

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

237272

STB DOCKET NO. AB-33 (SUB-NO. 164X)

ENTERED
Office of Proceedings
December 18, 2014
Part of
Public Record

**UNION PACIFIC RAILROAD COMPANY – ABANDONMENT EXEMPTION –
IN BONNE TERRE, MISSOURI**

**REPLY OF UNION PACIFIC RAILROAD COMPANY TO
PETITION TO REOPEN**

**David P. Young
Melissa B. Hagan
Jeremy M. Berman
Union Pacific Railroad Company
1400 Douglas St.
Omaha, NE 68179**

**Raymond A. Atkins
Matthew J. Warren
Hanna M. Chouest
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000**

Counsel to Union Pacific Railroad Company

Date: December 18, 2014

Table of Contents

	Page
I. FACTUAL BACKGROUND.....	4
A. The Abandonment.....	4
B. The District Court Litigation	6
II. ARGUMENT	7
A. The Board Does Not Have Jurisdiction To Reopen The Bonne Terre Abandonment.....	7
B. Asarco Has Not Demonstrated Any Fraud Or Misrepresentation By Union Pacific.	9
C. The Interests Of Repose And Finality Weigh Powerfully Against Reopening.	12
D. Asarco Does Not Have Any Standing To Reopen The Abandonment.	13
E. The Board Should Not Take Actions That Would Interfere With the Missouri District Court Litigation.....	15
III. CONCLUSION.....	16

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-33 (SUB-NO. 164X)

**UNION PACIFIC RAILROAD COMPANY – ABANDONMENT EXEMPTION –
IN BONNE TERRE, MISSOURI**

REPLY OF UNION PACIFIC RAILROAD COMPANY TO PETITION TO REOPEN

Asarco LLC’s Petition to reopen an abandonment that was consummated fourteen years ago is a transparent attempt to use the Board’s processes to gain a tactical advantage in ongoing federal litigation against Union Pacific Railroad Company (“Union Pacific”). Asarco has filed nearly a dozen civil lawsuits seeking contribution for its Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”) liability against various entities, including Union Pacific. One of those cases (the “Missouri District Court Litigation”¹) was filed in the Eastern District of Missouri in connection with several separate environmental sites located in Southeast Missouri (“SEMO”). The Board has no jurisdiction to “reopen” an abandonment of 1.1 miles of track in Bonne Terre, Missouri, that were lawfully authorized and previously consummated fourteen years ago, that are no longer owned by Union Pacific, and that are no longer part of the national rail transportation system. And the Board certainly has no jurisdiction to order Union Pacific to prepare a “report” on the environmental conditions “of all other abandoned lines in [Southeast Missouri]”—a demand that attempts to make an end run around the discovery limits imposed by the district court in the ongoing litigation. *Union Pac. R.R. Co. – Abandonment Exemption – in Bonne Terre, Missouri*, STB Docket No. AB-33 (Sub-

¹ *Asarco LLC v. NL Industries et al.*, No. 4:11-CV-00864-JAR (E.D. Mo.).

No. 164X), Asarco LLC Petition to Reopen, at 12 (filed Nov. 28, 2014) (“Petition”). And even if the Board had jurisdiction to reopen the abandonment of a line after a decade and a half, it would have no cause to do so here, because Asarco has produced no evidence of any misrepresentations in Union Pacific’s exemption filings, because Asarco does not have standing to participate in this proceeding, and because Asarco has filed its Petition for the improper purpose of subverting the discovery limitations imposed by the federal district court that is currently considering Asarco’s utterly meritless claims against Union Pacific.

Section I of this Reply describes the relevant background of the former Bonne Terre line segment that was the subject of STB Docket No. AB-33 (Sub-No. 164X); Union Pacific’s 2000 notice of exemption to abandon that line segment; and the subsequent transfer of the line to the Bonne Terre Industrial Development Authority and other entities. Section I also details the multiple federal lawsuits that Asarco instituted against numerous entities including Union Pacific in an attempt to recover some portion of Asarco’s significant environmental liabilities for former mining sites. Particularly relevant here is the Missouri District Court Litigation, in which Asarco alleges that defendants including Union Pacific have contributory liability for environmental contamination at several separate sites in Southeast Missouri. As discussed below, the district court has now closed discovery, and it is currently considering a motion for summary judgment in that matter.

Section II explains the multiple independent reasons why Asarco’s petition should be summarily denied. First, the Board does not have jurisdiction to reopen this proceeding at this late hour. The Board may not reopen a fully consummated abandonment, let alone an abandonment that was consummated fourteen years ago on a former rail line that was long ago transferred to third parties.

Second, even if the Board had jurisdiction to reopen the abandonment, Asarco has produced no evidence that Union Pacific misrepresented anything in its 2000 abandonment exemption filings, which were made with the full knowledge of the United States Environmental Protection Agency (“EPA”), Missouri environmental authorities, and the City of Bonne Terre. Indeed, as the included Verified Statement of Raymond Allamong attests, Union Pacific consulted with federal and state environmental authorities in advance of filing the abandonment exemption, and no party expressed any concern about the abandonment or considered that the abandonment would have any negative impact on the environment. *See* Attachment A, Verified Statement of Raymond Allamong at 1. In light of the undisputed facts that all environmental authorities were notified of the abandonment and did not object to it, Asarco’s claim that “testing” it performed in 2013 for the purposes of district court litigation somehow shows that Union Pacific must have misrepresented something in 2000 is baseless.

Third, the Petition should be dismissed because the extraordinary prejudice from reopening an abandonment of land that has since been sold and incorporated by a third party into a larger parcel of land far outweighs the (nonexistent) grounds for reopening. The need for administrative finality and repose becomes more compelling as time passes, particularly when reopening would interfere with the expectations and property interests of unregulated third parties.

Fourth, Asarco does not have standing in this proceeding. Asarco has no interest in this abandoned right-of-way and has not been injured in any way by Union Pacific’s abandonment of the line. Indeed, Asarco’s primary interest in reopening the proceeding appears to be to circumvent discovery limitations in the district court litigation by convincing the Board to order

Union Pacific to prepare reports on the environmental condition of other abandoned lines, including lines never owned by Union Pacific.

Fifth, the Petition should be denied because there is no reason for the Board to inject itself into this ongoing dispute. The district court is currently considering Asarco's CERCLA claim against Union Pacific, and whether or not the Board reopens the abandonment will have no effect on the outcome of that litigation. Union Pacific is not claiming, and has never claimed, that the fact that the Bonne Terre line was abandoned in 2000 has any effect on Union Pacific's potential liability for supposed environmental contamination from the abandoned line. The district court is adjudicating the question of whether Union Pacific has any liability to Asarco, and the Board should not interfere with that adjudication.

I. FACTUAL BACKGROUND

A. The Abandonment

On November 30, 2000, Union Pacific filed a Notice of Exemption with the Board, notifying the Board of its intention to abandon a 1.1 mile industrial lead track in Bonne Terre, Missouri pursuant to the class exemption of 49 C.F.R. § 1152.50. The northern portion of the line was constructed by the Saint Joseph Lead Company in 1888. *See* Notice of Exemption, Combined Environmental and Historic Report at 2, STB Docket No. AB-33 (Sub-No. 164X) (filed Nov. 30, 2000). Union Pacific acquired the line during its merger with the Missouri Pacific in 1997. At the time Union Pacific sought to abandon the line, no traffic had moved over the line for at least two years. Track had already been removed from the northern portion of the right of way. *See* Notice at 3. Union Pacific identified adjacent uses to the right of way to “include industrial and former lead mine operations.” *Id.*

Prior to filing the Notice, Union Pacific notified federal and local environmental authorities of the proposed abandonment, including the EPA and the Missouri Department of

Natural Resources. *See* V.S. Allamong at 1. Union Pacific asked the agencies to identify any potential adverse effects on the surrounding area and any hazardous material sites on the right-of-way. Neither agency responded with any concerns about the abandonment. In addition, Union Pacific served the United States EPA, the Missouri Department of Natural Resources, and the City of Bonne Terre with notices of the abandonment, and none of them filed any comments or otherwise objected.² The Board also conducted its own environmental review. No party commented on the Board's environmental assessment or otherwise identified environmental concerns regarding Union Pacific's abandonment of the line.

Significantly, the environmental authorities' acquiescence in Union Pacific's abandonment of the Bonne Terre line occurred when they were aware of environmental contamination in the Bonne Terre area due to mining waste. In 1998, EPA entered into an agreement with the City of Bonne Terre regarding the "Bonne Terre Superfund Site," which requires the City to contain, remove, and avoid spreading existing mining waste pollution. The Bonne Terre line that was abandoned in STB Docket No. AB-33 (Sub-No. 164X) is not part of the Bonne Terre Superfund Site, and Union Pacific has never been identified by EPA as a Potentially Responsible Party to the Bonne Terre Superfund Site.

The Notice of Abandonment Exemption was published in the Federal Register on December 21, 2000, and the Board notified the public that the exemption would become effective on January 20, 2001, unless it was stayed. The Section of Environmental Analysis issued an environmental assessment on December 26, 2000, and requested comments on that assessment by January 10, 2001. No party filed comments on either the abandonment or the

² *See* Attachment 4 to Notice, Letter from L. Pohl, Missouri Clearinghouse, to C. Saylor, Union Pacific Railroad, Re: Proposed Abandonment (Aug. 14, 2000) (stating that "[n]one of the [state and local] agencies involved in the review had comments or recommendations to offer" regarding the abandonment).

environmental assessment. Union Pacific consummated the abandonment on January 21, 2001, and filed the Notice of Consummation with the Board on January 23, 2001. Subsequent to the consummation, Union Pacific sold a portion of the line to the Bonne Terre Industrial Development Authority and another portion to the Egyptian Concrete Company. The remaining 0.4 miles was returned to a prior owner by virtue of a reversionary interest held in the land.

B. The District Court Litigation

By early 2000, Asarco was subject to significant CERCLA-related and other environmental liability at various mining sites in the United States. In response, Asarco filed for bankruptcy to discharge its environmental liability. When Asarco emerged from bankruptcy in 2009, it filed nearly a dozen civil lawsuits seeking contribution for its CERCLA liability against various entities, including Union Pacific. One of those cases was filed in the Eastern District of Missouri in connection with several separate environmental sites located in Southeast Missouri, which was one of the largest historic mining districts in the United States. During Asarco's bankruptcy it paid approximately \$80 million to settle its environmental and CERCLA-related liability for the Southeast Missouri sites. Asarco has connections to five environmental sites within SEMO, one of which is in St. Francois County, the county in which the Bonne Terre right-of-way was situated. However, none of Asarco's settlement funds have ever been used in connection with that abandoned right-of-way.

The District Court has allowed limited discovery in the Missouri District Court Litigation, including expert discovery. While Asarco has sought to expand the scope of permitted discovery, the Court has denied those requests pending its determination on Union Pacific's motion for summary judgment. For example, just last week the Court denied an Asarco motion seeking leave to depose a senior Union Pacific legal officer; the Court held that "[a]t some point, discovery must close and the case must progress" and found that "Union Pacific's

motion for summary judgment is fully briefed” and that the Court had “sufficient evidence” to rule on that motion. Memorandum and Order, *Asarco LLC v. NL Industries et al.*, No. 4:11-CV-00864-JAR, at 5 (E.D. Mo. Dec. 10, 2014).

Asarco’s petition before the Board appears to be a strategic gambit in the Missouri District Court Litigation, designed either to use the Board’s processes to obtain discovery beyond what the court has allowed or to gain some other advantage. Regardless of Asarco’s ultimate purpose, its Petition is utterly meritless and should be denied for multiple reasons.

II. ARGUMENT

A. The Board Does Not Have Jurisdiction To Reopen The Bonne Terre Abandonment.

In the first place, the Board does not have the regulatory authority to “reopen” the abandonment of a former rail line that was abandoned fourteen years ago and that is no longer owned by Union Pacific. It is difficult in almost any circumstance to reopen an administratively final proceeding.³ But even this high standard for reopening does not apply to abandonment proceedings, for once an abandonment is administratively final the Board loses all regulatory authority over that former line. *See Hayfield N. R. Co. v. Chicago & N. W. Transp. Co.*, 467 U.S. 622, 633 (1984) (“[U]nless the Commission attaches post abandonment conditions to a certificate of abandonment, the Commission’s authorization of an abandonment brings its regulatory mission to an end.”).⁴

³ *See, e.g., Boston Contract Carrier, Inc. –Extension – Points in Rhode Island*, ICC Docket No. MC-146440 (Sub-No. 11), 1986 MCC Lexis 409, at *3 (I.C.C. served April 29, 1986) (“The United States Supreme Court has consistently subscribed to the rule that administrative agencies are not to be required to reopen their final orders ‘except in the most extraordinary circumstances.’” (quoting *Bowman Transp. Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 US 281, 296 (1974))).

⁴ *See also BNSF Ry. Co. – Petition for Declaratory Order*, STB Docket No. 35164, at 4 (S.T.B. served Dec. 2, 2010) (“After abandonment authority has been lawfully consummated, the Board generally loses authority to reopen the abandonment proceeding.”); *CSX Transp. Inc. –*

The *Hayfield* Court could not have been clearer that “issuing a certificate of abandonment terminates the Commission’s jurisdiction.” *Hayfield*, 467 U.S. at 633. This principle follows from the unique nature of abandonments. An abandonment proceeding necessarily concludes with the removal of the subject line from the rail transportation network and thus from the Board’s jurisdiction. As the ICC acknowledged, “when a rail line has been fully abandoned, it is no longer [a] rail line and . . . the line is not subject to our jurisdiction.”⁵ In contrast, the termination of other Board proceedings such as transactions or rate disputes does not coincide with a loss of Board jurisdiction over the particular portions of the rail network affected by the decision.⁶

Here, Union Pacific complied with the abandonment exemption proceedings and filed a notice consummating the abandonment in January 2001. Union Pacific has since transferred title to the land underlying the former right of way to the Bonne Terre Industrial Development Authority and the Egyptian Concrete Company. No rail service has been offered on the line for more than fourteen years. Indeed, even before the abandonment, some of the track had been

Abandonment – between Bloomingdale and Montezuma, in Parke County, IN, STB Docket No. AB-55 (Sub-No. 486), at 5 (S.T.B. served Sept. 13, 2002) (“we do not have the same discretion to reopen and/or vacate an abandonment decision after any conditions that we have imposed are satisfied and the abandonment has been consummated”).

⁵ *Common Carrier Status of States, State Agencies and Instrumentalities, and Political Subdivisions*, 363 I.C.C. 132, 135 (1980) (footnote omitted), *aff’d sub nom. Simmons v. ICC*, 697 F.2d 326 (1982).

⁶ Indeed, the idea of retaining some residual jurisdiction to reopen long-ago abandoned lines is fundamentally inconsistent with Congressional intent to allow “railroads to be able to dispose of their property expeditiously and by a date certain.” *Chattahoochee Valley Ry. Co. – Abandonment Exemption – in Chambers County, AL, and Troup County, GA*, ICC Docket No. AB-59 (Sub-No. 1X), 1993 ICC Lexis 125, at *6 (I.C.C. served June 22, 1993) (noting that “both the plain language and legislative history of 49 U.S.C. 10904” make this intention clear).

removed from the northern part of the right-of-way.⁷ In short, the line has been wholly abandoned. The Board cannot impose its jurisdiction upon a piece of land that has not been part of the federal rail system for fourteen years.⁸

B. Asarco Has Not Demonstrated Any Fraud Or Misrepresentation By Union Pacific.

Despite the holding of *Hayfield*, the Board has suggested in some decisions that it might have regulatory authority to reopen a consummated abandonment if there was evidence of fraud, misrepresentation, or procedural defect. *See CSX/Bloomingtondale*, at 6 (“There are rare cases, such as instances of fraud, where we may assert jurisdiction over property after abandonment authority has been exercised.”); *see also Illinois Cent. Gulf. R.R. Co. – Abandonment – DeWitt and Piatt Counties, IL*, 5 I.C.C. 2d 1054, 1063 (1988) (Once an “abandonment is approved and has occurred, [the STB’s] jurisdiction remains . . . [where there has been] fraud, misrepresentation, or ministerial error . . .”) (“*ICG*”). Respectfully, these decisions are inconsistent with the basic *Hayfield* principle that the agency loses all jurisdiction over an abandoned rail line.

In any event, the Bonne Terre abandonment is plainly not the sort of “rare case” that could justify reopening. Asarco has produced absolutely no evidence of fraud or material misrepresentation. Indeed, the theory of its Petition is that “testing” it performed in 2013 showed that Union Pacific “should have known” of alleged contamination from ballast on the right of way in 2000. Pet. at 7. In the first place, the “testing” that Asarco put forward to the

⁷ *See Becker v. Surface Transp. Bd.*, 132 F.3d 60, 62 (D.C. Cir. 1997) (finding persuasive that the railroad had not only ceased service but that it “had taken the further step of removing the rails and ties from the line”). This section of the line was deeded with a reversionary interest, which was effected upon abandonment of the rail line.

⁸ *See Preseault v. ICC*, 494 U.S. 1, 5 n.3 (1990) (finding that once a rail line is abandoned “the line is no longer part of the national transportation system” and “ICC jurisdiction terminates”).

Board as supposed proof of environmental contamination on the line is highly suspect and has been subject to significant challenge in the Missouri District Court Litigation—in part because Asarco has refused to disclose the precise locations of its alleged samples (which are essential for determining whether the samples were actually taken from the right of way).⁹ Moreover, “testing” from 2013 of property that Union Pacific abandoned and sold over a decade ago is neither evidence of the condition of the line at the time of the abandonment, nor evidence that Union Pacific had any knowledge of potential environmental issues at that time.

Most importantly, the evidence shows that Union Pacific’s evaluation of environmental issues in connection with the abandonment was thorough, conscientious, and involved consultation with relevant environmental authorities—none of whom raised any concerns about the abandonment. Appended to this Reply as Attachment A is a verified statement of Raymond E. Allamong, Jr. Mr. Allamong served as Senior Manager Rail Line Planning at Union Pacific at the time of the Bonne Terre Abandonment. As Mr. Allamong testifies, “[b]ased on input from Union Pacific environmental specialists as part of the preparation for filing and information received from government entities, Union Pacific was not aware of any environmental concerns associated with the abandonment in Docket No. AB-33 (Sub-No. 164X).” V.S. Allamong at 2. Before it filed the notice of abandonment with the Board, Union Pacific informed the U.S. EPA and the Missouri Department of Natural Resources of its plan to abandon the Bonne Terre line, and Union Pacific asked the agencies to identify any potential effects on the surrounding area and the location of any hazardous waste sites and known hazardous material spills on the right-of-way. V.S. Allamong at 1. Neither agency informed Union Pacific of any environmental

⁹ See 30(b)(6) Deposition of John C. Pfahl, *Asarco LLC v. NL Industries et. al.*, No. 4:11-cv-00864-JAR (E.D. Mo. Mar 19, 2014) at 105:18-22; 106:16-23 (Asarco’s corporate witness admission that he could not determine from Teklab reports where Asarco samples were taken or even if they were taken in the right-of-way) (appended hereto as Attachment B).

concerns with the proposed abandonment. *Id.* Moreover, the Bonne Terre right-of-way was not (and has never been) included in the Bonne Terre Superfund Site, and Union Pacific was not (and has never been) identified as a Potentially Responsible Party for the Bonne Terre Superfund Site.

Union Pacific thus had ample support for every environmental representation that Asarco questions. Union Pacific's representation that the right-of-way contained "no known hazardous material waste sites" was made only after consulting with environmental authorities who identified no such sites. And Union Pacific's representations that the abandonment posed "no anticipated adverse effects on water quality" and no other "known adverse environmental impacts" was similarly made only after consulting with environmental authorities who identified no such impacts.¹⁰ Importantly, the environmental authorities were aware of the nearby Bonne Terre Superfund Site, but they never suggested at the time, or since, that anything on Union Pacific's right-of-way contributed to the environmental issues at that Site. Union Pacific reasonably relied on these consultations with environmental authorities to support the representations in its environmental filing with the Board.

Asarco has no evidence to the contrary. In fact, Asarco's arguments that Union Pacific "should have known" of alleged environmental contamination implicitly admit that it has no evidence of a material misrepresentation made by Union Pacific. The Board has no basis to reopen this proceeding. Asarco has not proven a material misrepresentation was made, and as Mr. Allamong testifies, "all statements made in the [Abandonment Exemption] Notice and the [Combined Environmental and Historic Report] were true and accurate." V.S. Allamong at 2.

¹⁰ Union Pacific had absolutely no knowledge of a potential environmental contaminant in the ballast, but if it had, that knowledge was completely irrelevant to the environmental questions posed by the abandonment, which focus on whether abandonment of the line creates new adverse environmental impacts.

C. The Interests Of Repose And Finality Weigh Powerfully Against Reopening.

In addition, the extraordinary amount of time that has passed since the abandonment—and the interests of parties that have acquired the former right-of-way in reliance on that abandonment—weigh strongly against reopening even if the Board had authority or cause to reopen, which it does not. When deciding whether a party has alleged sufficient grounds to support a request to reopen a proceeding, the Board weighs the magnitude of the alleged bases for reopening the case against countervailing equitable concerns regarding administrative finality and repose and detrimental reliance by the applicant and the public.¹¹ Concerns of detrimental reliance and the need for administrative repose increase as time passes.¹² Where significant time has passed since issuance of a final Board decision, a party must establish particularly compelling grounds to warrant reopening.¹³

Here, the balance between the need for finality and the asserted grounds for reopening is not even close. The abandonment was consummated fourteen years ago, and the underlying land is now owned by several different companies, including the Bonne Terre Industrial Development Authority. Those companies have, for fourteen years, relied on the fact that the abandonment is final. The Industrial Development Authority has combined its portion of the former Union

¹¹ See *Ariz. Pub. Serv. Co. v. Atchison, Topeka & S.F. Ry.*, 3 S.T.B. 70, 75 (1998) (“we must approach petitions to reopen . . . cautiously, on a case-by-case basis, striving to achieve an appropriate balance between the interests of fairness to all parties and of administrative finality and repose”); accord *S.R. Investors, Ltd., d/b/a Sierra R.R.--Aban.—In Tuolumne County, Cal.*, ICC Docket No. AB 239X, 1988 ICC Lexis 17, at *9 (I.C.C. served Jan. 20, 1988) (“we must balance concerns of administrative finality, repose and detrimental reliance with whatever factors favor reopening”), *aff’d sub nom. Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 667 (9th Cir. 1989).

¹² See, e.g., *Ind. Hi-Rail Corp.—Lease & Operation Exemption—Norfolk & W. Ry. Line Between Rochester & Argos, Ind.*, STB Docket No. FD 32162 (S.T.B. served Jan. 30, 1998) (petition filed two years after decision became effective invokes issues of repose and detrimental reliance).

¹³ See also *Tongue River R.R. Co., Inc. – Construction & Operation – Western Alignment*, STB Docket No. 30186 (Sub-No. 3), at 8 (S.T.B. served June 15, 2011) (refusing to reopen a four-year old proceeding “given the need for finality and repose”).

Pacific right-of-way with other parcels of land to create a larger property for potential development. Indeed, granting Asarco's request would not only disturb the parties' and the public's reliance upon this abandonment, but would disrupt the public's reliance on any abandonment—for it would suggest that no period of time is too long for the Board to reassert jurisdiction over abandoned track. Asarco's demand that the Board order Union Pacific to "report" on other abandoned lines in Southeast Missouri implicates several abandonments much older than the Bonne Terre abandonment, some of which were consummated by Missouri Pacific Railroad Company in the early 1970s. The suggestion that the Board should reopen abandonments that were consummated more than forty years ago is blatantly contrary to the need for public reliance, repose, and finality. The Board has recognized that "[t]here must be some administrative finality to our process," and that principle is particularly applicable here. *ICG*, 5 I.C.C.2d at 1063.

D. Asarco Does Not Have Any Standing To Reopen The Abandonment.

Another independently sufficient reason for the Board to dismiss this proceeding is the fact that Asarco has no standing to seek reopening.¹⁴ The abandonment that Asarco seeks to reopen did not injure Asarco in any way, and reopening the abandonment would not redress any injury Asarco has suffered. While the Board has ample reasons on the merits to deny the petition, it also has grounds to deny it because Asarco has no legitimate interest in reopening this proceeding.

The Board looks to the traditional federal court test to consider questions of standing.

"The courts have devised a three-part test to determine whether a party has standing to bring an

¹⁴ Union Pacific acknowledges that the STB does not apply a "strict" standing requirement. But the agency would be well within its discretion to deny a request to reopen a long-ago consummated abandonment on standing grounds, because Asarco suffered no injury that is traceable to the abandonment decision.

action: (1) the party must have suffered an injury in fact; (2) the injury must be fairly traceable to the defendant's challenged conduct; and (3) the injury must be one that is likely to be redressed through a favorable decision." *James Riffin d/b/a The N. Cent. R.R. – Acquisition and Operation Exemption – In York County, Pa.*, STB Docket No. 34501 (S.T.B. served Feb. 23, 2005) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Asarco satisfies no part of this test. First, Asarco's petition does not identify any injury suffered by it. While Asarco complains of the money it paid in bankruptcy to settle its own liability for environmental damage, it cannot point to any injury it suffered as a result of Union Pacific's abandonment of this rail line fourteen years ago. Asarco has no interest in rail transportation on this former line and is not seeking to have rail transportation restored. Asarco has no stake in the right-of-way or in the Board's decision to permit the abandonment to take place.

Second, Asarco has no injury that is fairly traceable to Union Pacific's abandonment of the line or the Board proceeding permitting that abandonment. Even if Asarco's CERCLA claims against Union Pacific had any merit (and they do not), whether or not the Board approved abandonment of rail service has nothing to do with any CERCLA liability that Union Pacific might have on the line. Moreover, at no time has any of the money Asarco has been required to pay been spent on any railroad right-of-way in the Southeast Missouri area.¹⁵

Third, Asarco's requested remedy is not tied to any injury identified by Asarco. Any favorable decision by the Board in this case would not redress any purported injury to Asarco. Asarco requests that the Board require Union Pacific to conduct testing and compile

¹⁵ See, e.g., Attachment B, Pfahl 30(b)(6) Deposition at 173:10-14 (Asarco's corporate representative acknowledging that he was "not aware" of any Asarco money being used for Union Pacific property or railroad right-of-ways).

environmental reports on all lines abandoned by Union Pacific and by Missouri Pacific in the Southeast Missouri area. This remedy is not tied to any injury to Asarco. Rather, this remedy would allow Asarco to circumvent federal court rules and secure compelled discovery from Union Pacific. There is no basis for the Board to entertain such a request.

Because Asarco suffered no injury that is traceable to the abandonment decision and because its requested remedy is not tied to any identifiable injury, its Petition should be denied for the additional reason that it lacks standing.

E. The Board Should Not Take Actions That Would Interfere With the Missouri District Court Litigation.

Finally, the Board should not grant the Petition because the basic dispute between Asarco and Union Pacific—*i.e.*, whether Union Pacific is responsible for any part of Asarco’s environmental contamination liability—is being adjudicated in the Missouri District Court Litigation. The Court will adjudicate whether Union Pacific is liable for any contamination in or along the abandoned right-of-way, and the Court has authority to order Union Pacific to pay any appropriate damages or cleanup costs. The Board should not interpose itself into this ongoing litigation.¹⁶

To be clear, the fact that the Bonne Terre line was lawfully abandoned is not a defense that Union Pacific is making in the Missouri District Court Litigation. The Board’s rulings on the Petition will therefore have no substantive impact on the Missouri District Court Litigation. But granting Asarco’s Petition would interfere with the progress of that litigation by allowing

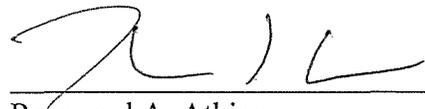
¹⁶ Prior Board decisions have adhered to this principle of comity and have declined to pursue petitions where there was ongoing litigation concerning the same matter. *See National Solid Wastes Management Assoc., et al. – Pet. for Declaratory Order*, S.T.B Docket No. 34776 , at 4 (served Mar. 10, 2006) (declining to institute a declaratory order proceeding where ongoing litigation encompassed the challenge); *MRC Regional R.R. Authority – Trackage Rights Exemption – Lines of the State of South Dakota* , STB Docket No. 34630, at 4 (served Dec. 29, 2004) (making clear that “the Board has made no determination” about rights that were concurrently being litigated in pending state court litigation).

Asarco to essentially subvert the District Court's discovery limitations and use the Board's processes as a means to obtain discovery from Union Pacific in the form of Board-ordered "reports" on other abandoned properties. The Board should not permit this end run around the District Court's orders.

III. CONCLUSION

For the reasons stated above, the Board should deny Asarco's Petition to Reopen. The Board lacks any authority to reopen an abandonment consummated fourteen years ago. Even if it did, Asarco has provided no evidence of a misrepresentation in that long-concluded proceeding, and reopening that proceeding would undermine important principles of finality and repose. Moreover, Asarco lacks standing in this proceeding, and in any event the Board should not take actions that are designed as an end run around discovery limitations in the Missouri District Court Litigation.

Respectfully submitted,



Raymond A. Atkins
Matthew J. Warren
Hanna M. Chouest
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

David P. Young
Melissa B. Hagan
Jeremy M. Berman
Union Pacific Railroad
1400 Douglas St.
Omaha, NE 68179

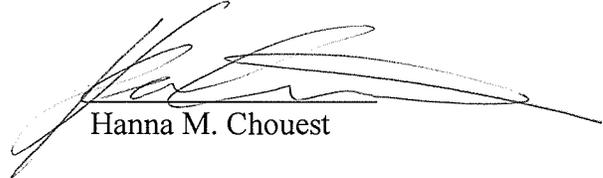
Counsel to Union Pacific Railroad Company

Dated: December 18, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December 2014, I caused a copy of the foregoing Union Pacific Railroad Company's Reply to Asarco LLC's Petition to Reopen to be served by email and overnight delivery upon:

Gregory Evans
Integer Law Corporation
633 West Fifth Street, Floor 67
Los Angeles, CA 90071



Hanna M. Chouest

ATTACHMENT A

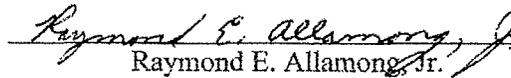
STB Docket No. AB-33 (Sub-No. 164X)

Verified Statement of Raymond E. Allamong, Jr.

My name is Raymond E. Allamong, Jr. I was employed with Union Pacific Railroad Company (“Union Pacific”) in various capacities from 1982 until I retired in 2013. From 1986 until 2013 I held a rail line planning position in the Interline Group of the Union Pacific’s Marketing & Sales Department, retiring as Senior Manager Rail Line Planning. In that role I participated in the evaluation of Union Pacific’s railroad lines to determine if they were candidates for abandonment. For lines considered abandonment candidates, I assigned a schedule priority for treatment by the Union Pacific Law Department and then assisted in preparation of abandonment filings submitted to the Surface Transportation Board (the “Board”) and its predecessor. I assisted in gathering information to be included in filings and reviewed filings to ensure the accuracy of information submitted to the Board. I also provided verifications to the Board verifying that the facts contained in abandonment filings were true, to the best of my knowledge, information and belief. I performed this function for the Notice of Exemption filed by Union Pacific in Docket No. AB-33 (Sub-No. 164X) (the “Notice”).

Prior to filing the Notice, Union Pacific carried out its regulatory obligations by having its environmental field manager notify numerous government entities including the United States Environmental Protection Agency and the Missouri Department of Natural Resources. Union Pacific’s notice to these agencies requested, among other things, that the agencies identify any potential effects on the surrounding area and identify the location of any hazardous waste sites and known hazardous material spills on the right-of-way. Neither agency informed Union Pacific of any hazardous waste sites or hazardous material spills on the right-of-way.

In the Combined Environmental and Historic Report (“CEHR”) associated with the Notice, Union Pacific stated that the abandonment would have no detrimental effects on public health and safety and that there were no known hazardous waste material sites or sites where known hazardous material spills had occurred on the right-of-way. Union Pacific did not engage in fraud or misrepresentation when making these statements. Based on input from Union Pacific environmental specialists as part of the preparation for filing and information received from government entities, Union Pacific was not aware of any environmental concerns associated with the abandonment in Docket No. AB-33 (Sub-No. 164X). All statements made in the Notice and CEHR were true and accurate.


Raymond E. Allamong, Jr.

Attachment B

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ASARCO LLC, a Delaware)
corporation,)
Plaintiff,)

vs.

) No.
) 4:11-cv-00864-
) JAR

NL INDUSTRIES, INC., a New Jersey)
corporation; ST. FRANCOIS COUNTY)
ENVIRONMENTAL CORPORATION, a)
Missouri corporation, DELTA)
ASPHALT, INC., a Missouri)
Corporation; ANSCHUTZ MINING)
CORPORATION, a Colorado)
corporation; BNSF RAILWAY)
COMPANY, a Delaware corporation;)
UNION PACIFIC RAILROAD COMPANY, a)
Utah corporation; and DOES 1-50,)
inclusive,)
Defendants.)

VIDEOTAPED 30(b)(6) DEPOSITION OF
JOHN CHRISTOPHER PFAHL
Tucson, Arizona
March 19, 2014
9:00 a.m.

REPORTED BY:

Robin L. B. Osterode, RPR, CSR

AZ Certified Reporter No. 50695

1 anyone in Asarco who assumed those responsibilities
2 for the SEMO active operation sites?

3 A. They had been sold by the time Mr. Robbins
4 retired, and they were no longer owned or operated by
5 Asarco.

6 Q. So there was no person in the Asarco
7 organization after Mr. Robbins retired who picked up
8 that mantle and visited those sites for environmental
9 reasons?

10 A. That's correct.

11 Q. Now, let's go to the former owned and
12 operated sites, which I think include the Catherine
13 Mine site and the Big River Federal site. Is that --
14 and feel -- yeah, feel free to look at the
15 definitions. It's a different document, Exhibit 74.

16 A. Could you restate the question, please.

17 Q. I'll be glad to.

18 Either using the definition in the
19 deposition notice for the Catherine Mine site or
20 using your own knowledge and information, how would
21 you describe that former operation?

22 A. It's my understanding that at some point in
23 time, Asarco bought the company that had the Federal
24 Mill and operated it for some period of time early in
25 the 20th Century.

1 Q. Was that Federal Lead Company?

2 A. That's correct.

3 Q. And so earlier in the 20th Century, Asarco
4 had bought that operation and continued operating
5 what had been the Federal Lead Company?

6 A. Yes. And they ultimately sold it to
7 St. Joe Lead.

8 Q. Okay. Do you know about when that sale
9 was?

10 A. I do not.

11 Q. You were not involved in that transaction?

12 A. I wasn't alive.

13 Q. You did not have any responsibility for
14 those operations or the sale of those assets?

15 A. No.

16 Q. Okay. So what is your understanding as to
17 why Asarco had some continuing responsibility for
18 environmental conditions at the Federal Mine site?

19 A. As a former owner/operator, we would have
20 had Superfund liability at that site under the
21 Superfund statute.

22 Q. Okay. At any time, have you had any
23 responsibility for overseeing or participating in the
24 management of that environmental liability for the
25 Federal Mine site?

1 considered that in preparing for your deposition?

2 A. I have not.

3 Q. And there was a written proffer of
4 testimony by Mr. Robbins. Have you seen that or
5 considered that in preparing for your deposition?

6 A. I have not.

7 MR. CONNELLY: All right. We'll take a
8 moment and go off the tape so that it can be changed.

9 THE VIDEOGRAPHER: This concludes tape two
10 in the deposition of Chris Pfahl. We are off the
11 record at 11:40.

12 (Recessed from 11:40 a.m. until 11:52 a.m.)

13 THE VIDEOGRAPHER: This begins tape three
14 in the deposition of Chris Pfahl. We are on the
15 record at 11:52.

16 (Previously marked Exhibit 4 is
17 attached hereto.)

18 BY MR. CONNELLY:

19 Q. Mr. Pfahl, I've shown you what's been
20 previously marked as Exhibit Number 4. I believe
21 this to be the NewFields report in 2007 that you made
22 reference to having seen in preparation for your
23 deposition. Is it?

24 A. That is correct.

25 Q. Okay. Now, this report is labeled "Draft."

1 Are you aware of a final ever being done?

2 A. I am not.

3 Q. And this -- the title of this report is
4 "Historic Railroads, St. Francois County Mined
5 Areas." Right?

6 A. That is correct.

7 Q. Does this limit the historic railroad
8 discussion in this report to St. Francois County?

9 A. That's what it's limited to.

10 Q. Okay. And you've looked at this. Do you
11 see anyplace in here where Union Pacific Railroad is
12 mentioned in any way?

13 A. I do not believe Union Pacific is directly
14 mentioned.

15 Q. Did you see anything in this report of
16 historic railroads that, based upon your knowledge,
17 the company's knowledge, your experience, you
18 associate with Union Pacific Railroad?

19 A. Some of these railroads were acquired by
20 Union Pacific.

21 Q. Tell me which ones and how you know that.

22 A. I believe the Missouri Pacific Railroad.

23 Q. Tell me where you're looking and I can look
24 with you.

25 A. Page 3.

1 Sweet -- I mean, to West Fork.

2 Q. And isn't the same true, that there was no
3 railroad close to Sweetwater?

4 A. I don't recall.

5 Q. Okay. Now, you mentioned having seen some
6 sampling results, and I'm going to hand you what's
7 been previously marked as both Exhibit 19 and
8 Exhibit 48.

9 (Previously marked Exhibit 19 is
10 attached hereto.)

11 BY MR. CONNELLY:

12 Q. Is that one of the sampling results that
13 you have seen before?

14 A. Yes.

15 Q. Now, it appears that this one was -- is
16 reported by Teklab, Inc., on November 4, 2013, and if
17 we look through here, it appears to be for -- hold
18 on. I'm trying to be more precise. Well, I guess my
19 first question is going to be, do you know where
20 these samples were taken?

21 A. I do not know where these samples were
22 taken.

23 Q. If you turn to the page of Exhibit 19 to
24 page -- what's numbered page 4, not the document
25 number, but the -- and it's actually -- if I may

1 point, it's in there, in the document number. Do you
2 see that?

3 A. Page 4 of 12?

4 Q. Yes, sir. There is a reference to client
5 sample ID at the top of the page, and it says "SB-1."
6 Do you see that?

7 A. Yes.

8 Q. And if you keep turning pages, you'll see
9 that it relates to SB-2, SB-3 and SB-4, which
10 indicates to me, and you may know even better than I,
11 that there are four separate sample locations where
12 samples are taken and tested. Does that mean that to
13 you?

14 A. Yes, and the samples were taken at
15 different intervals.

16 Q. Okay. But can you -- now, my having
17 pointed that out to you, can you determine where
18 these samples were taken?

19 A. I cannot determine where the samples were
20 taken.

21 Q. Can you determine whether or not they were
22 even taken within a railroad right-of-way?

23 A. I cannot.

24 Q. Okay. So once you had this information
25 reflected on Exhibit 19 of this sampling in November

1 were settled in the bankruptcy?

2 A. Somewhere between 70 and 80.

3 Q. Okay. Are you aware of Asarco money being
4 used for any property that was owned or operated by
5 any of the defendants in this case?

6 A. Again, I don't think we know where the
7 money's been spent --

8 Q. All right.

9 A. -- or if it's been spent at all.

10 Q. Well, let me take Union Pacific in -- in
11 particular. Are you aware of any Asarco money being
12 used for Union Pacific property or railroad
13 right-of-ways?

14 A. We're not aware of any.

15 Q. Well, in connection with the proofs of
16 claim that were made and the negotiated SEMO
17 settlement, didn't the governments and Doe Run make
18 claims as to what sites on which they had spent
19 response costs?

20 A. Yes, there were some pass cost claims. The
21 majority of claims were for NR -- natural resource
22 damages.

23 Q. And some for future costs?

24 A. And some for future costs.

25 Q. So what you're saying is past costs -- to

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I, JOHN CHRISTOPHER PFAHL, do hereby declare that I have read the foregoing transcript; that I have made any corrections as appear noted, in ink, initialed by me, or attached hereto; that my testimony as contained herein, as corrected, is true and correct.

_____I have made changes to my deposition.

_____I have NOT made any changes to my deposition.

EXECUTED on this _____ day of _____, 20____, at _____, _____.
(City) (State)

JOHN CHRISTOPHER PFAHL

1 STATE OF ARIZONA)
2 COUNTY OF MARICOPA)

3 CERTIFICATE

4 I, ROBIN L. B. OSTERODE, Certified
5 Reporter for the State of Arizona and Certified
6 Shorthand Reporter for the State of California
7 certify:

8 That the foregoing proceeding was taken
9 by me; that I am authorized to administer an oath;
10 that any witness, before testifying, was duly sworn
11 to testify to the whole truth; that the questions and
12 answers were taken down by me in shorthand and
13 thereafter reduced to print by computer-aided
14 transcription under my direction; that review and
15 signature was requested; that the foregoing pages are
16 a full, true, and accurate transcript of all
17 proceedings, to the best of my skill and ability.

18 I FURTHER CERTIFY that I am in no way
19 related to nor employed by any of the parties hereto,
20 nor am I in any way interested in the outcome hereof.

21 DATED this 27th day of March, 2014.

22
23
24 ROBIN L. B. OSTERODE, RPR
CA CSR No. 7750
AZ CR No. 50695
25