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THOMAS F. MCFARLAND

July 25, 2006

By UPS overnight mail

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. 34915, *Lincoln Lumber Company -- Petition for Declaratory Order -- Condemnation of Railroad Right-of-Way for a Storm Sewer*

Dear Mr. Williams:

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

Also enclosed are Lincoln Lumber Company's check in the amount of \$1,400 for the filing fee and a computer disk containing the filing.

Very truly yours,

Tom McFarland

ENTERED
Office of Proceedings

JUL 26 2006

Part of
Public Record

Thomas F. McFarland
*Attorney for Lincoln
Lumber Company*

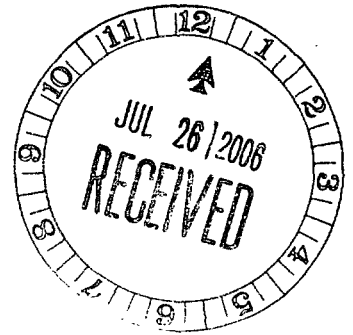
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JUL 26 2006

**SURFACE
TRANSPORTATION BOARD**

BEFORE THE
SURFACE TRANSPORTATION BOARD



LINCOLN LUMBER COMPANY --)
PETITION FOR DECLARATORY) FINANCE DOCKET
ORDER -- CONDEMNATION OF) NO. 34915
RAILROAD RIGHT-OF-WAY FOR A)
STORM SEWER)

PETITION FOR DECLARATORY ORDER

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

Petitioner

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DATE FILED: July 26, 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD

LINCOLN LUMBER COMPANY --	)	
PETITION FOR DECLARATORY	)	FINANCE DOCKET
ORDER -- CONDEMNATION OF	)	NO. 34915
RAILROAD RIGHT-OF-WAY FOR A	)	
STORM SEWER	)	

PETITION FOR DECLARATORY ORDER

Pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721, LINCOLN LUMBER COMPANY (LLC), a Class III rail carrier subject to the jurisdiction of the Board, hereby petitions that the Board issue an order declaring that condemnation by the City of Lincoln, Nebraska (the City) of portions of land in LLC's railroad operating right-of-way for a storm sewer is federally preempted by virtue of 49 U.S.C. § 10501(b) to the extent that the storm sewer would unreasonably interfere with LLC's railroad operations and would pose undue railroad safety risks.

Factual allegations in this Petition are supported by the verified statement of Mr. Donald Hamill, President of LLC, which is attached to this Petition as Appendix 1.

BACKGROUND

On November 12, 2003, the City filed a petition with the Board for an order declaring, among other things, that its acquisition under Nebraska eminent domain law of portions of land in LLC's railroad operating right-of-way for (1) a recreational trail, and (2) a storm sewer, would not be federally preempted under 49 U.S.C. § 10501(b). In a decision issued on August 12,

2004, the Board found that condemnation for a recreational trail would be federally preempted under that statute. *City of Lincoln - Petition for Declaratory Order*, 2004 STB LEXIS 508 (Finance Docket No. 34425, served Aug. 12, 2004), *aff'd sub nom. City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005).

In regard to the proposed storm sewer, the Board stated in *City of Lincoln - Petition for Declaratory Order*, *supra*, 2004 STB LEXIS 508 at *2-3:

LLC states that it does not oppose the City's proposal to place an underground storm sewer in the right-of-way . . .

On judicial review of the Board's decision in that proceeding, the City sought clarification of the effect of the Board's action on the storm sewer project. The Court of Appeals said the following in *City of Lincoln v. STB*, *supra*, 414 F.3d, at 15-16:

. . . The Board responds that there was no need to rule on that project because there was no dispute and that it is well-established that nonconflicting, nonexclusive easements across railroad property are not preempted if they do not hinder rail operations or pose safety risks. To the extent that the Board's intentions were ambiguous, they have now been clarified, making a remand unnecessary.

It is evident from the Board's statement to the Court that the Board was under the impression that it was proposed that the storm sewer would be installed across LLC's right-of-way and trackage at roughly a 90-degree angle at a single location. That is not so. It is proposed that the storm sewer be installed longitudinally along the entire length of LLC's operating right-of-way, as was the proposal for a recreational trail.

At the conclusion of judicial review of the Board's decision, the City turned its attention to the storm sewer. As reflected in the attached verified statement of Mr. Donald Hamill, the City failed to negotiate with LLC to resolve a number of aspects of the proposed storm sewer

installation that would materially interfere with railroad operations over LLC's right-of-way, and that would compromise safety. The City's refusal in that respect was contrary to its prior representation that it would cooperate with LLC, such that the storm sewer would not interfere with rail operations, nor adversely affect safety. Mr. Hamill relied on those representations in taking a position before the Board in 2003 that LLC did not oppose the storm sewer. Mr. Hamill more recently stated to the City that LLC would oppose the storm sewer unless and until the interferences with railroad operations and adverse effects on safety were resolved.

On February 2, 2006, the City instituted a proceeding in a Nebraska state court to condemn portions of land in LLC's railroad operating right-of-way for a storm sewer. *City of Lincoln v. Lincoln Lumber Company*, Cty. Ct., Lancaster County, NE, No. C106-1034.

LLC removed that case to the United States District Court for the District of Nebraska. *City of Lincoln v. Lincoln Lumber Company*, No. 4:06CV3046. The City filed a motion to remand the case to state court. LLC opposed that motion. In a Memorandum and Order in that case entered on May 23, 2006, U.S. Magistrate Judge David L. Piester granted the City's motion. A copy of that Memorandum and Order is attached to this Petition as Appendix 2.

On or about June 15, 2006, LLC filed a motion in the Nebraska condemnation Court seeking referral to the Board under primary jurisdiction of the issue of whether the proposed condemnation of railroad right-of-way is federally preempted by virtue of 49 U.S.C. § 10501(b) to the extent that it is shown that the proposed storm sewer would materially interfere with LLC's railroad operations and/or would compromise rail safety. The condemnation Court was requested to stay the condemnation pending the Board's disposition of that issue.

On July 6, 2006, the condemnation Court denied LLC's motion for referral and stay. The Court did not provide an explanation for its ruling.

A condemnation Court exists solely to determine the value of the property to be condemned. That Court was not equipped to decide questions of law, such as referral under primary jurisdiction.

The condemnation Court has not yet fixed the value of the property to be condemned. When it has done so, LLC intends to appeal that Court's denial of the referral motion to a Nebraska District Court, which is equipped to decide that issue. LLC will request that the District Court stay the condemnation pending the Board's determination of the issue of federal preemption.

LLC is requesting the Board to provide a declaratory order on that issue so that the District Court will have the benefit of the Board's expertise on the subject matter. If the Board exercises its discretion to issue such an order, LLC intends to make that order available to the Nebraska District Court.

ARGUMENT

Magistrate Judge Piester found that in opposing the City's motion to remand, LLC failed to prove that the City's condemnation action is federally preempted by virtue of 49 U.S.C. § 10501(b) (at p. 18). In so finding, the Magistrate Judge relied on the Board's decision in *Maumee & Western Railroad Corp. -- Petition for Declaratory Order*, 2004 STB LEXIS 140 at *5, where the Board stated in *dicta* that routine, non-conflicting uses of railroad land, such as non-exclusive easements for sewer crossings, are not federally preempted under § 10501(b) so long as they would not impede rail operations or pose undue safety risks (at 16).

As reflected in the attached verified statement of Mr. Donald Hamill, the City's condemnation does not involve a single, perpendicular sewer crossing as was referred to in *dicta* from the *Maumee & Western* case. Instead, the condemnation seeks installation of a storm sewer longitudinally for the entire length of LLC's railroad operating right-of-way. In *City of Lincoln - Petition for Declaratory Order, supra*, the Board found that attempted condemnation by the City of such a longitudinal strip of LLC's railroad operating right-of-way land for a recreational trail was federally preempted under 49 U.S.C. § 10501(b) because the trail would unreasonably interfere with LLC's railroad operations and would pose undue railroad safety risks. 2004 STB LEXIS 508 at *12-13.

By virtue of this Petition, the Board is requested to determine whether the storm sewer sought by the City's proposed condemnation would unreasonably interfere with LLC's railroad operations and/or would pose undue railroad safety risks. In that respect, the Board is asked to find whether that proposed storm sewer is more like the sewer crossing referred to in *dicta* in the *Maumee & Western* case, or the recreational trail whose condemnation was federally preempted in the 2004 decision in the *City of Lincoln* case.

The decision of Magistrate Judge Piester (Appendix 2 hereto) is not a bar to a Board proceeding and decision on the issue here referred to the Board. *See Grafton & Upton R. Co. v. Town of Milford*, 337 F.Supp.2d 233, 240 (D, Mass., 2004); *CSX Transp., Inc. - Petition for Declaratory Order*, 2005 STB LEXIS 134 at *14 (Finance Docket No. 34662, served March 14, 2005, "... (T)he fact that this matter is also pending in federal district court does not make Board issuance of this decision inappropriate, particularly if it might assist the court ...").

WHEREFORE, the Board should institute a proceeding in response to this Petition, and set forth a procedural schedule for the taking of evidence and argument in this matter.

Respectfully submitted,

LINCOLN LUMBER COMPANY
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Petitioner

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DATE FILED: July 26, 2006

APPENDIX 1

BEFORE THE SURFACE TRANSPORTATION BOARD

July 20, 2006

Lincoln Lumber Company (LLC) wishes to open proceedings on the Storm Sewer project that was to be constructed from 24th Street to 19th Street on the South half of the railroad Right of Way by the City of Lincoln in the year 2004. This Storm Sewer project not being constructed in the year 2004 as represented by the City to the Surface Transportation Board (STB) and to LLC is causing serious disruption, interference, impeding and threatening safety to the entire LLC railroad transportation operation.

Since November of 2000, LLC has owned and operated that portion of an existing railroad track, which lies just South of "Y" Street and runs from just West of 18th Street to 24th Street in Lincoln, Nebraska. Attached hereto as Exhibits #29 and #30 (2 railroad maps) is a true and correct copy of the Engineer drawings showing the location of the railroad track.

LLC uses the full length of its railroad track from just West of 18th Street to 24th Street. LLC receives rail shipments of lumber and other building materials that are sold by LLC in the course of our business. The ability to receive the rail shipments is vital to the continuing business of LLC. The ability to deliver and pick-up shipments from the entire railroad Right of Way is vital to the continuing operation of LLC's railroad transportation operations.

I have personally managed LLC's railroad transportation operations since LLC purchased the tracks and related Right of Way. Further, I have managed the exact same railroad prior to purchasing it for approximately 30 years.

I am the president and owner of LLC and in such capacity I have access to the business books and records of LLC. I was closely involved in preparing LLC's case before the STB. I read and am familiar with the briefs filed in the Eighth Circuit Court of Appeals, and the decision filed by the Eighth Circuit Court of Appeals. Each of the documents submitted was either prepared by me personally, or personally reviewed by me in the course of the STB proceedings and appellate proceedings. Each of the documents submitted appears in LLC's business books and records. The decision of the STB was dated August 11, 2004 and the opinion filed by the Eighth Circuit Court of Appeals was on July 12, 2005.

Beginning several years before the City filed its petition for Declaratory Order with the STB, I personally informed the City on numerous occasions about the various railroad disruption, railroad interference, and various railroad safety hazards concerns and worries I had with their proposal to place a Storm Sewer down LLC's railroad Right of Way. For example, you will see documentation communicating to approximately a dozen City officials and several City departments. These various City officials were told numerous times by me personally (again, beginning several years before the City filed its petition for Declaratory Order with the STB) of the railroad Right of Way obstacles, the dangers, the safety threats, about specific railroad disruption – interferences and overall – general impact. LLC worked hard and long communicating that the City and LLC needed to “plan,” and plan a lot very carefully this Storm Sewer construction project to lessen and/or eliminate this railroad disruption, railroad interference and fully address the safety for the entire railroad Right of Way. The OL&B railroad carrier that delivered (OL&B railroad still delivers to LLC currently) our railroad cars to LLC for unloading were constantly talking to me about their derailment concerns. It was not my intent to excessively criticize the Union Pacific railroad abandonment, but when the entire Mainline railroad and several railroad spurs were abandoned by the Union Pacific railroad almost everything needed maintenance and repair badly or the LLC railroad transportation was faced with extraordinary derailment. The OL&B railroad did not want this threatening danger of derailment and LLC did not want this threatening danger of derailment either. The Mainline trackage and all of the railroad spur tracks were in such a bad state and needing repair that OL&B would say if we were to ever have a derailment it could be very bad, causing a loss of life or injury to people and serious damage to the train and train trackage (tear the tracks up!!!). So back to the beginning, several years before the City filed its petition for Declaratory Order with the STB regarding the Storm Sewer project, I personally worked hard over a substantial period of time, informing the City on numerous occasions about the various railroad disruption, various railroad interference and various railroad safety hazards will need to be addressed in order to fully plan the Storm Sewer project and railroad Right of Way if the City decides for certain that they are going to place and construct the Storm Sewer project on the railroad Right of Way from 24th Street to 19th Street. I have always expressed that the entire LLC railroad transportation operation and City Storm Sewer Engineers needed to regularly communicate and communicate often with a maximum amount of cooperation regarding this large Storm Sewer project, telling them it was for certain going to fully impede the railroad transportation operation to an even greater extent if there was no “joint planning” and full complete cooperation between the City and LLC. I stressed to the City that the LLC railroad wanted to be informed and LLC wanted to supply some input as to the Storm Sewer

project. I felt LLC was still extremely well qualified to fully aid the railroad interference and safety problems. LLC communicated it was fair and also reasonable to expect some good wholesome Storm Sewer project planning decisions by the City and sharing of information in trouble spots of interference and safety. LLC expressed to City this railroad disruption – interference and addressing safety in non-compromising way would cost the City and cost LLC money. Don Hamill needed to know prior to construction of the Storm Sewer project what our LLC costs may or may not be because it could impede and interfere with the planned expenditures on the Mainline track and impede and interfere with the planned expenditures on the several railroad spurs we intended to spend time and money on reviving for their safe usage. Mr. Al Imig, Storm Sewer project Engineer, told me on August 30, 2000 that there was consideration of a Storm Sewer project on the North side of the main railroad track and boring under the Mainline at approximately 19th Street and railroad curve. In 2000 and 2001 they had Storm Sewer project and trail talks but no facts or information from the City whereby LLC could make any railroad plans (especially the spur tracks maintenance and repair), we were on almost a spur hold up. This delay was starting to hurt, interfere and disrupt excessively. It was impacting and disrupting the railroad a lot for all of 2000 and 2001 to the extent of railroad maintenance and railroad repair being restricted to the mainline track and curve trackage at approximately 18th Street and 19th Street. There was a gradual escalation of an item called a bicycle trail from 24th Street to 19th Street. The escalation and possible co-location of a Storm Sewer project and trail really injected a lot of interference, a lot of disruption and injected a lot of safety risk. All of this was affecting the City people as well as all of the employees at LLC. LLC employees and OL&B were speaking out and being troubled and noticeably bothered with the disruption of no planning, and they were not allowed to compromise on safety not a single time, not a single hour, not a single day. LLC employees heard about railroad safety from a Workman's Compensation viewpoint, they heard about railroad safety from a "Federal OSHA" viewpoint, they heard about railroad safety from a liability viewpoint and they heard about railroad safety as to LLC customers and the general public. Now I will point up to the STB that this still very much exists for the LLC employees as of July 2006. This railroad interference, disruption, and safety demands regarding this railroad Right of Way from 24th Street to approximately 19th Street and the railroad curve have been continuous since the purchase in the year 2000. I clearly recall the City of Lincoln sending out Clint Thomas on January 10, 2003 pressuring me to sign documents and threatening me with Eminent Domain/Condemnation for approximately four hours at LLC. This was extremely disruptive. The evidence will show as of February 18, 2003 over a month past the City's Mr. Thomas badgering LLC that the Storm Sewer project plans are now 90% complete, but it was very disturbing to the employees

and staff that Storm Sewer Engineer Mr. Dave Skodas does not know the route of the Storm Sewer or if he does he won't tell me that he does. So employees, staff and myself don't know if the Storm Sewer is going on the South side of the Mainline or the North side or back and forth on both sides. It will be another 30 days per Engineer Dave Skodas of delay and wait, yes delay and wait; making it impossible for LLC to make any railroad Right of Way plans. The City making LLC wait and making us hold up on LLC railroad construction on the railroad spur track costs LLC time and a considerable amount of money. City Engineer Brian Kramer will review these Storm Sewer drawings and they will finalize the drawings in 30 days. LLC relied on the fact that these Storm Sewer project plans would be finalized in approximately 30 days or on approximately March 18, 2003. A meeting at LLC on June 20, 2003 with Mr. Brian Kramer for the City of Lincoln represents that he is responsible for the construction and design engineering for the City's Storm Sewer project on the railroad Right of Way between approximately 18th Street and 27th Street in Lincoln, Nebraska. He represented that the Storm Sewer project plans were to be finalized. As of June 20, 2003 (the day that Kramer came to LLC) I have never seen these Storm Sewer project plans. I have never ever again talked by phone or face to face or had any type of communication (none, absolutely none) with the City Engineer Brian Kramer as of writing this document. I swear this to be absolutely true accurate and correct I never have seen the Storm Sewer project 701 321 drawings until I received my copy of the City of Lincoln petition for Declaratory Order filed on November 6, 2003. These drawings received zero LLC input. The City entirely refused and disallowed the ownership of the property any and all participation in these Storm Sewer project drawings. Mr. Kramer, on behalf of the City, decided to put these Storm Sewer drawings on eleven separate pages sized 11"x 8". They had the date of January 2003 and were referenced as Kramer Exhibit #1. All eleven drawings were stamped in very bold type "Draft - Subject to Change," were sized 11"x 8" and showed a very small fine print. Mr. Brian Kramer prepared two pages of Verified Statement that is dated October 28, 2003 containing six points that were significant to the Storm Sewer project guarantees and warranties. Mr. Kramer, on behalf of the City of Lincoln, Nebraska, headed up his Verified Statement in caps "Before the Surface Transportation Board." I quote, "I, Brian A. Kramer, make this Verified Statement for use on behalf of the City of Lincoln in the above captioned (F.D. 34425) proceeding based on personal knowledge and reliable facts reported to me." In his point #1 on page #1 says, "The information provided herein is based on my personal knowledge, or on information provided to me by staff or contractors assembling information in discharge of their responsibilities, and is true and accurate to the best of my knowledge, information and belief." Mr. Kramer, on behalf of the City, says we can use and rely on the entire facts over his signature. LLC did fully and completely rely

on him as person, as engineer, for his engineering services, and the entire set of documents filed with the STB on November 6, 2003. Mr. Kramer, on behalf of City, represented on June 20, 2003 upon his visit to the LLC office that the Storm Sewer project plans were to be finalized. Mr. Douglas Stevenson, the surveyor, told me that he completed entirely the Storm Sewer project survey work on January 14, 2003. Per Kramer's filing dated November 6, 2003 to the STB, I find the Kramer Exhibit #1 to be consisting of eleven individual drawings that are stamped "Draft – Subject to Change." The drawings are not signed nor dated by the City sub-Engineer E&A Engineering or by the City Engineers' office and Mr. Brian Kramer. In my opinion, I note that the Kramer representations are misrepresented, misleading, and deceiving. Draft does not mean final. Draft would mean that it is a preliminary drawing. Subject to change does not mean "final" it means they may or may not be changed. On December 30, 2003, I personally delivered a hand-written note I wrote (regarding a Storm Sewer conversation related to the railroad Right of Way and the Storm Sewer City Engineer Dave Skodas) to Mr. Joel D. Pedersen City Attorney in which he signed a notarized receipt proving that he received it for the City. The note says that the Storm Sewer drawings were 90% complete and were being reviewed by Mr. Kramer. I quote, "probably be a month before they get the plans back from being reviewed and being told to finalize." Further, these words "Draft – Subject to Change" communicates and represents significant City meaning and the City intent. Per transmittal letter from E&A Engineering (the City Engineering company being supervised by the City's Brian Kramer) dated August 10, 2005, three sets of the Storm Sewer project drawings were released for the first time to LLC. Prior to August 10, 2005, all of the Storm Sewer project drawings were on strict hold per City and absolutely unavailable to LLC. In LLC's opinion, the City forced the hold on the Storm Sewer drawings and forced the hold on any and all construction on the Storm Sewer project in order to wait on a trail decision by the STB. On August 10, 2005, the Storm Sewer project drawings were changed by the City with the significant words (with their meaning and intent) "Draft – Subject to Change" being removed from all of the Storm Sewer drawings and with the amount of pages increasing from eleven to twelve. These Storm Sewer drawings are not signed or dated either, same as the first set not being signed or dated. E&A Engineering Engineers did not sign or date and the City Engineers' office and Brian Kramer did not sign or date. There is a second full drawing page showing the entire length of the Storm Sewer project form 24th Street to 18th Street vacated. The Storm Sewer from 24th Street to 22nd Street is on the lower half of the page. The Storm Sewer from 22nd Street to 18th Street vacated is on the upper half of the page. Each upper and lower are now marked "Proposed Storm Sewer improvements." As of August 10, 2005 the Storm Sewer plans are at the proposed stage. The plans never go beyond proposed; they are never ever identified as final drawings.

To me, the plans remain uncompleted. By August 10, 2005 Engineer Brian Kramer, on behalf of the City, has not honored (no attempts to honor) what they guaranteed and warranted to the STB. Mr. Charles H. Montange, counsel for the City of Lincoln, stated, "Storm Sewer improvement to be completed during the 2004 construction season." Mr. Douglas Stevenson, the surveyor represented to me personally that the Storm Sewer survey was completed on January 14, 2003 and went to Holdrege (approximately 150 miles away) and never came back ever, ever, to do more survey work. On October 28, 2005, Kramer/City represents a final survey of the Right of Way in 30 days (approximately March) or prior in 2004 and Mr. Kramer/City represents final Engineering Design 30 days April, 2004. None of this Kramer/City representation has happened. LLC relied on the above events that the City Engineer Mr. Kramer promised and be assured it has damaged the LLC railroad transportation operation. We have hired at the end of 2004 (when City promised Storm Sewer completion) high dollar specialized personnel to work on, repair, and reestablish several needed railroad spur tracks, two terminals, railroad roof for railroad incoming freight storage, railroad switches, and more repair – maintenance work time to Mainline. We still have these specialized railroad personnel on hold (especially regarding the railroad spurs, railroad switches, and railroad roof plans, etc.) because of all of the uncertainty, the unknown, the lack of cooperation, and the City's word being undependable and unreliable. LLC had previously purchased all railroad ties, rails, spur switches, spikes, bolts, and rail bed materials, etc. So we have had money tied up in repair and maintenance track equipment, supplies and personnel that are stopped in holding pattern because of, in my opinion, the City's deliberate, selfish, and self-centered planning that is causing unnecessary safety risk on the railroad Right of Way. LLC has estimated a minimum of \$175,000 in City Storm Sewer losses to date. To this short line railroad transportation operation, that is a lot of loss and it's an unnecessary loss that would pay for a lot of railroad spur improvements. LLC deserves a reasonable return on railroad operation and railroad Right or Way capitol for the risk we take and investment we have made. The City delay and stalling of the Storm Sewer drawings have seriously interfered with the railroad transportation operations profitability over the past several years and have impacted our safety. In my opinion, the City is being spiteful because of the trail decision. The City is causing disruption, interference and impacting our safety in a negative way and that has to stop and stop immediately. There should be a City/LLC friendship and cooperation and there still can be that. Since the survey completion on January 14, 2003, its been over 3 ½ years and we still do not have a final set of Storm Sewer drawings; see all of the prior evidence to support this assessment of no final plans we can use reliably, that is free of railroad mistakes, errors, deletion and some quality we (City/LLC) can depend on for the next 100 years.

After August 10, 2005, Don Hamill reviewed the three sets of Storm Sewer plans obtained. A review of the plans received on August 10, 2005 showed they are now dated April, 2005. The Storm Sewer plans review shows changes that are needed per LLC. Plans show the following railroad deletions: four railroad spur tracks, one present railroad switch and least three future railroad switches, two safety walls, present railroad concrete loading ramp, two future loading ramps, two railroad terminals, one crossover track, two open deep railroad ditches, no present Storm Sewer pipes, no railroad forklift passage way, and no railroad storage roof. The railroad plans delete all of the above. There should be a Storm Sewer project specifications book on a significant Storm Sewer project of this magnitude. There were no Storm Sewer specifications on November 6, 2003 and there are none now. Specifications on drawings are very limited. April, 2005 drawings received on August 10, 2005 have now changed by the City, with a page 2 of 12 being added. This full-page drawing has no reference to the high-pressure gas pipe crossing the full width of the railroad curve at approximately 19th Street (it was also deleted). This is dangerous and should be referenced on the drawing page 2 of 12. The City disregards the spur track at the Whittier Street terminal connection to 22nd Street at West. The City disregards this railroad spur track because they have an old Storm Sewer pipe in place that they wanted located in approximately the same location below (under) the spur track. Train cars pull over top of the Storm Sewer pipe, which may cause it to crumble, and then we would have a high-dollar derailment problem. The City wants to delete a reinforced concrete wall at the end of Whittier Street. The City has shaped and reshaped Whittier Street and adjoining streets to drain lots of Storm Sewer water into the railroad Right of Way. The street elevation is several feet lower causing a dangerous drop off for the railroad equipment of all kinds, including dangerous derailment. The concrete wall, with a safety railing at the top is required by OSHA. The City wants to disregard this safety. In short, the railroad terminal area at Whittier Street and the old Storm Sewer pipe below the railroad spur are too dangerous. Safety cannot and will not be compromised by LLC on these two life-threatening railroad items. STB, the safety risk here is huge for LLC employees and the general public. The solution presented to the City (to date, the City refuses) is to move the Storm Sewer pipe to the South from Whittier Street to 21st Street and move the Storm Sewer within 4' of the Sanitary sewer. The old abandoned concrete dock connected to the Sanitary sewer (sewer is used presently by the University of Nebraska) needs to be removed by the City because this is blocking the railroad passage way for the future railroad terminal #2 and the present terminal #1. Parallel 4' of compatible spacing for the new Storm Sewer and existing Sanitary sewer to conserve the railroad land, as this railroad land should not be wasted. This transaction eliminates a 30' wide Storm Sewer path required presently by the City, which is unfair and unreasonable

to the railroad operation. In 2002 and prior written evidence to the November 6, 2003 STB filing by the City, LLC talked to City officials of moving to the South property line of Right of Way. Presently, the Storm Sewer drawings are approximately 30' to the North of Sanitary sewer, this is pure waste. There is pipe in the center of the concrete dock directly centered over the Sanitary sewer. LLC refuses to interfere with any of the City utilities, including the fire hydrant that needs to be recessed into the ground, removing the dock, and putting in a concrete safety wall across Whittier Street. The reason is if LLC interferes or disrupts proper usage of these utilities, the City will send LLC a big bill and there will be hard feelings between the City and LLC. The relationship between the City and LLC has to improve, be more positive and have a certain amount of good old-fashioned everyday happiness. City, if LLC damages any of your utilities you will bill us. Be careful City, I may ask for a refund. The dirt has to go over top of the Storm Sewer project entirely because LLC will not risk damaging any of the Storm Sewer. City, if we refuse to interfere will your Storm Sewer follow the example and stop interfering with the railroad transportation operation and stop violating safety laws (federal safety laws to boot)?

STB, read the Permanent and Temporary Easement agreements the City is pressuring LLC to sign. These contracts are absent and void of the railroad transportation operations and safety on the railroad Right of Way. I have let the LLC railroad employees, specialized LLC railroad employees (hired and on board the long term reliable), plus the LLC staff read the Permanent and Temporary Easement contracts the City demands be signed or its Eminent Domain/Condemnation and I'll give the following report STB. Lets establish that the employees understand and are fully aware of the railroad interference and safety risk with this Storm Sewer project. Without exception they say City is out in extreme left field with the Storm Sewer project process and they would not sign these Permanent and Temporary Easement contracts. I did not sign them either.

There are a number of City communication refusals that impacts and harms the Storm Sewer project. I call Joel Pedersen City Attorney for example; he refuses to talk to me. I set up a meeting on September 14, 2005 and City/Pedersen refuse to allow any agreements to be made regarding the Storm Sewer project. None were made. On December 20, 2005 I went to see Joel Pedersen about the Storm Sewer project and he refuses to invite me into his office, refuses to talk to me and walks away with anger refusing to sign a receipt. The City refuses LLC Storm Sewer changes to drawings. Mr. Pedersen says the City doesn't have the time or budget to make Storm Sewer project drawing changes regardless of railroad transportation operations suffering interference and suffering safety risk. Mr. Pedersen, on

behalf of the City, agreed to only one Storm Sewer meeting on September 14, 2005. Mr. Brian Kramer failed to attend the Storm Sewer meeting and the City was enforcing there be no agreements, no changes; it is Eminent Domain/Condemnation all the way. The City refuses negotiations. The City refuses to redesign or make needed changes to Whittier Street where the LLC terminal #1 is located. LLC cannot operate the railroad per original plan with only half of the railroad terminal. Unloading railcars on one side, then moving them to unload on the other side risks upsetting the railcars. The City refuses to put seven days maximum on the impacted areas during the construction as promised by Kramer/City. They deleted the seven days from the Temporary Construction Easement. The City refuses to honor the 90 days total construction time. The contract provided for a two-year construction duration from the date of LLC signing the Temporary Construction Easement. Two years is equal to more than 730 days or converts to a City change of over eight times what Kramer/City originally promised. In my opinion, this is another example of the City going backward on its word, misrepresenting, misleading, and being deceitful.

STB, compare the railroad transportation improvement to the Storm Sewer proposed improvement (which is how the latest Storm Sewer drawings are identified as of August 10, 2005). Per Lancaster County Assessment, notice the increased assessed value of \$267,850. Yes, LLC spent substantial time and money improving the exact same location as the Storm Sewer project location. The Storm Sewer project has advanced from the "Draft – Subject to Change" stage on November 6, 2003 (or perhaps February 18, 2003) to the present July 20, 2006 and Storm Sewer project has become proposed per the drawings. At this rate of Storm Sewer improvement progress the delay will cost the LLC railroad transportation operation another (second) \$175,000 or more. This is extreme, serious railroad interference by the City. Mr. Kramer (City Engineer) represents that he worked seven years for the City of Minneapolis, Minnesota. Mr. Kramer has worked at least 2003, 2004, 2005 an approximately seven months of 2006, or over 3 ½ years and per his Verified Statement, but we are not to finalize plans for some time yet. City, you represented Storm Sewer completion in the 2004 construction season. This is far too disruptive to the whole Right of Way operations.

I want to inform the STB exactly what Brian A. Kramer, on behalf of the City, represented to the STB with his Verified Statement so the STB can compare and understand why LLC feels our railroad transportation operations are being interfered with and our railroad safety is at a serious risk.

I quote the following from Brian Kramer's Verified Statement dated and signed by Brian Kramer on October 28, 2003 as follows:

I quote the first paragraph, " I Brian A. Kramer, make this Verified Statement for use on behalf of the City of Lincoln, in the above captioned proceeding based on personal knowledge and reliable facts reported to me."

I quote page 1 and #1, "I am employed by the City of Lincoln Public Works Department in the Engineering Services, Design Construction Division, as an Engineering Coordinator for the past 1 ½ years." "I am responsible for construction and design engineering for the City's storm sewer project in the former MoPac right of way between 18th and 27th streets in Lincoln, Nebraska near the planned Husker Link Trail. My involvement with the project includes overseeing the design, bidding, and construction of the Project. I am personally acquainted with plans for, and negotiations with Lincoln Lumber Company (LLC) concerning, the Storm Sewer Project on Lincoln Lumber Company's property which is the subject of this proceeding. The information provided herein is based on my personal knowledge, or on information provided to me by staff or contractors assembling information in the discharge of their responsibilities, and is true and accurate to the best of my knowledge, information and belief."

I quote page 1 and #2, "The purpose of the storm sewer project is to install/improve the storm water system down the former MoPac corridor. Currently, the existing system is undersized, antiquated or non-existent. Once finished the system will move storm water more efficiently and help to eliminate localized flooding on the corridor and adjacent properties."

I quote page 2 and #4, "The City intends to work with Lincoln Lumber to minimize any disruption to the business during construction. There is a piece of spur track, which is required to be removed and re-laid. The City

will require the Contractor to hire a sub-contractor who specializes in rail work.”

I quote page 2 and #5, “The City is familiar with and has done work in railroad right of way, and all necessary precautions will be observed and the City will undertake every reasonable effort to minimize impact on rail operations. The storm sewer will be compatible with rail operations. That is, we will specify designs, materials, and methods that will allow continued rail operation. I attach hereto (Exhibit 1) our current plans as they relate to this project. Construction activity directly impacting the area where the main line rails are placed will be minimized and it is anticipated that any direct impact would be confined to a window of not more than seven days of possible impact that could be further minimized with advanced planning and coordination.”

Per Kramer/City I quote, “Currently, the existing system is undersized, antiquated or non-existent. Once finished the system will move storm water more efficiently and help eliminate localized flooding on the corridor and adjacent properties.”

Per Mayor Seng letter dated November 4, 2003 to the STB on November 6, 2003. Here is how the City feels, I quote, “Since it appears the owner will not cooperate regarding the trail, and he will only agree to the Storm Sewer without the trail, this issue needs to be resolved by Eminent Domain.” This to me has been the City attitude and is still the City attitude. The Mayor says “needs Right of Way by March 2004.” The City, per Mayor, will bear the entire cost of the Storm Sewer. Mayor Seng states the Storm Sewer improvements are needed because this corridor has been a trouble spot for localized flooding for many years.

Now I will try to briefly explain the urgency regarding the City Storm Sewer project construction and that the City delay of construction has to cease. We have a long block and a short block of still open deep ditches that threaten dangers such as derailment or loss of life.

- (1). LLC can’t fill the two remaining ditches without causing serious flooding. See two paragraphs above and underlined.

- (2). As it is existing currently, when it rains hard the City “collects” so much rain water that it overflows these two deep ditches and transfers excess storm water from 24th Street West to approximately 18th Street vacated to the approximately \$125,000,000 Antelope Valley 100 year flood removal basin (under construction now). The City has designed and caused collection of such a large volume of water that it will go “atop,” yes “atop” the railroad and Right of Way and be a minimum of 12” to 18” of rushing water headed for the inlet at Antelope Valley. The railroad Mainline, railroad spurs, railroad terminals, main railroad switch are all covered up entirely with water. You see no railroad or railroad Right of Way. (You see none.) It is a rushing, deep flood of water. It completely stops the LLC railroad transportation operations entirely. When this flooding happens, it sometimes washes and erodes the railroad track side banks, washes out and sometimes destroys the railroad beds under the Mainline railroad and the railroad beds in the terminal area, and has been known to wash out the bed around the Mainline railroad switch. This increases the danger and threat of derailment. In my opinion, Mr. Joel Pedersen City Attorney and the City are subjecting this LLC railroad transportation operation, the LLC employees, my customers, and the general public, all of them to extreme interferences, extreme disruption and extreme unsafe flood conditions. Mr. Kramer, the City Engineer responsible, obviously knows because he says “undersized, antiquated, and non-existent.” The City Attorney Joel Pedersen knows. City Mayor Seng has known for many years as she says it has “been a trouble-spot for flooding for many years.” I have personally told Mr. Joel Pedersen that the flooding is so extraordinary that when the water is deep and rushing one could not know (can’t see it) a railroad exists. I further told Mr. Pedersen City Attorney that there is a great risk taken as to a loss of life and people being injured. We need a set of Storm Sewer project plans and specifications that we can completely rely on now and to serve in full a Permanent (long-term) Easement the City desires. STB, in my opinion, Mr. Pedersen and the City Law Department are subjecting this entire railroad transportation operation from 24th Street to 18th Street vacated (Right of Way) to extreme safety hazards and all of us will pay the price some day.

I have requested the City officials to work on this Storm Sewer project and do all parts to complete the Storm Sewer construction. If the STB will open this proceeding, I will furnish dates now and full letters later illustrating my efforts of hard work toward the Storm Sewer completion. See letters dated July 25, 2005 (6 pages), July 25, 2005 (4 pages), August 26, 2005 (3 pages), September 14, 2005 (5 pages), December 19, 2005 (one page), February 10, 2006 (4 pages), February 16, 2006 (one page).

In brief, the City is trying these major blocks to both terminal areas and the blockage is impacting the railroad, interfering, disrupting and causing serious safety risk all the way up to the most serious being "increasing the risk of derailment." The City does not have respect for derailment as they ignore, disregard, and discount my concerns and my being cautious about derailment. We had a railcar off the tracks within approximately the last 30 days. It was scary. I have said to Mr. Joel Pedersen City Attorney (who seems to be in control) that the City and Mr. Kramer (the City Engineer in charge) need to come down and actually visit these terminal areas when flooding is going on. The Whittier Street terminal collects a lot of floodwater and it rushes hard and deep into the terminal area. It is blocking the completion of half of the railroad terminal. The Whittier Street terminal wall and safety rail atop will be Federal OSHA required right and requiring some quality. The City needs a Whittier Street wall not just for flooding but when snowplows pile snow high into area (ram and jam) because this could harm expensive Storm Sewer equipment. STB, the City-planned flood drainage and prior street shaping to cause drainage collection and routing created this complex danger location. The other City blockage is the refusal to move a fire hydrant in the middle of terminal #2. LLC doesn't want half of the 50' wide terminals; we want and need the full 100' wide terminals.

The City decided the Storm Sewer route. The City knew or should have known that the site is available for Kramer/City Storm Sewer site visits and to become aware of obstacles present and to help make the Storm Sewer construction more railroad friendly and safe for railroad transportation operation. Mr. Kramer/City to date you have went backwards, yes backwards on your representations regarding the Storm Sewer project. I have told Mr. Pedersen City Attorney to have Mr. Kramer come and visit. But not only a site visit to the LLC railroad, a visit to talk with other general employees and staff about this flooding, over the Storm Sewer construction and the entire project interference, and their safety concerns and worries. City, you will learn a lot about present dangers of Right of Way flooding because these LLC people know. Safety is a high, high priority with them everyday.

Above I say the LLC employees and LLC staff know about this City/railroad and railroad Right of Way interference – disruption and disregard for the safety by the City. The employees and staff also know that recently the City employees were sent by the City to the Right of Way at 23rd Street and Mainline railroad track to take down two railroad safety cross arm signs. Take down railroad safety cross arm signs (the one on North and on one South side of Mainline trackage) on 23rd Street right in front of our office during business hours????????? City of Lincoln??????????? No prior notification from the City to LLC regarding this railroad sign removal.

The following are specific points from the Affidavit of Don Hamill prepared on March 30, 2006:

1. STB will be furnished later a true and correct copy of a letter dated February 12, 2002 addressed and delivered to various agents and officials of the City regarding the LLC's concerns about the proposed storm sewer.
2. On February 18, 2003, I requested from Dave Skodas, one of the City engineers who was working on the storm sewer project, the City's plans for the storm sewer. I was told by Mr. Skodas that the plans had not yet been finalized. I will furnish a true and correct copy of notes that I made at the time of my conversation with Mr. Skodas. The notes accurately reflect what I was told by Mr. Skodas.
3. Prior to the time the City filed its Petition for Declaratory Order before the STB, Brian Kramer, Joel Pedersen and other agents of the Plaintiff each told me on at least one occasion that the Plaintiff would work with LLC in designing and constructing the storm sewer in order to minimize the interference by the storm sewer and the construction thereof on LLC's railroad operations and to address LLC's safety concerns.
4. Before the City filed the Petition for Declaratory Order with the STB, I made several requests of the City for a copy of the City's plans for the portion of the storm sewer the City intended to construct on LLC's property. I was told by City representatives that the plans had not yet been approved.
5. The first time I was provided with any plans for the proposed storm sewer was when I was served with Brian Kramer's verified statement in the STB proceedings.

6. The plans were difficult to read and had several noticeable errors. For example, the plans did not show a mapped railroad spur, did not show a drain pipe running underneath an LLC building and included portions of existing LLC buildings within the borders of the proposed Temporary Construction Easement.
7. I had been told by several officials of the City, including the City's engineers that the plans were just drafts and that the City would work with me to make sure that the proposed storm sewer project did not interfere with LLC's railroad operations or pose safety risks.
8. The following excerpts from Brian Kramer's verified statement are consistent with representations made to LLC by City's agents prior to the filing of LLC's Partial Resistance to Petition for Declaratory Order:
 - a. "Construction – 90 days"
 - b. "The City intends to work with Lincoln Lumber to minimize any disruption to the business during construction."
 - c. "There is a piece of spur track, which is required to be removed and re-laid. The City will require the Contractor to hire a sub-contractor who specializes in rail work."
 - d. "The storm sewer will be compatible with rail operations. That is, we will specify designs, materials, and methods that will allow continued rail operations."
 - e. It is anticipated that any direct impact would be confined to a window of not more than seven days of possible impact that could be further minimized with advanced planning and coordination."
9. The following excerpts from Walter Schuchmann's verified statement are consistent with representations made to LLC by City's agents prior to the filing of LLC's Partial Resistance to Petition for Declaratory Order:
 - a. "The storm sewer would be located south of the track over the entire length of the corridor. It would be underground entirely through the length of the line segment."
 - b. "The City's proposed...storm sewer would not interfere with the ability of OL&B to operate rail freight service on the LLC line."

- c. "rail operations will be the same after (unaffected by) construction of the...storm sewer as at present."
 - d. "construction would cause minimal interference with rail service and that the construction plan could be coordinated with LLC to reduce impacts further."
10. The following excerpts from the City's Petition for Declaratory Order are consistent with representations made to LLC by City's agents prior to the filing of LLC's Partial Resistance to Petition for Declaratory Order:
- a. The City needs certain...underground portions for a storm sewer in order to complete...an important storm sewer project."
 - b. "the City's acquisition will have no effect on rail service."
 - c. "the City...must clear title for the storm sewer project by March 2004."
 - d. "Thus, construction plans for the storm sewer and trail projects are not entirely final. Preliminary designs are attached as exhibits to the Kramer V.S. (storm sewer plans) so the Board may verify that the uses Lincoln intends to make are as represented herein." (emphasis added).
11. After the Eighth Circuit Court of Appeals issued its Opinion, City's agents contacted me to negotiate an Easement for the storm sewer. Thereafter, I reiterated to the City LLC's concerns regarding the detrimental impact of the storm sewer project as proposed on the LLC's railroad operations, including interference and safety issues. I requested that the City consider some changes to the storm sewer plans to alleviate railway interference and safety issues.
12. I have personally discussed LLC's interference and safety concerns of the storm sewer project as designed with the City's engineers, and have been told by them that changes I had requested to alleviate these concerns were reasonable. However, the City's legal department has flatly refused to consider any changes to the storm sewer project plans. Joel Pedersen City Attorney says the final plans are identical to the preliminary plans that were submitted to the STB with Brian Kramer's verified statement. Pedersen is wrong, wrong, and wrong.
13. Despite repeated assurances made to myself and to the STB by the City's representatives and agents, and despite statements made to me personally by the City's engineers that requested revisions were reasonable, the City has

refused to consider any requested revisions to the storm sewer project made by LLC.

14. I informed the STB that I was not opposed to the City's proposed storm sewer project because: 1) I believed (and continue to believe today) that the storm sewer is an important improvement for the residential neighborhoods to be served by it; 2) I believed the City's representations that the matter regarding the bike trail and storm sewer had to be resolved in a very short period of time or the City would lose vital funding for the storm sewer project; and 3) I believed the repeated assurances made to me and the STB by Mr. Joel Pedersen and other representatives of the City that the City would work with LLC to alleviate railroad interference and safety issues.
15. I would not have informed the STB that LLC was not opposed to the storm sewer project had I known that the urgency of the matter was apparently overstated (as the City apparently still has funding for the project two years later) and that the City would thereafter flatly refuse to consider any requested changes to the plans or otherwise work with LLC to alleviate the railroad interference and safety concerns that LLC had with the City's draft plans.

It is my intent to give the STB preliminary and the most minimum facts in a summary form that I can to request of the STB to give the maximum consideration to open the proceedings on this Storm Sewer project that is still as of this date not even close to construction. STB, per my evidence in my opinion, we don't even have final plans. The plans are only to the point of proposed and are absent of many significant railroad present and future deletions.

The plans also delete significant railroad interferences and cause safety concerns but the City refuses all changes and will not negotiate or talk about changes. The City has reneged on Kramer's (the City Storm Sewer engineer) promises, warranties, assurances, and guarantees that LLC relied on to the fullest of extent. I promise substantial evidence relating to the railroad interference, disruption, and railroad safety to the STB if it will open this still not completed Storm Sewer project. May I summarize some of the above with the following to climax my proceeding request:

1. On November 6, 2003, the City of Lincoln filed a Petition for Declaratory Order with the STB. In connection with their filing, the City provided to the STB various evidentiary documents, including a verified statement of Brian Kramer, an

engineer employed by the City Engineering, the City's Engineers on the project, including 11 pages of engineers' drawings showing the storm sewer project. The engineers' drawings were dated January, 2003 and bore the stamp "Draft – Subject to Change."

2. In December, 2003, I personally delivered to Joel D. Pedersen, the Assistant City Attorney, copies of the January, 2003 engineer's drawings that had been filed by the City with the STB, containing my hand written notes indicated where the project, as shown on the January 2003 plans would unreasonably interfere in LLC's railroad operations and create unreasonable safety hazards. I also personally delivered to the City a written statement setting forth my objections to the draft drawings of the storm sewer project. A true and correct copy of my statement and accompanying comments on the engineers' drawings along with hand drawings were delivered to the City. Copies will be furnished to the STB later. A true and correct copy of the receipt of the foregoing documents signed by Joel Pedersen will be furnished to the STB.
3. During the course of the prior STB proceedings, I informed the STB and the City of Lincoln that LLC is not opposed to the placement of a storm sewer beneath its property along the length of its railroad right of way provided it can be done without unreasonably interfering in the operations of LLC's railroad and further provided that it can be done without imposing unreasonable safety risks.
4. During the STB proceedings, the City repeatedly assured myself and the STB that it would work with me to assure that the construction and operation of the storm sewer Easement would only have minimal interference on LLC's railroad operations and would not cause any safety risks to the operation of the railroad.
5. The City represented that the City's plans could be changed to accommodate interference and safety risks. For example:
 - a. In the Petition for Declaratory Order filed by the City with the STB, the City stated, "[n]either project will interfere with continued rail use of the line. Moreover, the City will bear all relevant costs."
 - b. In the verified statement of Brian Kramer filed with the STB, Mr. Kramer asserted, "[t]he City intends to work with Lincoln Lumber to minimize any disruption to the business during construction."

- c. Mr. Kramer also stated in his verified statement that, “the City will undertake every reasonable effort to minimize impact on rail operations. The storm sewer will be compatible with rail operations. That is, we will specify designs, materials, and methods that will allow continued rail operation.”
- d. In their brief on appeal filed in the Eighth Circuit Court of Appeals, the City stated, “[c]ity will bear all costs of all improvements, including safety related expenses like fences.”

True and correct copies of excerpts from the City’s filings with the STB where it made the foregoing representations will be furnished to the STB later.

- 6. From the time the City filed its prior Petition for Declaratory Order with the STB, the City put its plans for the storm sewer project “on hold.” During 2004 and 2005, I personally made numerous requests to the City for a copy of the updated drawings for the storm sewer project. I was told the drawings had been put on hold. The City refused to provide LLC a copy of the drawings until August, 2005.
- 7. On August 10, 2005, the City released to LLC for the first time since filing the January, 2003 drawings with the STB, a new set of drawings for the storm sewer project. The drawings released in August, 2005, are dated April, 2004. A true and correct copy of the April, 2004 drawings will be furnished to the STB later.
- 8. The April, 2004 drawings contained several changes from the January, 2003 drawings, including the following:
 - a. An additional page of drawings was inserted as page 2 of 12, whereas the original set of drawings consisted of 11 pages. The new page shows the location of LLC mainline track and one spur, the location of the Construction Easement and the Permanent Storm Sewer Easement, the location of the portion of the buildings within the Easements and the location of the proposed storm sewer and related improvements.
 - b. The stamp “DRAFT – SUBJECT TO CHANGE” has been removed from the drawings and the phrase “Proposed Storm Sewer Improvements” has been added.
 - c. The date is changed to April, 2004.
 - d. They were not signed or dated by the City.

9. However, the April, 2004 drawings did not contain any material design changes addressing the interference or safety issues that I had pointed out to the City in my correspondences to the Assistant City Attorney in December, 2003.
10. The April, 2003 engineers' drawings do not include the following details, all of which I personally communicated to the City's engineers, the City Attorney and other City officials prior to April, 2004:
 - a. Future railroad terminal #2, which is to be installed in the approximate area East of the vacated 20th Street. This terminal will consist of a large building or other permanently roofed structure that will cover the track and adjacent right-of-way to allow for railroad storage operations being sheltered from the outside elements.
 - b. A future railroad spur track on the North side of the mainline between approximately 19th Street and 21st Street, which will replace a spur track that had previously existed in this area.
 - c. A spur track that is partially in place East of 22nd Street on the south side on the mainline, that LLC plans to complete and to connect to the mainline at approximately Whittier Street in the vicinity of Terminal #1.
 - d. An existing switching mechanism and several proposed switching mechanisms for use by LLC in the operation of the existing and planned railroad spurs.
 - e. An existing concrete dock, also called a railroad ramp, located on the South side of a railroad spur between Short Street and 23rd Street.
 - f. Plans by LLC to use the railroad right of way area in the Whittier Street vicinity for railroad loading and unloading operations, which requires the construction of a reinforced wall and safety guard rail and other safety measures at the south edge of the right-of-way and leveling of the ground in this area, along with structures form use in LLC's loading and unloading operations.
 - g. Additional permanent improvements that LLC plans to place within the railroad right-of-way for use in its loading and unloading operations.
11. The proposed Construction Easement and Permanent Sanitary Storm Sewer Easement, which also reserves the right to use the Easement way for maintenance,

repair and ongoing operation of the storm sewer, will significantly interfere with LLC's operations of its mainline track, 4 railroad spur tracks, two railroad terminals (loading and unloading areas), one cross-over spur track, one present and several future spur switches.

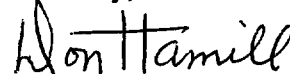
12. The Permanent Easement the City seeks prohibits the placement of any permanent structures upon the Easements, effectively barring LLC from construction many if not all of the proposed structures in LLC's railroad right-of-way that are important to LLC's future railroad operations.
13. The Construction Easement the City seeks to condemn in these proceedings is to be for a period of up to one year, four times longer than the period of time the City had represented to the STB that it would need. Further the Construction Easement the City seeks to condemn in these proceedings does not provide any restriction on the period of time for removal and replacement of LLC's spur under which the storm sewer is proposed to run, despite the fact that the City represented in filings before the STB in the prior proceedings that "any direct impact would be confined to a window of not more that seven days of possible impact." (See Brian Kramer's verified statement, will be furnished later to the STB. The Construction Easement the City seeks to condemn would give the City the right to completely disrupt LLC's railroad operations for up to one full year, which would be devastating to LLC's railroad operations.
14. The construction activities within LLC's railroad right-of-way will result in the substantial interference with LLC's railroad operations, and will impose undue safety risks to employees of LLC as well as employees of the City's contractors and sub-contractors and other invitees of LLC.
15. The Permanent Storm Sewer Easement the City seeks to condemn encompasses approximately one-half of the width of railroad right-of-way on the South side of the mainline, touching the mainline in places and fully encompassing several existing or proposed spur tracks, railroad unloading ramps, terminal, other unloading facilities, and storage facilities used in LLC's railroad operations for the full length from 24th Street to 19th Street.
16. The Construction Easement the City seeks to condemn encompasses all of the railroad facilities identified above, plus the mainline track, and additional parts of

the LLC railroad right-of-way that are vital to LLC's railroad operations, including unloading and transferring of materials from railroad cars.

17. It is my opinion, based upon my substantial experience in the operation of LLC's railroad and on prior experience in operating railroads that due to the City's proposed location of the storm sewer the construction activities are certain to cause interference and safety issues in LLC's railroad operations. Any delays during the construction process would substantially exacerbate the interference and safety risks.
18. The City has been telling me since I bought the railroad in 2000, that the storm sewer project is a top priority of the City. Although the City continues to assert that it is imperative that it be allowed to move quickly on the storm sewer project, the City voluntarily chose to wait more than two years while it sought the STB approval of its proposed bike trail condemnation across LLC's railroad right-of-way, and then appealed the STB's ruling in that matter to the Eighth Circuit Court of Appeals. In front of the STB, the City claimed that the storm sewer project had to be completed in 2004, stating in its original petition to the STB that, "City of Lincoln is required to initiate eminent domain proceedings by that date so that it can secure the property interests required in time to permit construction of the storm sewer improvement to be completed during the 2004 construction season."
19. The only reason the proposed terminal, spur tracks, railroad storage facilities and other structures have not yet been built is because of the City's threats since approximately 2001 to condemn railroad right-of-way for the bike trail and the Storm Sewer Easement.

The Surface Transportation Board consideration regarding opening this new Storm Sewer project construction proceeding will be appreciated. Thank you.

Sincerely,

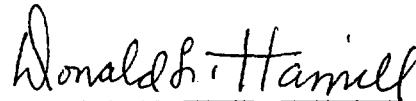


Don Hamill
President and Owner
Lincoln Lumber Company

VERIFICATION

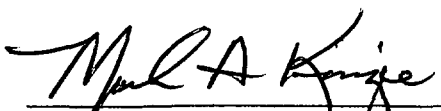
STATE OF NEBRASKA)
) SS;
COUNTY OF LANCASTER)

DONALD L. HAMILL, 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.



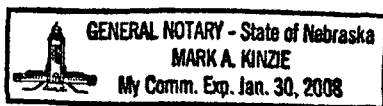
DONALD L. HAMILL

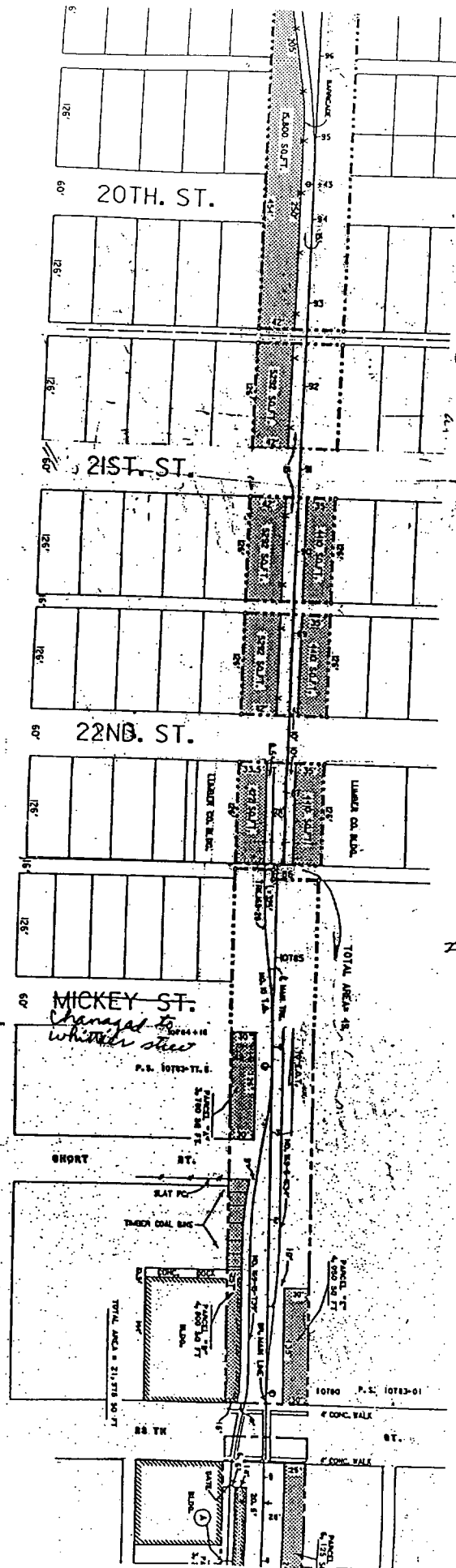
SUBSCRIBED AND SWORN to
before me this 21st day
of July, 2006.

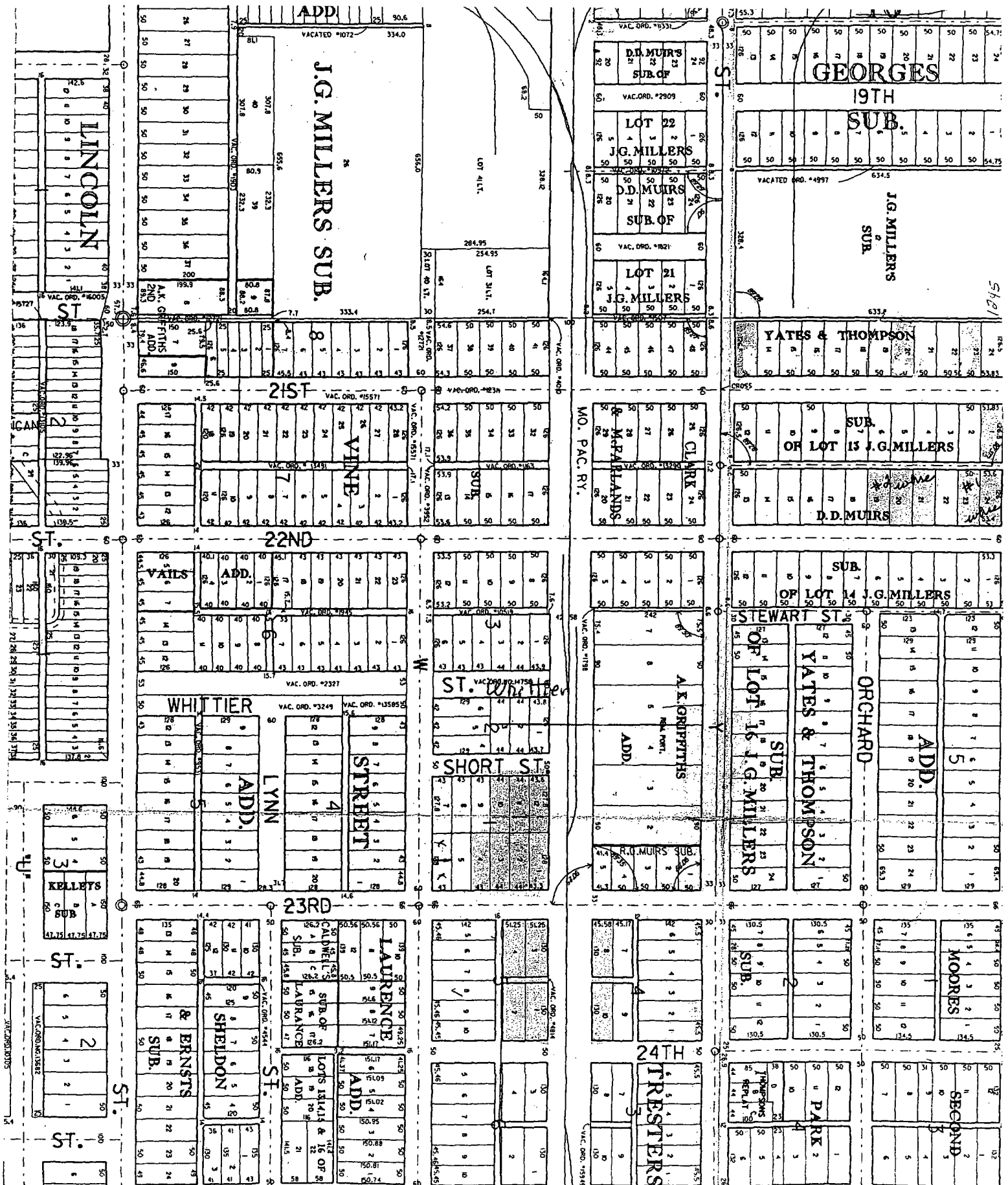


Notary Public

My Commission Expires:







APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CITY OF LINCOLN,	)	
	)	
Plaintiff,	)	4:06CV3046
	)	
v.	)	
	)	
LINCOLN LUMBER CO.,	)	MEMORANDUM AND ORDER
	)	
Defendant.	)	
	)	

INTRODUCTION

The defendant, Lincoln Lumber Company ("LLC"), timely removed this case from the County Court of Lancaster County, Nebraska pursuant to 28 U.S.C §§ 1331 and 1446. LLC claims the condemnation action filed by the City of Lincoln ("City") arises under the laws of the United States because the City "seeks to condemn property used in the railroad operations of LLC, which condemnation if allowed to proceed would prevent or unduly interfere with railroad operations and interstate commerce." Filing 7 (amended notice of removal), ¶ 3. LLC alleges this court has federal question subject matter jurisdiction because "[s]tate condemnation actions which prevent or unduly interfere with railroad operations are preempted by 49 U.S.C. § 10501(b), as broadened by the ICC Termination Act of 1995 (ICCTA)." Filing 7 (amended notice of removal), ¶ 3.

Pending before me is the City's motion for remand, filing 11.¹ The City argues that its authority to condemn this railroad

¹The parties have voluntarily consented to have the undersigned magistrate judge conduct any and all proceedings in this case, including any trial and entry of final judgment. See filing 24, "Consent to Exercise of Jurisdiction by a United States Magistrate Judge," and 28 U.S.C. § 636(c).

property for the purpose of constructing a storm sewer was already litigated and decided in plaintiff's favor in City of Lincoln v. Surface Transportation Board, 414 F.3d 858, 863 (8th Cir. 2005). It claims the only remaining issue, the amount of compensation owed to the plaintiff for the taking, is not a federal question, and therefore no federal question jurisdiction exists. Filing 12 (plaintiff's brief) at 1-2.

SCOPE OF THE RELEVANT RECORD

The issue before me is whether this court has federal question jurisdiction; the merits of the case are not before me and should not be addressed until the court first determines that it has jurisdiction. Therefore, the initial question is whether the allegations of the City's condemnation petition raise a claim that "arises under" federal law. As summarized in Phipps v. F.D.I.C., 417 F.3d 1006, 1010 (8th Cir. 2005):

Removal based on federal question jurisdiction is usually governed by the "well-pleaded complaint" rule. Krispin v. May Dep't Stores Co., 218 F.3d 919, 922 (8th Cir. 2000). This rule provides that federal jurisdiction may be invoked "only where a federal question is presented on the face of the plaintiff's properly pleaded complaint." Id. The rule also "makes the plaintiff the master of the claim," allowing the plaintiff to "avoid federal jurisdiction by exclusive reliance on state law." Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987).

Phipps, 417 F.3d at 1010.

However, where removal is based federal question jurisdiction, 28 U.S.C. § 1441, a federal claim is raised not

only when the well-pleaded complaint establishes that "federal law creates the cause of action," but also when the "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law," or the plaintiff has raised a claim that is completely preempted by federal law. Lundeen v. Canadian Pacific Ry. Co., 2006 WL 1319983, *1 (8th Cir., May 16, 2006) (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 27-28 (1983) and citing Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 542 (8th Cir. 1996)).

LLC's notice of removal raises preemption as the basis for federal question jurisdiction. As such, the plaintiff's "Petition for the Appointment of Appraisers and Condemnation of Lands" presents a federal claim if the federal statutory and regulatory laws, which govern the use of property for railroad operations and vest the Surface Transportation Board with administrative authority over such uses, completely preempt the City's pending state law condemnation action.

The court's determination of federal question jurisdiction is usually based solely on its review of the plaintiff's complaint. However, the City and LLC have each submitted evidence concerning prior litigation between these parties regarding the land at issue, the rulings of the Surface Transportation Board ("STB") and the Eighth Circuit, and the underlying facts.²

²With the exception of the defendant's supplemental reply brief, filing 23, the parties have not briefed whether complete preemption under 49 U.S.C. § 10501(b) effectively converts the City's condemnation action into a claim arising under federal law, or whether any preemption under 49 U.S.C. § 10501(b) provides only a defense to the claim. Instead, the parties' briefs and evidentiary submissions focus on whether the defendant is barred by res judicata and collateral estoppel from claiming

It is within the court's discretion to determine how to proceed on jurisdictional questions, and the court "may consider materials outside the pleadings such as depositions or affidavits in determining whether the record demonstrates lack of subject matter jurisdiction." Satz v. ITT Financial Corp., 619 F.2d 738, 742 (8th Cir. 1980). See also Land v. Dollar, 330 U.S. 731, 735 & n. 4 (1947); Western Nebraska Resources Council v. Wyoming Fuel Co., 641 F.Supp. 128, 139 (D.Neb. 1986) (Urbom. J.).

Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction--its very power to hear the case--there is a substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of the jurisdictional claims.

Western Nebraska Resources, 641 F.Supp. at 139.

Upon review of the parties' submissions, I conclude the evidence submitted by the parties may assist the court in

the City's condemnation action is federally preempted. Res judicata and collateral estoppel govern a party's right to litigate or re-litigate the merits of a case, and are generally raised as affirmative defenses to a claim. Here they are raised by the City to bar the defendant from claiming the condemnation action is subject to the exclusive jurisdiction of the Surface Transportation Board and therefore raises a federal question.

This memorandum and order concludes that no federal question jurisdiction exists. However, to reach that conclusion, I need not and have not addressed the merits of the plaintiff's res judicata and collateral estoppel claims. Res judicata and/or collateral estoppel may be relevant to the underlying merits of this case, but this court has no subject matter jurisdiction over the merits. Therefore, the res judicata and collateral estoppel claims should be, and have been, reserved for determination by the state court upon remand.

assessing whether the plaintiff's condemnation petition, which appears to raise only a state law claim, actually alleges a claim arising under federal law. I have therefore considered the evidence submitted by the parties; not for the purpose of deciding if the defendant is barred from re-litigating certain issues in this case, but to decide whether the case as pleaded actually arises under federal law.

STATEMENT OF FACTS

The plaintiff's state petition alleges an eminent domain proceeding against the defendant. The City claims it is entitled to obtain a permanent easement and temporary construction easement across the defendant's real property to construct, install, operate, and maintain a storm sewer. The real estate at issue is a railroad right-of-way. The City alleges that its acquisition and use of the permanent easement will "not divest the record owner of the real property of the title or ownership of the rights to use and enjoy the above-described property for railroad purposes" Filing 7, attachment 1 (petition) at p. 5.

As early as February 2002, the City advised LLC of its intent to install an underground storm sewer within LLC's railroad right-of-way. Filing 17, Hamill affidavit, ex. K (Hamill letter). LLC advised the City that it intended to move the railroad tracks on the 18th to 24th street right-of-way to the south side of the land, and then build buildings on the land to house building materials. LLC advised the City by letter that it was concerned that the storm sewer project would disrupt LLC's long-term business plans because once a storm sewer was constructed on the property, the City would deny permit requests

for constructing buildings on top of the storm sewer easement. LLC's letter further requested a total and complete release of liability for anything related to the existence and construction of the storm sewer on its property. The letter did not mention concern that railroad service would be disrupted by the storm sewer project. Filing 17, Hamill affidavit, ex. K (Hamill letter). The proposed route for the storm sewer remained unknown as of February 2002. Filing 17, Hamill affidavit, ex. K (Hamill letter).

In November 2002, the City filed a Petition for a Declaratory Order with the STB seeking "a declaratory order determining that the acquisition of certain limited portions of a railroad corridor owned by Lincoln Lumber Company . . . does not constitute either an acquisition or an abandonment/discontinuance of operations for which prior Board approval is required under 49 U.S.C. § 10901-03." Filing 13, ex. 1 (Pederson affidavit), attachment A (Petition for Declaratory Order), p. 1. The City's petition stated it was attempting to acquire limited portions of a five-block railroad corridor in Lincoln, Nebraska owned by LLC for a pedestrian and bike trail (the "Husker Link Trail") system and for a storm drainage system improvement. Filing 13, ex. 1 attachment A (Pederson affidavit), attachment A (Petition for Declaratory Order), p. 2.

As of November 2002, the City had provided LLC with information generally explaining the proposed route of the storm sewer construction. The City intended to install the storm sewer underground within LLC's railroad right-of-way and south of its rail line. The City had also advised LLC that the storm sewer project would require temporary construction easements for work performed south of the main track and under a spur track, and to

permit track crossings at 22nd, 23rd, and 24th Streets. Filing 17, Hamill affidavit, ex. C (Schuchmann STB statement) ¶¶ 2, 14. The City's attorney represented to STB that "[t]he storm sewer is currently planned on the south side of the rail to match best practices and avoid boring under the tracks." Filing 17, Hamill affidavit, ex. F (Pederson STB statement), ¶ 4.

However, during the course of the proceedings before the STB, the precise construction plans for the storm sewer were only "90% complete," still in draft form, and therefore subject to change. Filing 17, Hamill affidavit, ¶ 16; ex. E (Kramer STB statement), ex. 1; ex. L (Hamill notes). The City had not surveyed LLC's land or performed any other non-intrusive examinations in anticipation of any construction because, although LLC said it supported the storm sewer project, it refused to cooperate with the City's request for access to LLC's land unless the City agreed not to construct the Husker Link Trail Project. Filing 17, Hamill affidavit, ex. E (Kramer STB statement), ¶ 6; ex. F (Pederson STB statement), ¶¶ 8-9. LLC's president "[m]ade it clear that he supported the storm sewer project and noted 'that would help a lot of people,' but he linked approval of the storm sewer acquisition to keeping the trail off [LLC's] property." Filing 17, Hamill affidavit, ex. F (Pederson STB statement), ¶ 8; ex. J (Hamill notes), p. 2.

In support of its STB petition, the City stated construction of the sewer project would cause LLC's spur track to be out-of-service for about one week (and possibly less with advance planning), but that railcar loads received by LLC could be unloaded from the main track during this brief period of time. The City also advised the Board that LLC's railcar volume on the track was low (approximately only fifty cars a year), and

evidence from the City's experts stated construction of the storm sewer would not burden LLC's rail service. Filing 17, Hamill affidavit, ex. C (Schuchmann STB statement), ¶ 25; ex. E (Kramer STB statement), ¶ 5. The City assured the Board and LLC that it would work with LLC in designing and constructing the storm sewer in order to minimize any interference of LLC's railroad operations caused by the existence and construction of the storm sewer. Filing 17, Hamill affidavit ¶ 16, & ex. E (Kramer STB statement), ¶ 4-5.

Don Hamill ("Hamill"), president of LLC, reviewed the City's STB petition and accompanying evidence, and noted that these documents referred to the City's "current" plans, meaning the plans could still be changed. Hamill further noted his belief that it was impossible to install a storm sewer and bike trail on the right-of-way without interfering with rail operations. Filing 17, Hamill affidavit, ex. J (Hamill notes). However, LLC's filed response to the City's STB petition objected only to construction of the bike trail. The response stated:

LLC is not opposed to the City's proposal for improvement to the storm sewer, assuming adequate compensation is paid for taking the 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.

Filing 13, ex. 1 (Pederson affidavit), attachment D (LLC's Reply in Partial Opposition to Petition for Declaratory Order), p. 3.

On August 11, 2004, the STB issued a decision in favor of the LLC regarding the proposed bike trail. The STB found that

LLC was currently using the right-of-way to move freight, store lumber, unload railroad cars, and stage unloaded freight for further movement into shipper facilities, and it intended to rebuild a sidetrack and construct a terminal facility. The STB concluded these activities were part of transportation by rail as defined in 49 U.S.C. § 10102(9), the proposed trail could interfere with these transportation activities, and the City had not adequately refuted LLC's contentions that the trail would create safety hazards. Filing 17, Hamill affidavit, ex. A (STB decision). The STB decision did not specifically state a ruling regarding the sewer project.

The STB decision was appealed to the United States Court of Appeals for the Eighth Circuit. The City requested reversal of the STB's decision regarding the trail, and clarification of the its ruling regarding the storm sewer project. City of Lincoln v. Surface Transp. Bd., 414 F.3d 858, 860 (8th Cir. 2005). The STB's responsive Eighth Circuit brief explained that since LLC did not object to the storm sewer project, there was no dispute with regard to the City's proposed subsurface sewer easement, and therefore the STB was not required to issue a ruling on the proposed underground sewer project. Filing 17, Hamill affidavit, ex. I (STB Eighth Circuit brief), pp. 33-34.

On July 12, 2005, the Eighth Circuit affirmed the STB decision and, with regard to the storm sewer issue, held:

Lincoln acknowledges that LLC has stated on the record that it does not oppose the project, but it seeks a remand and a ruling that the condemnation for the storm sewer will not be an acquisition or abandonment of a rail line for purposes of 49 U.S.C. §§ 10901-10903. The Board responds that there was no need to rule on that project because there was no dispute and that it is well established that nonconflicting, nonexclusive

easements across railroad property are not preempted if they do not hinder rail operations or pose safety risks. To the extent that the Board's intentions were ambiguous, they have now been clarified, making a remand unnecessary.

City of Lincoln v. Surface Transp. Bd., 414 F.3d 858, 863 (8th Cir. 2005).

The City promptly submitted proposed deeds to LLC for the grant of a temporary construction easement and a permanent easement for the storm sewer project. Filing 17, Hamill affidavit, ¶¶ 17-18; exs. M & N. These deeds were not executed. The City and LLC entered into negotiations for the storm sewer easements, and during those discussions, LLC expressed its concerns regarding the "detrimental impact of the storm sewer project as proposed on the LLC's railroad operations, including interference and safety issues," and "requested that the Plaintiff consider some changes to the storm sewer plans to alleviate railway interference and safety issues." Filing 17, Hamill affidavit, ¶ 29. According to LLC, the City's legal department "flatly refused to consider any changes to the storm sewer project plans." Filing 17, Hamill affidavit, ¶ 30. According to the City, its plans for the storm sewer project have not changed since it filed the STB petition. Filing 13, ex. 2 (Higgins affidavit).

In February 2006, LLC submitted a proposed agreement to the City which set forth "LLC's requested terms for the temporary and permanent easements." Filing 17, Hamill affidavit, ¶ 19 & ex. O. The City did not sign LLC's proposed agreement, but instead countered with a redlined version of the agreement identifying the City's proposed deletions, additions, and changes. Filing 17, Hamill affidavit, ¶ 20 & ex. P. According to LLC, the City's

counterproposal "deleted provisions requested by LLC to help minimize railroad interference and safety issues LLC had previously discussed with Plaintiff's agents, including provisions that were consistent with representations Plaintiff had made to LLC and the STB prior to and during the STB proceedings." Filing 17, Hamill affidavit, ¶ 20; ex. P.

Accordingly, the core dispute pending between the parties regarding alleged "railroad interference and safety issues" are identified in the redlined portions of the City's counterproposal. Filing 17, Hamill affidavit, ex. P. The issues in dispute can be summarized as follows:

- As to the storm sewer construction itself, the parties dispute whether the City is required to:
 - 1) "replace" rather than "restore" any track removed or disturbed "to a condition fully equal to that existing before said work commenced," (filing 17, Hamill affidavit, ex. P. ¶ 6);
 - 2) remove the water inlet currently located near LLC's railroad switch at the City's expense, (filing 17, Hamill affidavit, ex. P. ¶ 10);
 - 3) install the sewer line three feet below the frost line, (filing 17, Hamill affidavit, ex. P. ¶ 11);
 - 4) complete the project within LLC's specified timetable, rather than the 120 calendar days proposed by the city, (filing 17, Hamill affidavit, ex. P. ¶ 12); and
 - 5) use a subcontractor experienced in working with railroad beds and tracks to do the work. Filing 17, Hamill affidavit, ex. P. ¶ 6)
- As to construction of retaining walls, the parties dispute whether the City must allow LLC to install the

wall immediately, or before the City begins installing the storm sewer; and whether LLC must obtain city approval and permits for the design, location, and construction of the retaining wall.

- LLC's proposal requires the City to contractually indemnify LLC for damages related to the retaining wall construction, the abandoned storm sewer under LLC's property, any environmental contamination resulting from the storm sewer construction, and any property damage and bodily injury claims related directly or indirectly to the sewer line construction. The City will not agree to these written indemnification provisions, and instead proposes to require the contractor performing the construction to carry a Railroad Protective Liability Insurance policy with \$2,000,000 per occurrence, and \$6,000,000 aggregate limits for coverage of property and bodily injury claims.
- Concerning a cement loading dock currently located above the previously buried sanitary sewer line, LLC claims that if it is necessary to remove the dock to repair or maintain that line, the City must pay the expense. The City disagrees.

LEGAL ANALYSIS

"A defendant may remove a state law claim to federal court when the federal court would have had original jurisdiction if the suit originally had been filed there." Phipps, 417 F.3d at 1010 (citing 28 U.S.C. § 1441(b)). See also, City of Chicago v. International College of Surgeons, 522 U.S. 156, 163 (1997). A

defendant opposing remand bears the burden of establishing that federal subject matter jurisdiction exists over the plaintiff's case. Green v. Ameritrade, Inc., 279 F.3d 590, 596 (8th Cir. 2002). If the defendant proves that any claim within the plaintiffs' complaint supports federal question jurisdiction, the defendant may remove the entire case to federal court, including any alleged state-law claims arising from the same core of operative facts. See 28 U.S.C. § 1367; City of Chicago, 522 U.S. at 164; Phipps, 417 F.3d at 1010 (citing Gaming Corp., 88 F.3d at 543). However, all doubts as to the propriety of exercising federal jurisdiction over a removed case must be resolved in favor of remand. Transit Cas. Co. v. Certain Underwriters at Lloyd's of London, 119 F.3d 619, 625 (8th Cir. 1997).

"Congressional intent is the 'ultimate touchstone' guiding preemption analysis." Lundeen, 2006 WL 1319983, *1 (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987)). If a statute contains an express preemption clause, then the statute's plain meaning is the best evidence of Congress' preemptive intent. Lundeen, 2006 WL 1319983, *1 (citing Peters v. Union Pac. R.R., 80 F.3d 257, 261 (8th Cir. 1996)). LLC claims the City's proposed storm sewer project will interfere with LLC's railroad operations, and therefore the project is subject to the federal law set forth in the Interstate Commerce Commission Termination Act of 1995, codified at 49 U.S.C. §§ 10101, et seq., (the "ICCTA").

Therefore, to determine whether the doctrine of complete preemption applies to the ICCTA and preempts the City's state law claims in this case, the court must examine the language of the statute and recent case law to decide whether the ICCTA so pervasively occupies the field of railroad governance that a

competing state law claim necessarily invokes federal law, and determine whether the City's state condemnation action competes with or stands as an obstacle to purpose of the ICCTA.

Cedarapids, Inc. v. Chicago, Central & Pacific R. Co., 265

F.Supp. 2d 1005, 1011 (N.D. Ia. 2003). See also Commonwealth of

Pa. v. Nelson, 350 U.S. 497, 502-05 (1956). Pursuant to 49

U.S.C. § 10501(b), the Surface Transportation Board³ has

"exclusive" jurisdiction over:

(1) transportation by rail carriers and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, facilities of such carriers; and

(2) the construction, 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. . . .

49 U.S.C. § 10501(b). The remedies provided under the ICCTA "with respect to regulation of rail transportation are exclusive

³As explained in Iowa, Chicago & Eastern R.R. Corp. v. Washington County, Iowa, 384 F.3d 557, 558-59 (8th Cir. 2004): Congress established the Interstate Commerce Commission in 1890, giving it broad authority to regulate many facets of the railroad industry, a major component of the nation's interstate transportation network. Ninety years later, to reverse the industry's severe decline, Congress in the Staggers Act of 1980 significantly reduced the ICC's regulatory authority. In 1995, convinced that even greater deregulation was needed, Congress enacted ICCTA, terminating the ICC altogether. ICCTA transferred essential ICC regulatory functions to the Surface Transportation Board (STB), a quasi-independent three-member body within the Department of Transportation. See 49 U.S.C. §§ 701-703.

and preempt the remedies provided under Federal or State law." 49 U.S.C. § 10501(b). Rail "transportation," as used in the ICCTA, means:

- (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 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.A. § 10102(9) (A) & (B).

Under the express terms and plain meaning of 49 U.S.C. § 10501(b), the preemptive force of the ICCTA extends only to the regulation of rail "transportation." In accord with this interpretation, the STB itself recognizes the limits of ICCTA preemption, and has held:

The Federal preemption provision contained in 49 U.S.C. 10501(b), as broadened by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), protects railroad operations that are subject to the Board's jurisdiction from state or local laws or regulations that would prevent or unreasonably interfere with those operations. . . . But this broad Federal preemption does not completely remove any ability of state or local authorities to take action that affects railroad property. To the contrary, state and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety. . . . Thus, acquisition of an easement by eminent domain to permit a crossing of railroad track in connection with construction of a new public street would not implicate the Federal preemption of 49 U.S.C. 10501(b) unless it would

prevent or unreasonably interfere with railroad operations.

[N]either the court cases, nor the Board's precedent, suggest a blanket rule that any eminent domain action against railroad property is impermissible. Rather, routine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings, wire crossings, sewer crossings, etc., are not preempted so long as they would not impede rail operations or pose undue safety risks.

Maumee & Western Railroad Corporation and RMW Ventures, LLC-Petition for Declaratory Order, 2004 WL 395835, *1-2 (S.T.B. March 2, 2004) (emphasis added) (internal citations omitted). Maumee held that the STB did not have exclusive jurisdiction over, and the ICCTA did not preempt, a city's local condemnation proceeding to acquire an easement to construct an at-grade road crossing over, and install subsurface utilities under, the main line of an active right-of-way. See also Florida East Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324 (11th Cir. 2001) (holding that enforcement of city's zoning and licensing ordinances against railroad's lessee was not preempted by ICCTA where the lessee used the property for non-rail transportation purposes; enforcing the ordinances did not impact or effectively govern rail transportation); District of Columbia v. 109,205.5 Square Feet of Land, 2005 WL 975745, *3 (D.D.C. 2005) (remanding state eminent domain action to state court for lack of federal question jurisdiction where the railroad failed to show that use of its right-of-way for a bike trail would interfere with railroad operations); Dakota, Minn. & Eastern R.R. Corp. v. South Dakota, 236 F.Supp. 2d 989, 1009 (D.S.D. 2002), vacated in part on other grounds, 362 F.3d 512 (8th Cir. 2004) ("[T]he Court finds that Congress did not intend to preempt the field of eminent domain in enacting the ICCTA.").

Accordingly, the question before me is whether condemnation of an underground easement on LLC's right-of-way land for the storm sewer project will potentially impede rail operations or pose an undue safety risk. If so, the state condemnation action will undermine and potentially conflict with the STB's exclusive jurisdiction to regulate rail transportation, and this court has federal question jurisdiction because the state law claim is completely preempted by federal law; if not, this court has no jurisdiction and the case must be remanded to the state court.

The dispute between LLC and the City over the terms of insurance coverage and written indemnification provisions involves allocation of risk, not the regulation of rail transportation. There is nothing in the record to explain how the timing and cost for installing retaining walls, or the allocation of costs for removing a cement loading dock located above the previously buried sanitary sewer line, will in any way impact or impede LLC's use of the land for rail transportation. LLC has not explained how the distinction between "replacing" rather than "restoring" its tract "to a condition fully equal to that existing before said work commenced" will affect its continued use of the track for rail transport, nor has it produced any evidence that removing the water inlet located near LLC's railroad switch at the City's expense and requiring installation of the sewer line three feet below the frost line will affect rail transportation on the right-of-way. Though LLC may be claiming the City must comply with LLC's timetable for completion and should hire only subcontractors experienced in working with railroad beds and tracks, it is questionable whether these issues are really in dispute, and the possible impact of the projects' timing and the contractor's experience level on

rail transportation is too speculative to vest this court with federal question jurisdiction.

Underlying LLC's current dispute is one highly persuasive and undisputed fact: LLC represented to the STB that it "is not opposed to the City's proposal for improvement to the storm sewer, assuming adequate compensation is paid for taking the land," and that "[w]hile 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." Filing 13, ex. 1 (Pederson affidavit), attachment D (LLC's Reply in Partial Opposition to Petition for Declaratory Order), p. 3. The proposed construction specifications for installing the storm sewer have not changed since that statement was made. LLC's current dispute with the City appears to be primarily focused on allocating any risk related to the storm sewer and retaining wall construction, and imposing responsibility on the City to repair, remove, or perhaps even upgrade, existing structures on the LLC's land. These disputes can be raised and resolved in the state court action; they do not present a federal question.

LLC removed the City's condemnation action to federal court and therefore bears the burden of establishing federal subject matter jurisdiction. Green, 279 F.3d at 596. Based on the record before me, I conclude the LLC has failed to prove that the City's claim, or any part of it, is preempted by the ITTCA. Absent ITTCA complete preemption, no federal question jurisdiction exists and this case must be remanded to the County Court of Lancaster County, Nebraska.

IT THEREFORE HEREBY IS ORDERED: The plaintiff's motion to remand this case to the County Court of Lancaster County, Nebraska, filing 11, is granted.

DATED this 23rd day of May, 2006.

BY THE COURT:

s/ **David L. Piester**

David L. Piester
United States Magistrate Judge

CERTIFICATE OF SERVICE

I certify that on July 25, 2006, I served the foregoing document, Petition For Declaratory Order, on Joseph Rupp, Esq., 575 South 10th Street, #4201, Lincoln, NE 68508, by first-class, U.S. mail, postage prepaid.

Thomas F. McFarland

Thomas F. McFarland