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April 1, 2016

Chief, Section of Administration
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

240428

Re: STB No. AB-1241, Union Pacific Railroad
Petition for Waiver
Ironton Railroad Right-of-Way

ENTERED
Office of Proceedings
April 7, 2016
Part of
Public Record

Sirs:

Enclosed is a Reply to Union Pacific's Challenge to Board's Authority and Request for Declaratory Order. Ten copies are included. A copy of this correspondence has been sent to Jeremy M. Berman, Union Pacific Railroad Company, 1400 Dodge Street, Stop 1580, Omaha, NE 68179.

Respectfully,

Carl J. Belliston
Attorney for NewVista Property Holdings, LLC

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423

STB Docket No. AB 1241

NEWVISTA PROPERTY HOLDINGS, LLC
ADVERSE ABANDONMENT OF THE IRONTON BRANCH
IN UTAH COUNTY, UTAH

REPLY TO UNION PACIFIC'S CHALLENGE TO BOARD'S AUTHORITY AND REQUEST
FOR DECLARATORY ORDER

Respectfully Submitted,

Carl J. Belliston
Attorney for NewVista Property Holdings, LLC
2365 Mountain Vista Lane, Provo, UT 84606
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REQUEST FOR DECLARATORY ORDER

NewVista Property Holdings, LLC ("Petitioner"), has filed a Petition for Waiver from certain statutory and Surface Transportation Board ("STB") requirements, preliminary to the filing of an Application for Adverse Abandonment of a right-of-way referred to as the "Ironton Branch." The waiver requests are of a type routinely granted by the STB in the past in the context of adverse abandonment proceedings.

Union Pacific Railroad ("Union Pacific") has filed a Reply to Petition for Waiver. The Reply does not respond to any of the matters raised in the Petition. Instead, it argues that the Board has no authority to consider an application for adverse abandonment in connection with the Ironton Branch, which is "excepted" track.

Union Pacific cites two STB decisions in support of its argument. The first decision, *Allied Industrial Development Corporation – Petition for Declaratory Order*, FD 35477 (served Sept. 17, 2015), involved an argument over whether certain track had been removed from the national rail system based on private agreements. Noting that the tracks at issue were "ancillary spur track," all parties agreed that STB did not have "licensing authority" over them, but the STB clearly stated that the absence of such licensing authority did not deprive the STB of its jurisdiction over abandonment of the track. The fact that the Ironton Branch is "excepted" track

only means that the STB has authorized abandonment and that no further authorization is *required*. It does not deprive the STB of jurisdiction over an adverse abandonment proceeding, the purpose of which is to compel consummation of an abandonment.

In the second decision, *Pinelawn Cemetery – Petition for Declaratory Order*, FD 35468 (served Apr. 21, 2015), a cemetery sought a ruling that certain “excepted” track was in fact private track outside the STB’s jurisdiction. Again, the STB stated that track excepted from licensing is nevertheless subject to the STB’s jurisdiction, and observed “Pinelawn could not force the Railroads off the property unless it seeks and receives a ruling from the Board concluding that the property is not needed as part of the national rail system.” *Id.* at 2. The fact that “excepted” rail track “can be added or removed from the system without a license from the Board,” *id.* at 5, is inapposite as to the authority of the STB to conclude that the property is not needed as part of the national rail system and to order an abandonment.

Union Pacific argues that once the STB has authorized the abandonment of track by declaring it to be “excepted” track, it loses its authority to bring about the consummation of an abandonment through an adverse abandonment process. That position is not supported by the cases it cites, and it undercuts the whole purpose of adverse abandonment. As noted by the DC Circuit Court of Appeals in *Consolidated Rail Corp. v. Interstate Commerce Commission*, 29 F.3d 706, 708 (D.C. Cir. 1994), “In an adverse abandonment, the carrier wants to continue service; it is a third party who seeks issuance of an abandonment certificate.” It makes no sense that the STB should be deprived of the authority to consummate an abandonment just because the railroad has the right to abandon track without the STB’s authorization.

If adverse abandonment is not the correct process by which Petitioner can achieve consummation of the abandonment of the Ironton Branch, sufficient to remove the land from the

jurisdiction of the Board and to allow a state court to resolve issues relating to property ownership, Petitioner respectfully requests guidance from the STB on that matter, including direction from the STB so the appropriate procedures can be followed.

It is well established that the STB has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to terminate a controversy or eliminate uncertainty. Both of the cases referenced by Union Pacific recite that rule. Petitioner hereby requests a declaratory order stating clearly that the STB has authority to adversely abandon the Ironton Branch, or, alternatively, that the Ironton Branch is no longer part of the national rail system and that the STB has no jurisdiction over it. If the Ironton Branch has been taken outside the authority of the STB because an abandonment already has been consummated, Petitioner requests a declaratory order so stating.

Although the original Petition stated an intention to file the application for adverse abandonment within 45 days, the Board's rulings on the Petition and the matters raised herein will have a significant impact on the costs and burdens associated with the application. Accordingly, Petitioner desires to postpone the filing until after it has received rulings on the Petition, with the Board's leave.

Petitioner requested expedited consideration of its original Petition, and it respectfully renews that request.

Dated: April 1, 2016.

Respectfully Submitted,



Carl J. Belliston
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