated. The complaint should contain a detailed statement of the relief requested.”⁸ TCRY’s Complaint contains none of these

⁷ Docket No. No. 36588-3-III (April 18, 2019) at slip op. at 7-8 (attached as Appendix 8 to TCRY’s Complaint).

⁸ 49 U.S.C. § 1111.2(a).

requisite elements, and it does not state a claim for which the Board can grant relief, and, therefore, must be dismissed.⁹

The Board is entitled by statute to initiate complaint proceedings against “a rail carrier providing transportation or service subject to the jurisdiction of the Board.” But neither of the Cities is a rail carrier. Despite TCRY’s claim, Richland is not a rail common carrier, and there is no STB exemption or order to the contrary. To try to make its point, TCRY badly misreads Tri-City Railroad Company, LLC – Petition for Declaratory Order, Docket No. 36037 (STB served Jun. 1, 2017) (“TCRY – Horn Rapids”), which TCRY falsely contends establishes Richland’s common carrier status due to the so-called “H.R. Spur.” In fact, TCRY – Horn Rapids devotes an entire section to “Richland’s Status,” reading as follows:

Richland’s Status. TCRY also argues that Richland has retained enough control over rail operations on the H.R. Spur to make Richland a rail carrier. However, there is no allegation here of interference with the provision of rail service on the H.R. Spur, and no shipper on the H.R. Spur has complained that it has been deprived of rail service. Thus, there is no apparent need for the Board to consider this question. Moreover, the Board fully recognizes the public benefit of economic development, such as rail-served industrial parks, and does not wish to discourage such investments through unnecessary regulation. See 49 U.S.C. § 10101.¹⁰

Accordingly, Richland is not a Board-regulated rail carrier.

TCRY’s contention that Richland is a rail carrier may be the result of a misreading of TCRY – Horn Rapids. Furthermore, the notion that the Cities nevertheless fall under the Board’s jurisdiction due to their past participation in Board proceedings is legally

⁹ See, e.g., Cargill Inc. v. BNSF Railway Company, Docket No. NOR 42120 (STB served May 23, 2012), 7 (holding complaint must state a cause of action to avoid dismissal); PCI Transportation v. Fort Worth & Western Railroad Company, Docket No. STB 42094 (Sub-No. 1) (STB served Apr. 25, 2008), 5 (dismissing complaint for failure to state a claim on which relief can be granted).

¹⁰ TCRY – Horn Rapids at 6.

unsupported.¹¹ Pursuant to 49 U.S.C. § 10501, the Board has jurisdiction over “transportation by rail carrier.”¹² Section 10501 says nothing about entitling the Board to assume jurisdiction over non-carriers that elect to participate as interested parties in formal Board proceedings, and the Cities know of no precedent supporting such an outlandish expansion of the agency’s jurisdiction. TCRY offers no legal basis for the proposition; none exists. Accordingly, the Board lacks jurisdiction over the Cities, and, in turn, it lacks the necessary authority to issue a preliminary injunction against Richland and Kennewick separately or collectively. For that reason alone, the Board should deny TCRY’s complaint and injunction petition, dispensing with the unnecessary task of ruling on the merits of the injunction request.

Beyond that, TCRY’s filing simply does not contain a complaint. At unnumbered page 10 of its May 13 Complaint, TCRY states that the entire sum and substance of its filing is to seek to have the Board “grant the Petition for preliminary injunction.” TCRY does not identify any statutes or regulations that are implicated by its Complaint, it alleges no violation of federal statutes or regulations, and it seeks no damages or any remedial Board action. TCRY’s filing is, therefore, nothing more than a Petition for a Preliminary Injunction under which TCRY intends to have the Board intervene in County Court affairs without that court’s invitation, and to have the Board order the suspension (or termination) of pending state court action. As such, TCRY has failed to articulate any basis for initiating Board proceedings under an “NOR” docket, and, again, the Complaint element of TCRY’s May 13 filing must be dismissed.

C. TCRY is not entitled to a preliminary injunction.

The injunction element of TCRY’s May 13 filing fares no better than the Complaint, since the Board lacks the authority to enjoin the Cities, both of which are non-

¹¹ TCRY does not claim that Kennewick is also a rail carrier subject to Board oversight.

¹² 49 U.S.C. § 10501(a)(1).

carriers. Aside from the threshold jurisdictional defect, TCRY simply has not demonstrated that an injunction is even remotely warranted.

“A preliminary injunction is an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion.” Cobell v. Norton, 391 F.3d 251, 258 (2004) (citing Mazurek v. Armstrong, 520 U.S. 968, 972 (1997)). The Board requires a party to make a very strong showing of entitlement to equitable relief. “A preliminary injunction is an extraordinary remedy and will generally not be granted unless the requesting party can show that it faces *unredressable actual and imminent harm* that would be prevented by an injunction.” Richard Best Transfer, Inc. v. Union Pac. R.R. Co., Docket No. 42149 (STB served Dec. 22, 2016) (emphasis added).¹³ Specifically, the party seeking a preliminary injunction has the burden of demonstrating that – (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be preliminarily enjoined; (2) it will suffer irreparable harm in the absence of a preliminary injunction; (3) other interested parties will not be substantially harmed by a preliminary injunction; and (4) the public interest supports granting the preliminary injunction.¹⁴

TCRY fails utterly to meet its burden under the Holiday Tours standard, quite apart from the fact that TCRY’s request for a preliminary injunction suffers from more profound and fundamental jurisdictional flaws. TCRY faces no imminent, much less unredressable, harm from the continuation of the County Court proceedings. The injunction would interfere with

¹³ See also, e.g., Am. Chemistry Council v. Ala. Gulf Coast Ry., NOR 42129, slip op. at 4 (STB served May 4, 2012).

¹⁴ See, e.g., Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc. (“Holiday Tours”), 559 F.2d 841, 843 (D.C. Cir. 1977); Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n, 259 F.2d 921, 925 (D.C. Cir. 1958); see also Union Pac. R.R.—Pet. for Declaratory Order & Preliminary Injunction, FD 36197, slip op. at 3 (STB served June 29, 2018); Richard Best Transfer, Inc. v. Union Pac. R.R., NOR 42149, slip op. at 4 (STB served Dec. 22, 2016).

state court proceedings counter to Board jurisprudence. Ultimately, TCRY is asking the Board to declare that it alone possesses exclusive jurisdiction over ICCTA preemption issues bearing upon the Cities' revised Center Parkway crossing proposal.¹⁵ Expecting the Board to take such an unprecedented stand, TCRY also expects the Board then to forbid the County Court from proceeding further with any eminent domain proceedings related to Center Parkway. The Board must soundly reject TCRY's efforts to incite the Board to "intervene by injunction."

1. TCRY will not prevail on the merits of its Complaint.

TCRY is highly unlikely to prevail on the merits. As explained above, the Board lacks jurisdiction over the Cities (and over the County Court, for that matter), TCRY has not articulated a genuine cause of action under the Board's complaint statute or regulations, and it has avoided requesting a new or updated declaratory order from the Board, so TCRY's injunction effort is untethered to a genuine Board proceeding, and is, thus, inherently meritless.

TCRY insists that only the Board may address the preemption issues, arguing that, because TCRY previously resorted to the Board for a preemption determination, any subsequent Center Parkway preemption dispute is subject to the Board's exclusive "subject matter jurisdiction." The Cities presume that TCRY is arguing that the Board exclusively is entitled to adjudicate and resolve issues of ICCTA preemption involving any crossing of TCRY's leasehold at the location originally (and currently) proposed by the Cities. If so, recent Board jurisprudence reveals that is decidedly incorrect.

The Board repeatedly has acknowledged that courts, including state courts, have concurrent jurisdiction over issues related, and are fully competent, and entitled, to interpret the

¹⁵ TCRY might have just as well requested that the Board enjoin the County Court from allowing the eminent domain proceedings to continue, but the Cities presume that TCRY opted against that out of a tacit recognition that the Board lacked jurisdiction over, and authority to enjoin, the County Court.

preemptive scope and application of 49 U.S.C. § 10501(b).¹⁶ Most, if not all, of these cases reflect the Board’s commitment not to intervene in pending ICCTA preemption matters pending in other venues, absent the court’s invitation or request.

TCRY’s merits claim suffers from two primary defects. First, TCRY has not – and cannot – contend that the County Court is incompetent to read and apply TCRY – Declaratory Order or other pertinent Board and court case law. It is certainly competent to do so. Second, it assumes, incorrectly, that, if the Board were itself to evaluate the ICCTA preemption issues surrounding the Cities’ new Center Parkway/Siding proposal, the Board would necessarily find that invoking state condemnation processes under the new proposal would be preempted, also. But TCRY hasn’t made that case here, so it is impossible for the Board to assess for itself the likelihood of TCRY’s success. TCRY has not filed to reopen TCRY – Declaratory Order, or in the alternative, initiated a new declaratory proceeding based on the new facts and circumstances. (It is not clear, at this juncture, incidentally, that the Board would take up such an effort anyway, pending the County Court’s discretion.) Instead, TCRY contends that the onus of returning to the Board falls upon the Cities, although that proposition is itself legally

¹⁶ See, e.g., Hartwell First United Methodist Church – Adverse Abandonment and Discontinuance – The Great Walton Railroad Company, Inc., In Hart County, Georgia, Docket No. AB-1242 (STB served Feb. 12, 2019), 2 (Board declined to issue a declaratory order regarding ICCTA preemption because the issue was already pending in state court); Jimmy Lee Waneck and Star Swearingen Waneck – Petition for Declaratory Order, Docket No. FD 36167 (STB served Oct. 31, 2018), 4; City of Sammamish, Wash. – Petition for Declaratory Order, Docket No. 36161 (STB served Mar. 29, 2018), 4; Adrian & Blissfield Railroad – Petition for Declaratory Order, Docket No. FD 36148 (STB served Jan. 30, 2018), 4 (“The Michigan court has not referred any issues to the Board, and it can address whether [a] condemnation claim for a non-exclusive easement is preempted by [ICCTA]” – recognizing concurrent jurisdiction of state courts to interpret ICCTA’s preemptive scope); Ingredion Inc. – Petition for Declaratory Order, Docket No. FD 36014 (STB served Sep. 30, 2016), 3; Brookhaven Rail Terminal and Brookhaven Rail LLC, Docket No. FD 35819 (STB served Aug. 28, 2014), 4; 14500 Limited LLC – Petition for Declaratory Order, Docket No. FD 35788 (STB served Jun. 5, 2014), 2.

unsupported and without merit. TCRY will not prevail on the merits, and so its injunction request must be denied.

2. TCRY will suffer no irreparable harm.

TCRY's claim of irreparable injury depends upon stacking speculation upon baseless assumption, focusing upon a presumed injury that is neither likely nor imminent. To begin with, the new Center Parkway/Siding proposal would not harm TCRY or its operations. More likely than not, TCRY's very modest operations would be aided by the project. Second, TCRY's irreparable harm claim supposes, without any support or connection to reality, that "there would not be an adequate opportunity for TCRY to show that its rail operations would be materially impeded."¹⁷ Third, TCRY would have the Board believe that the County Court is intent on issuing a condemnation order in favor of the Cities at any moment, without regard for TCRY's related claims of impediment and federal preemption, and that the Cities are already lining up earth moving equipment to commence construction within hours, none of which TCRY can substantiate, and none of which is true.

In fact, there is no evidence whatsoever that the County Court would act irresponsibly or ignore TCRY in moving ahead with the subject condemnation proceedings. For that matter, there is no evidence to show that the County Court would decline to allow TCRY to refer its ICCTA preemption arguments to the Board for a new or reopened decision on the new facts. Additionally, TCRY falsely suggests that it lacks the right or ability to seek review of any County Court order that might issue. The record in this proceeding shows that TCRY has, and is willing to pursue, recourse beyond the County Court were TCRY to disagree with the County Court's findings, as it has before. As such, whatever illusory harm TCRY fears, it is very far

¹⁷ Complaint at 9.

from imminent.¹⁸ Here, also, TCRY fails to satisfy the Holiday Tours standard and its injunction petition must be denied.

3. Other parties and the public interest would be harmed by an injunction.

TCRY's contention that no parties would be substantially harmed is pure nonsense. In fact, an injunction would unquestionably harm the Cities. For the same reason, an injunction would harm the public interest. And, finally, the public interest, as articulated by the Board in a host of cases cited above, is to allow competent tribunals to apply for themselves the scope of ICCTA preemption in at-grade crossing cases. So, TCRY's idea that the Board must act here to protect its alleged "subject matter jurisdiction" to bar a "different view on federal preemption" (Complaint at unnumbered 10) is, in fact, entirely at odds with the public interest and the law. Accordingly, TCRY has failed to show that its requested injunction satisfies either of the last two prongs of the Holiday Tours standard, and, for those reasons, also, the injunction petition must be denied.

D. The outcome of an adverse discontinuance petition pending against TCRY is likely to bear materially on TCRY's ICCTA preemption arguments going forward.

The Port has filed an adverse discontinuance proceeding against TCRY¹⁹ as a consequence of the Port's apparent desire to terminate its lease relationship with TCRY. BNSF supports the discontinuance application. If the Port is successful in prosecuting its application, the Port would be entitled to remove TCRY from the Port's rail premises under process of state law. The outcome of that proceeding is likely to inform any prospective preemption arguments

¹⁸ Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation, Inc., — Petition for Declaratory Order, Docket No. FD 34824 (STB served Feb. 12, 2008), 2 (holding that further prosecution of state court action is not an imminent harm); Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) ("the injury must be both certain and great; it must be actual and not theoretical. Injunctive relief 'will not be granted against something merely feared as liable to occur at some indefinite time . . .'" (internal citations omitted)).

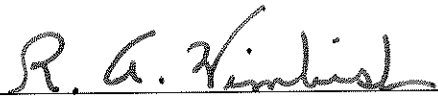
¹⁹ Docket No. AB-1270 (pending).

that TCRY might again seek to present to the Board, and/or render this action for a preliminary injunction moot.

CONCLUSION

For the foregoing reasons, TCRY's Complaint must be dismissed, and its Petition for Preliminary Injunction denied.

Respectfully submitted,

By: 

Robert A. Wimbish
Bradon J. Smith
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 800
Chicago, Illinois 60606
(312) 252-1500

Lisa M. Beaton
City Attorney
City of Kennewick
210W 6th Avenue
Kennewick, Washington 99336
(509) 585-4272

Heather D. Kintzley
City Attorney
City of Richland
975 George Washington Way
Richland, Washington 99352-3548
(509) 942-7385

**ATTORNEYS FOR THE CITY OF
KENNEWICK, WASHINGTON, AND THE
CITY OF RICHLAND, WASHINGTON**

Dated: June 3, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of June, 2019, a copy of the foregoing **Consolidated Answer to Complaint, Motion to Dismiss Complaint, and Reply in Opposition to Petition for Preliminary Injunction of the City of Kennewick, Washington, and the City of Richland, Washington** was served by first class mail, postage prepaid, or via more expeditious means of delivery upon all parties of record.


Robert A. Wimbish

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42163

TRI-CITY RAILROAD COMPANY, LLC
VS.
CITY OF KENNEWICK, WASHINGTON,
AND CITY OF RICHLAND, WASHINGTON

**CONSOLIDATED ANSWER TO COMPLAINT, MOTION TO DISMISS COMPLAINT,
AND REPLY IN OPPOSITION TO PETITION FOR PRELIMINARY INJUNCTION**

EXHIBIT A

Docket No. FD 35915

238631
ENTERED
Office of Proceedings
June 15, 2015
Part of Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

Petitioner,

v.

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

Respondents.

**REPLY BRIEF OF THE CITY OF KENNEWICK
AND THE CITY OF RICHLAND**

Lisa Beaton,
Kennewick City Attorney,
WSBA # 25305
Heather Kintzley
Richland City Attorney,
WSBA # 35520

FOSTER PEPPER PLLC
P. Stephen DiJulio, WSBA No. 7139
Christopher G. Emch, WSBA No. 26457
Stephanie G. Weir, WSBA No. 41722
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
Telephone: (206) 447-4400
Email: dijup@foster.com
Email: emchc@foster.com
Email: weirs@foster.com

Attorneys for Respondents City of Kennewick and City of Richland

5.5 The Crossing Project Is An Essential Regional Improvement.

The Cities have received unanimous approval from the UTC to construct an at-grade Crossing over the track and siding at the Richland Junction.⁵⁰ The Benton County Superior Court has affirmed the UTC Order approving the Crossing.⁵¹

The Center Parkway Crossing is an essential capital improvement identified in the City of Richland's Comprehensive Plan, the City of Kennewick's Comprehensive Plan, and the Regional Transportation Plan.⁵² Recognizing the regional significance of this project, the Crossing has received federal and state funding through the Washington State Community Economic Revitalization Board, the Surface Transportation Program Regional Competitive Fund, and the Transportation Improvement Board.⁵³

The Crossing will extend Center Parkway northward, across the Port of Benton-owned track and siding, and into the City of Richland,

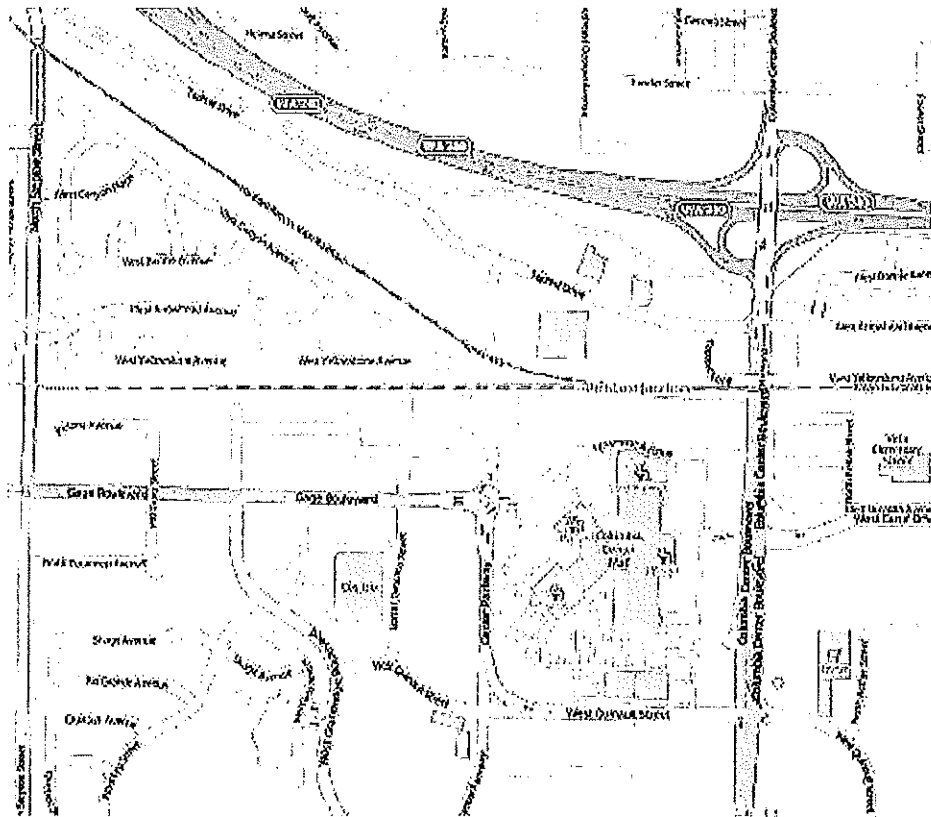
⁵⁰ CP 0-000000644-645 (UTC Order 03).

⁵¹ CP 0-000002207-2209 (Benton County Superior Court Order Affirming the UTC's Orders).

⁵² CP 0-000000862 (City of Richland Comprehensive Plan); CP 0-0000001736-1737 (City of Kennewick Comprehensive Plan); CP 0-000000909 (Regional Transportation Plan); CP 0-000000637-638 (UTC Order 03 at §§ 20, 21).

⁵³ CP 0-000000756 (Joint Agreement Center Parkway Extension) ("Whereas Kennewick has secured \$2,016,000 in Rural Economic Vitality funds ... and \$364,241 through the Surface Transportation Program Regional Competitive Fund.").

intersecting Tapteal Drive, thereby completing a grid network of regional significance.⁵⁴ Center Parkway currently ends at a roundabout west of the Columbia Center Mall in Kennewick, as identified in the following image.⁵⁵



⁵⁴ CP 0-000000637-638 (UTC Order 03 at §§ 20, 21, citing the City of Richland Comprehensive Plan, the City of Kennewick Comprehensive Plan, and the Regional Transportation Plan).

⁵⁵ CP 0-000000631 (UTC Order 03 at ¶ 9).

likelihood that a vehicle will try to cross the tracks as a train is approaching.⁸⁴

The center lane used for left turns outside the Crossing will stop at traffic islands that will be a median separator, blocking vehicles from driving around the lowered gates.⁸⁵ As a result, there are no undue safety risks for rail crews or the public.

Based upon these facts, the UTC concluded that “even imprudent drivers will be effectively barred from crossing the tracks when the gates are closed next to concrete barrier medians;”⁸⁶ and, the safety measures “significantly reduce” the risk of the Crossing.⁸⁷

5.8.4 The Public Need for the Crossing.

The UTC approved the Crossing because the public need for the Crossing outweighs its speculative risk. The UTC found that the Crossing completes a grid network for the efficient movement of traffic and economic development:

The Center Parkway Extension, including the proposed at-grade railroad crossing, is a long-planned and important component of the Cities’ transportation system. The project will improve traffic movement between two

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ CP 0-000000634 (Order 03 ¶ 14).

⁸⁷ CP 0-000000634-635 (Order 03 ¶ 14); CP 0-000001521-1532 (Testimony of Kevin Jeffers, P.E., describing the Crossings attributes and its safety features).

important and growing commercial areas in Kennewick and Richland, thus promoting economic development.⁸⁸

The Cities' studies⁸⁹ and other substantial evidence⁹⁰ support this finding.

Further, the UTC found that the Crossing provides an alternative route for police and fire:

The Center Parkway extension may assist the Cities' emergency responders by providing an alternative route for responding to incidents in the vicinity of the Columbia Center Mall, when trains are not blocking the intersection.⁹¹

Substantial evidence in the record supports the UTC's conclusion.⁹² It is also undisputed that the Crossing will be blocked less than one percent (1%) of the day based upon current railroad usage.⁹³ The Crossing will be

⁸⁸ CP 0-000000644 (Order 03 ¶ 37).

⁸⁹ See e.g., CP 0-000000096-97 (The JUB Study).

⁹⁰ See e.g., the Cities' pre-filed testimony, CP 0-000000831:14-832:2 (Testimony of Rick Simon, Development Services Manager for the City of Richland); CP 0-000001698:22-25, and CP 0-000001699:6-7 (Testimony of Spencer Montgomery, author of the JUB Study).

⁹¹ CP 0-000000644 (UTC Order 03 ¶ 36).

⁹² CP 0-000000097 (the JUB Report, with a section titled "Improve Emergency Response"); also see CP 0-000001696-1702 (Testimony of Spencer Montgomery, author of the JUB Study); CP 0-000001169:7-1171:1 (TCRY's cross-examination of Spencer Montgomery); CP 0-000001879-1902 (data supporting the JUB Study); CP 0-000001059:15. (Richland's Fire Chief Baynes' testimony that the crossing would improve emergency response times by "[a]pproximately a minute").

⁹³ CP 0-000001183 (TCRY cross-examination of Spencer Montgomery, author of the JUB Study).

blocked less than three percent (3%) of the day, even assuming TCRY's unrealistic projection that rail traffic will increase 85 percent this year.⁹⁴

5.9 The UTC and The Benton County Superior Court Have Rejected TCRY's Arguments.

More than two years have passed since the Cities filed the Crossing petition, and TCRY has failed in its motion for reconsideration to UTC and in its Administrative Procedures Act appeal before the Benton County Superior Court.⁹⁵ The UTC, the Washington State agency charged with fact-finding, concluded that TCRY's arguments for reconsideration were misleading and incorrect.⁹⁶ TCRY repeats those arguments before the STB. For example, in response to TCRY's motion for reconsideration, the UTC clearly articulated that Order 03 was based upon the entire record, not just public safety. As succinctly summarized by the UTC,

"What TCRY ignores is that our Order on review examines the question of public need in terms of economic development as an important factor in addition to public safety. ... In addition, while the ALJ's role does not necessarily require consideration of broader policy implications of the Commission's adjudicative orders, the Commissioner's role requires this inquiry."

⁹⁴ CP 0-000001183-1185 (TCRY cross-examination of Spencer Montgomery), attention to CP 0-000001185:18-25 (explaining that the Crossing will not be closed more than three percent of the day).

⁹⁵ CP 0-000000702-710 (UTC Order 04, Denying TCRY's Petition for Reconsideration); CP 0-000002207-2209 (Benton County Superior Court Order Affirming UTC Orders).

⁹⁶ CP 0-000000707 (UTC Order 04, ¶ 10).

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42163

TRI-CITY RAILROAD COMPANY, LLC
VS.
CITY OF KENNEWICK, WASHINGTON,
AND CITY OF RICHLAND, WASHINGTON

**CONSOLIDATED ANSWER TO COMPLAINT, MOTION TO DISMISS COMPLAINT,
AND REPLY IN OPPOSITION TO PETITION FOR PRELIMINARY INJUNCTION**

EXHIBIT B

Center Parkway

Port of Benton Commission
July 12, 2017

Why Does Richland Want the Project?

- Economic Development
 - \$52 million in private property improvements
- Street System Improvement
 - Efficient circulation
 - Reduces load on Columbia Center Boulevard and Steptoe
- Comprehensive Plan Fulfillment
 - Right development in the right place

[illegible]

Can the Project Coexist with Effective Railroad Service?

- Safety – The WUTC and Washington Court System Decided Safety was not a reason to block the project
- Operational Interference – The City's consultant team will convince you this is not a reason to block the project
- At-grade crossing maintenance – City has agreed to carry this burden

Does the City Oppose Rail Business?

- Long term development strategy for Horn Rapids Industrial Park leverages rail
 - City-funded rail infrastructure exceeds \$3 million
 - Horn Rapids is where most, if not all, rail business growth is occurring
- Does not play favorites with rail companies
 - Equal terms for access to City track
 - All proceeds dedicated to maintenance

Tri-City Railroad Opposition

- City negotiated successfully with BNSF and UPRR to allow Center Parkway
- City willing to resolve genuine rail or real estate issues
- TCRR conditions to allow Center Parkway are unrelated to the project
 - Cash settlement well in excess of \$1 million
 - Exclusive rail business control over Horn Rapids Industrial Park

Tri-City Railroad Opposition

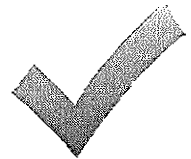
- TCRR Approach to Center Parkway has
 - Delayed the project by more than five years
 - Introduced expensive litigation as a project cost in addition to normal construction and real estate costs
 - Forced the City to address a moving target of claims presented opportunistically in different settings

Current City Approach

- Identify and address potential rail issues
 - Retained Chuck Laggan
 - 49 years short line railroad (1966-2015)
 - Railroad management (1978-2015)
 - Retired as Vice President & General Manager of 3 Pinsky short lines and 2 distribution companies
 - Retained Kevin Jeffers, P.E.
 - Prepared three separate track modifications proposals

City Requests

- Port facilitate dialog with railroads regarding track modification solutions
- Consider the input of Chuck Laggan regarding genuine railroad issues
- Adopt a statement that the City's proposal is sufficient to mitigate genuine railroad facility impacts of Center Parkway



Charles Laggan Experience

- Baltimore-Washington DC Terminal Improvement Project working with consultant Booz, Allen & Hamilton. Planned and implemented major plant improvements and reprogramed work tasks for 87 train crews
- Coordinate Conrail-GTW route consolidation with City of Monroe, MI
- Design and build 125 car unit-train handling facility in AR
- Grew Pinsly Railroad business west of the Mississippi River 10-fold through facility changes and negotiations for purchase/lease of six new rail lines
- Working with the Port of Houston, consultant TransSystems, UP, BNSF, and numerous Fortune 50 companies, designed and oversaw construction of two 800 rail car storage yards
- Handled consolidation of three Conrail subsidiary companies

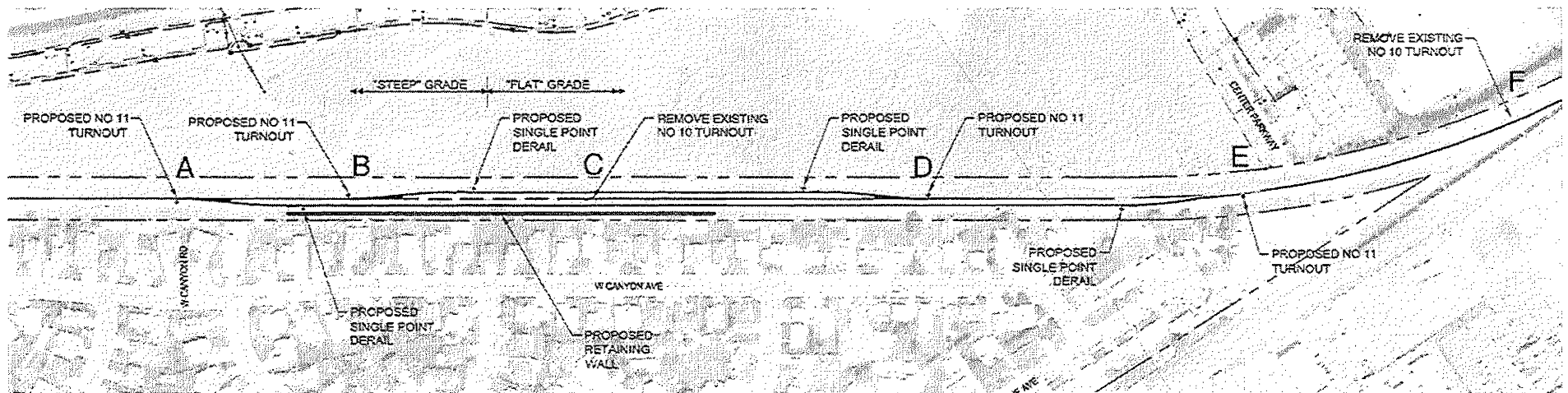
Uses of POB Main Line at Richland Jct.

- TCRR crew going to/from interchange with Union Pacific at Kennewick
- BNSF local crew to/from industries on POB
- BNSF and UP unit trains to/from Horn Rapids Industrial Park
- Passing trains

Uses of POB Siding at Richland Jct.

- Storage of rail cars by TCRR
- Passing trains (TCRR and BNSF)

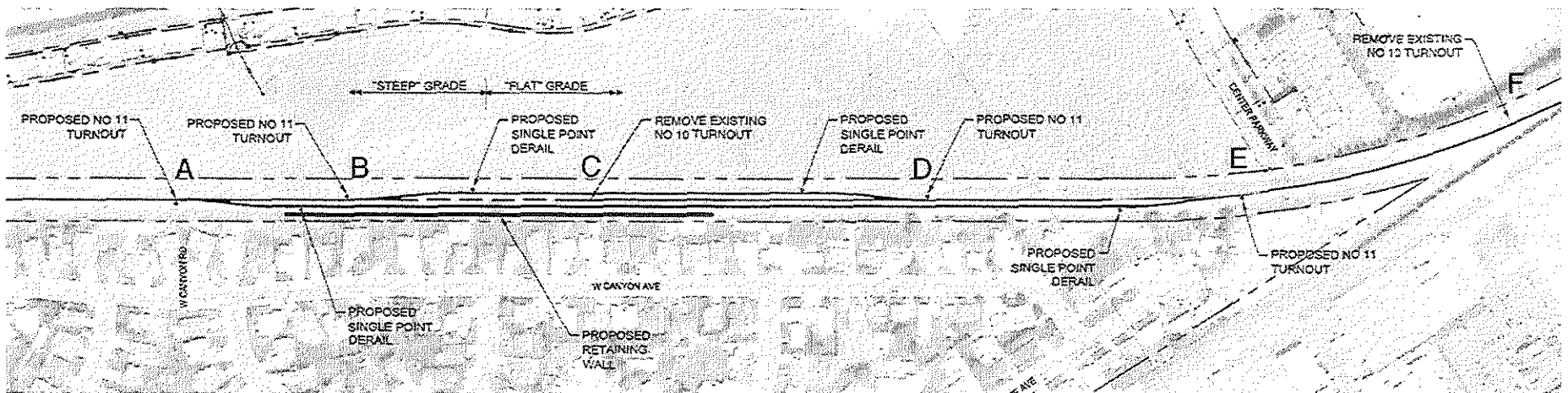
- 35 -



Concerns Addressed

Concern 1: Center Parkway Project would compromise TCRR's ability to use Richland Siding for **passing trains**

Solution: Addition of 2nd siding (B-D) increases operating flexibility over present facility. The 2nd siding gives TCRR the new ability to pass two trains at one time if needed without having to back any train out of the siding. This is an important feature if rail cars are being stored there.

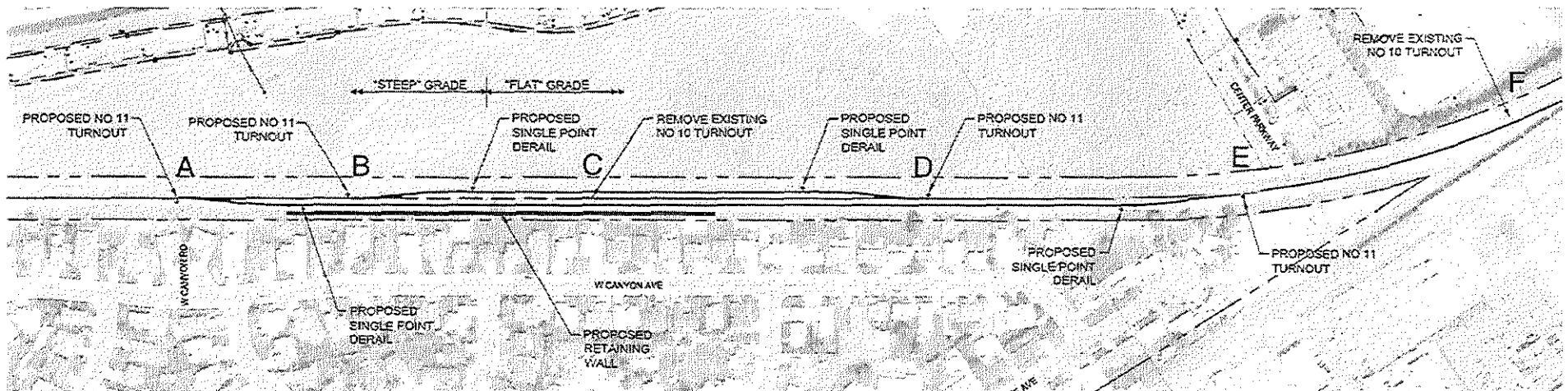


Concerns Addressed

Concern 2: Center Parkway Project would compromise TCRR's ability to use Richland Siding for **staging railcars**

Solution: The City's plan adds a second siding where cars can be switched and staged without interfering with vehicles crossing at Center Parkway

- 37 -

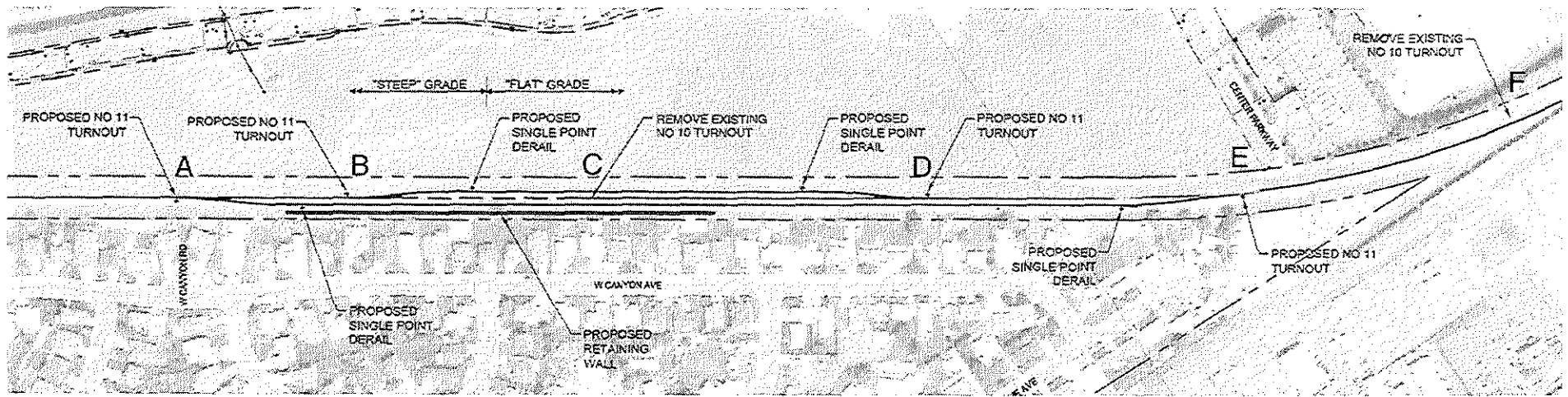


Concerns Addressed

Concern 3: The Center Parkway Project would **eliminate rail car storage** at the southern end of the siding

Solution: The City's plan provides 2,665.50' on 2 sidings on the existing grade for car storage vs. 1,900' at present

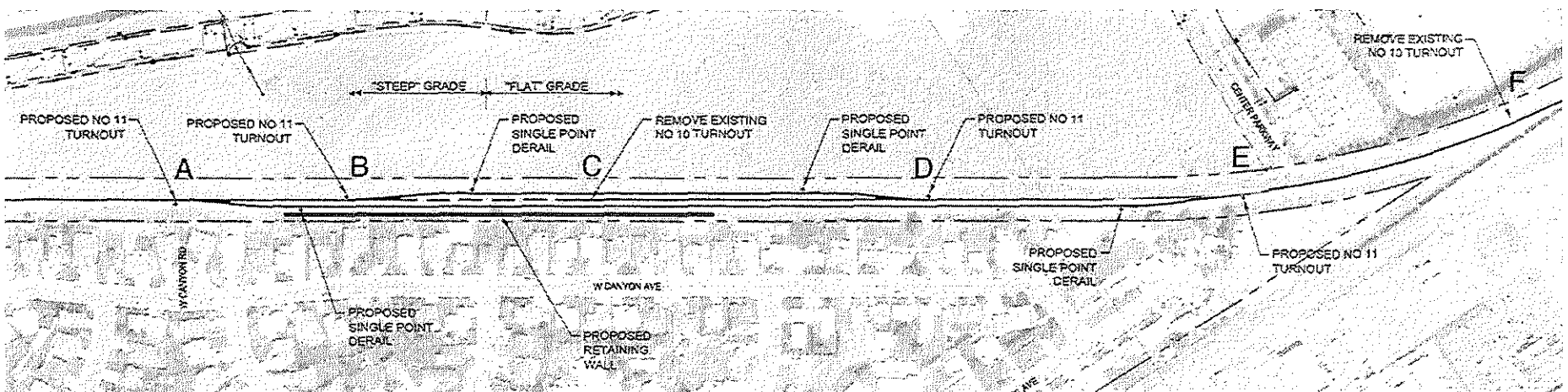
- 38 -



Concerns Addressed

Concern 4: Rail cars cannot be placed closer than 250' to the crossing so **500' of rail car storage space will be lost**

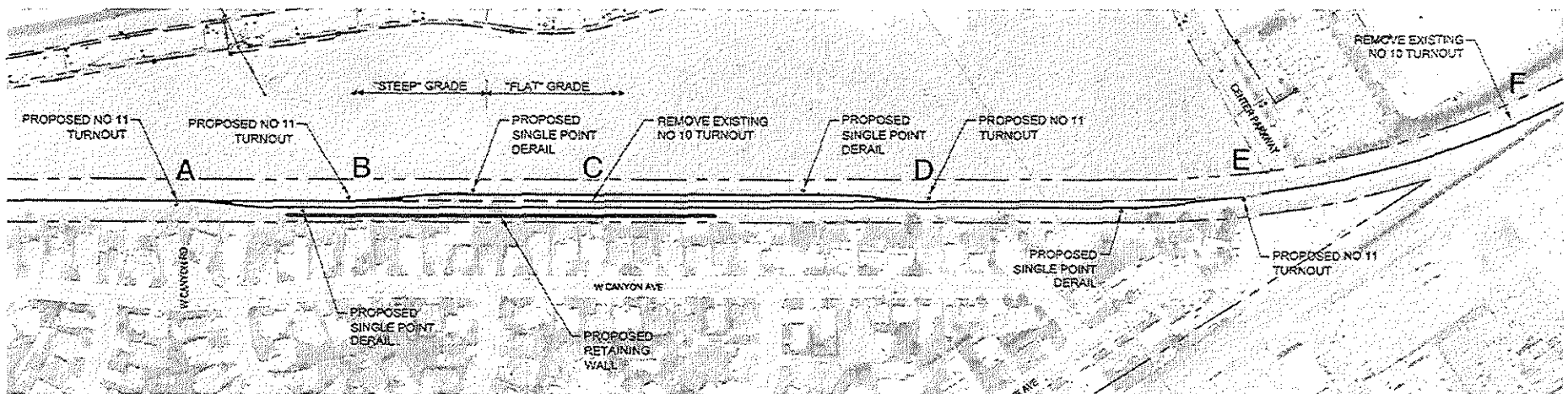
Solution: The City's plan eliminates this concern by (1) removing the siding through the crossing which also improves grade crossing safety, (2) moves the clearance point on the relocated siding to 255.71' from edge of crossing and (3) adds additional storage capacity



Concerns Addressed

Concern 5: The General Code of Operating Rules requires that TCRR not leave any **rail cars standing closer than 250'** from the crossing

Solution: The City's latest plan removes the siding through the Center Parkway crossing at grade and designed the relocated siding so that the clearance point for any standing cars is 255.71' from the crossing

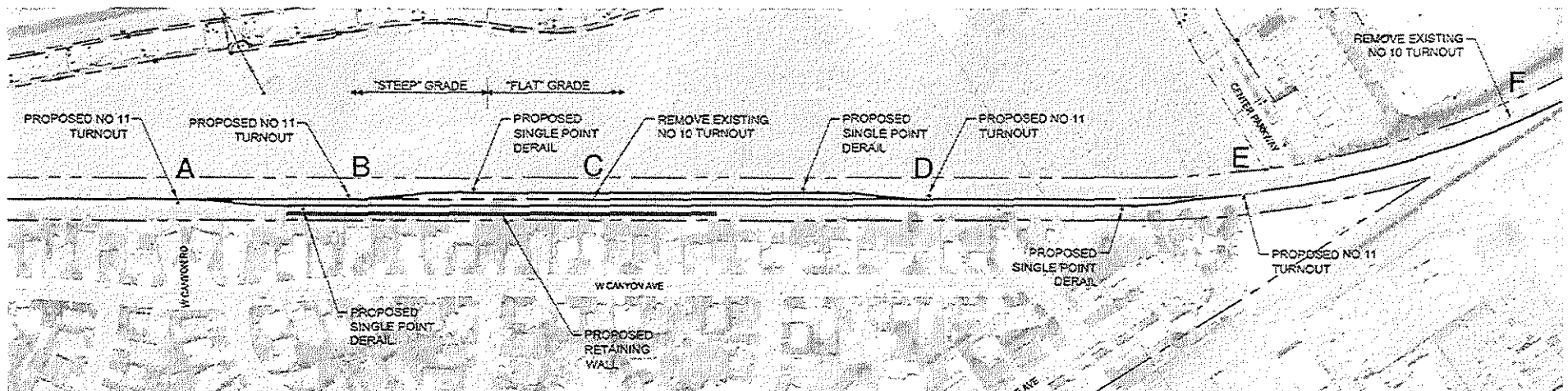


Concerns Addressed

Concern 6: The Center Parkway Project reduces TCRR's ability to use the Richland Siding for “**over-capacity**” storage

Solution: The City's latest plan increases overall potential rail car storage capacity at this location from 1,900' at present to 3,062.92'

- 41 -



Concerns Addressed

Concern 7: The Center Parkway Project limits TCRR switching operations

Solution: The City's latest plan:

- Addresses all the operational concerns previously mentioned and preserves TCRR's switching ability
- The addition of a 2nd siding enables TCRR to switch cars on the same grade as present without occupying the crossing

Concluding Remarks

- The City's latest plan addresses the operating concerns that have been identified and preserves all the operational ability TCRR presently has at Richland Jct
- The plan actually provides the Port and TCRR a substantial increase in infrastructure at Richland Jct
- The City is willing to fund the cost of the changes
- These changes will enable the much needed Center Parkway Project to move forward
- The changes, when complete, will produce a rail facility that will not unreasonably interfere with rail operations

Questions?