

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,

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
L.R.E. NO. P-3498OKLAHOMA DEPARTMENT OF TRANSPORTATION
PROJECT NO. RRP-0008 ()DIVISION Construction

S.A. NO. _____

SUB. DIV. Track

DISTRICT _____

TRNG NO. B+B-61FOREMAN H.C. Hill

RES. ENGR. _____

DATE Feb-18-80

DATE _____

QUANTITIES INSTALLED

FRISCO MILE POST	D.O.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 INSTALLED
55+15	672039B	Ada	1			1			2-13-80
56+17	672013F	Ada	1			1			11
58+14	672015U	Ada	2				6		11
60+15	672020R	Rolls	1			1			11
62+38	672021X	Rolls	1			1			11
63+22	672022E	Rolls	1				2		11
64+21	672023L	Rolls	1			1			11
65+27	672024T	Rolls	1			1			11
66+27	672025U	Rolls	1			1			11
71+6	672029C	McLain	1				1		2-14-80
74+1	672031D	11	1			1			11
75+8	672032K	11	1			1			11
76+9	672034F	11	1			1			11
78+9	672035E	11	1			1			11
79+20	672037H	11	1			1			11
79+22	672041J	11	1				1		11
81+20	672043K	11	1			1			11
81+27	672044U	11	1			1			11
85+6	672047H	Kenner	1			1			2-15-80
85+26	672048G	11	1			1			11
87+8	672050H	11	1			1			11
89+8	672052W	11	1			1			11
90+13	673064U	11	1			1			11

EXHIBIT # 6
DATE _____
DEPONENT Hofner
PROFESSIONAL
REPORTERS 800.376.1006

EXHIBIT
DEFENDANTS
TRIAL EXHIBIT
Nye v. BNSF Case No. CJ 2006-243
301

DX301.1