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April 10, 2019

VIA E-FILING AND HAND DELIVERY

Hon. Scott S. Harris
Supreme Court of the United States
Washington, D.C. 20543

Re: No. 18-847, BNSF Railway Co. v. Nye (April 18, 2019 conference)

Dear Mr. Harris,

As petitioner's counsel of record, I respond to an April 4, 2019 letter in which respondent purports to identify a "factual issue" as to the number of crossbucks installed with federal funds. Respondent claims that *no* crossbucks were installed using federal funds.

In the petition, BNSF explained that there was overwhelming evidence federal funds participated in the installation of two crossbucks at the crossing. (Pet. 12-14.) But, *even assuming* there were not two, the alternative was that at least one crossbuck was installed with federal funds. (BNSF Reply Br. at 2-6.) This was based on –

- (1) the decision below, which found a factual dispute "as to whether one or two crossbucks were installed" during the federal program (App. 17a.);
- (2) the testimony of the state DOT official (Hofener) that he initially stated there was one crossbuck added as part of the project but later corrected the amount to two crossbucks (Tr. 1656-58; Opp. 29 n.4);
- (3) Respondent's own opposition brief, which claimed "only one crossbuck was installed at the crossing" during the project (Opp. 21; *see id.* at 5, 29 n.4);
- (4) The Quantities Installed List, which showed that two crossbucks were installed in February 1980 at the subject crossing as part of an upgrade project (Def. Ex. 301-admitted at Tr. Vol. 7 1625-30).

The Quantities Installed List resolves the purported dispute. This form confirms that, at the subject crossing (DOT #672023L), the Oklahoma upgrade project added one "X buck only" to an existing post and one "X buck on new post." (Def. Ex. 301.) Thus, this addition of two crossbucks and one post presents a stronger case than *O'Bannon*, where "the defendant 'railroad submitted a quantities installed form showing the installation of 'one crossbuck and one wooden post.'" (Respondent's April 4 letter, citations omitted). For convenience, a copy of the Quantities Installed List, admitted at trial without objection, is attached.

Sincerely,
A handwritten signature in blue ink that reads "Charles G. Cole".
Charles G. Cole

JUN -02' 00 (PRI) 09:05 BONDS MATTHEWS BONDS

TEL: 918 687 0846

P. 029

OKLAHOMA CROSBUCK PROJECT

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY
LRE. NO. P-3498OKLAHOMA DEPARTMENT OF TRANSPORTATION
PROJECT NO. RRP-CODS ()

DIVISION Instrumentation
 SUB. DIV. 111
 RANG NO. B+B-61
 FOREMAN HC Hill
 DATE Feb -18 - 80

S.A. NO. _____
 DISTRICT _____
 RES. ENGR. _____
 DATE _____

QUANTITIES INSTALLED

FRISCO MILE POST	D.G.T. NUMBER	NEAREST 'CITY'	I X-BUCK ONLY	II TRK. NO. SIGN ONLY	III X-BUCK TRK. NO. SIGN	IV X-BUCK ON NEW POST	V X-BUCK; TRK. NO. SIGN ON NEW POST	VI FRISCO DOT I.D. SIGN	DATE INSTALLE
55+15	6720398	Oda	1			1			2-13-80
56+77	672013F	Oda	1			1			11
58+14	672015U	Oda	12				6		11
60+15	672020R	Ross	11			1			11
62+33	672421T	Ross	1			1			11
63+22	672022E	Ross	1				2		11
64+21	672023L	Ross	1			1			11
64+27	672024T	Ross	1						11
64+37	672025U	Ross	1			1			11
71+6	672029C	Melunkt	1				1		2-14-81
74+1	672031D	"	1			1			11
75+8	672032K	"	1			1			11
76+9	672034Y	"	1			1			11
78+57	672035E	"	1			1			11
78+57	672036H	Shoemaker	1			1			11
79+72	672041J	"	1			1			11
81+30	672043X	"	1			1			11
81+27	672044U	"	1			1			11
85+6	672047A	Raven	1			1			2-15-81
85+26	672048G	"	1			1			11
87+8	672050H	"	1			1			11
89+8	672052W	"	1			1			11
90+13	673064U	"	1			1			11

EXHIBIT # 6
 DATE
 DEPONENT H. Ferner
 PROFESSIONAL REPORTERS
 800-278-1006

EXHIBIT
 DEFENDANTS
 TRIAL EXHIBIT
 NY & BNSF Case No. CJ 2000-743
 301

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