

204879

UNION PACIFIC RAILROAD COMPANY

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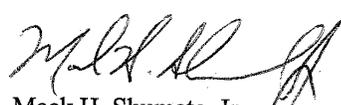
The Honorable Vernon A. Williams,
Secretary - Surface Transportation Board
1925 "K" Street, N.W.
Washington, D.C. 20423-0001

**RE: Docket No. AB33- (Sub-No. 170), Union Pacific Railroad Company
--Abandonment and Discontinuance of Operation--in Polk County, IA
(Bell Avenue Industrial Lead in Des Moines, IA)**

Dear Mr. Williams:

Attached for filing in the above proceeding is an original and ten (10) copies of Union Pacific Railroad Company's ("Union Pacific"), Reply to the Appeal of Mid-America Railroad, L.L.C. ("Reply"). This Reply is filed in accordance with the Board's Decision served February 21, 2002 on the UP's Petition for Extension of Time.

Sincerely yours,


Mack H. Shumate, Jr.,
Senior General Attorney

cc: Joseph Dettmar (STB)
Persons shown on Certificate of Service

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ENTERED
Office of the Secretary

MAR 04 2002

Part of
Public Record

CERTIFICATE OF SERVICE

I certify that I have this date served the foregoing "Reply to the Appeal of Mid-America Railroad, L.L.C." was served upon the following via U. S. regular mail:

Des Moines Water Works
2201 Valley Drive
Des Moines, IA 50321

Iowa Transportation Department
Modal Division
800 Lincoln Way
Ames, IA 50010

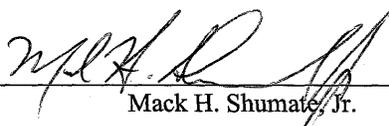
Iowa Interstate Railroad, Ltd.
Terry Bailey
1300 Des Moines Building
405 Sixth Avenue
Des Moines, IA 50309

Ringling Brothers and Barnum and Bailey Circus
8607 Westwood Center Drive
Vienna, VA 22182

Steven E. Zumbach
William D. Bartine
Holly M. Logan
Christopher M. Miller
BELIN LAMSON McCORMICK ZUMBACH FLYNN, P.C.
606 Walnut Street, Suite 2000
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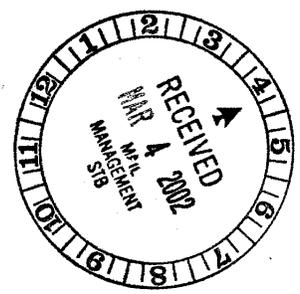
Jim Shelley
Smurfit-Stone Container Corporation
2201 Bell Avenue
Des Moines, IA 50321

DATED: March 1, 2002


Mack H. Shumate, Jr.

204879

BEFORE THE
SURFACE TRANSPORTATION BOARD



Docket No. AB-33 (Sub-No. 170)

UNION PACIFIC RAILROAD COMPANY
ABANDONMENT AND DISCONTINUANCE OF OPERATION
IN POLK COUNTY, IOWA
(BELL AVENUE INDUSTRIAL LEAD IN DES MOINES, IOWA)

UNION PACIFIC RAILROAD COMPANY'S REPLY TO THE APPEAL OF
MID-AMERICA RAILROAD, L.L.C. TO DECISION REJECTING
OFFER OF FINANCIAL ASSISTANCE

UNION PACIFIC RAILROAD COMPANY

Mack H. Shumate, Jr.,
Senior General Attorney
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ENTERED
Office of the Secretary

MAR 04 2002

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Public Record

Dated: March 1, 2002
Due: March 4, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. AB-33 (Sub-No. 170)

UNION PACIFIC RAILROAD COMPANY
ABANDONMENT AND DISCONTINUANCE OF OPERATION
IN POLK COUNTY, IOWA
(BELL AVENUE INDUSTRIAL LEAD IN DES MOINES, IOWA)

UNION PACIFIC RAILROAD COMPANY'S REPLY TO THE APPEAL OF
MID-AMERICA RAILROAD, L.L.C. TO DECISION REJECTING MID-AMERICA'S
OFFER OF FINANCIAL ASSISTANCE

Union Pacific Railroad Company ("UP") files this Reply to the Appeal submitted by Mid-America Railroad, L.L.C. ("MAR") to the decision of the Director of the Board's Office of Proceedings served January 30, 2002, rejecting MAR's Offer of Financial Assistance ("OFA") for the above line on the grounds that MAR had failed to demonstrate that it was financially responsible.

As we will show below, the Director properly rejected MAR's offer. Neither the arguments nor additional information that MAR has presented for the first time in its Appeal warrants a different result. In addition, the offer should be rejected as unreasonable, as it amounts to a request that UP give the line to MAR virtually for free. Finally, we will show that there is absolutely no merit to MAR's claim that UP has acted in bad faith.

I. FINANCIAL RESPONSIBILITY.

As noted in the January 30, 2002 decision, MAR was required to furnish concrete evidence in its OFA demonstrating that it had the financial resources to fulfill its obligations under the Board's regulations. In other words, MAR was required to demonstrate that it had the financial resources to fund not only the ridiculously low purchase price it had offered for the line (\$5,000), but also the resources to operate it for the required two-year statutory period, as required by 49 U.S.C. 10904(f)(4)(A), see Docket No. AB-167 (Sub-No. 1094), Chelsea Property Owners – Abandonment, served December 9, 1992, p. 3; Docket No. AB-1 (Sub-No. 249X), Chicago & North Western Transp. Co. – Abandonment, served August 31, 1994, pp. 6-7. In order to operate the line for two years, MAR would have to rehabilitate the bridge over the Des Moines River. As shown in the evidence submitted in the abandonment proceeding, this would require an immediate expenditure of \$1.5 million. UP Abandonment Application, Appendix D, Meyer V.S.

The Director properly found that MAR failed to demonstrate that it was financially responsible. The fact is that MAR's OFA had no evidence of financial responsibility, simply an unsubstantiated claim that Mid-America Development Co. (not MAR itself) had "more than sufficient assets" to meet its financial obligations under the OFA. In its appeal, MAR argues that it should have been excused from the requirement to make a showing of financial responsibility because UP had supposedly agreed to negotiate with MAR. We will discuss the alleged "agreement" in Section III below. For now, we simply point out that MAR is not claiming that there was any agreement by UP to waive any of

the requirements of 49 C.F.R. § 1152.27 – it claims only that there was some nebulous agreement to "negotiate." MAR had absolutely no basis to assume it was excused from meeting the statutory requirement of 49 U.S.C. § 10904 or the Board's OFA rules, or to simply ignore those requirements in its OFA. The Director's rejection of the OFA was correct and should be affirmed.

MAR then goes on to present in its appeal, for the first time, financial information that supposedly demonstrates MAR's financial responsibility. As a preliminary matter, it is obviously improper for MAR to be presenting this information in its appeal. Under the Board's rules, any such information should have been included in MAR's OFA.

Beyond this, the financial statements included in MAR's appeal give no information as to MAR's financial responsibility. The statements are consolidated balance sheets and income statements for "Mid-America Group LTD and subsidiaries" as of November 30, 2001. But Mid-America Group is not the offeror – MAR is. MAR did not even exist on November 30, 2001. According to the Iowa Secretary of State, MAR was only organized on January 24, 2002. Further, MAR is set up as a separate, limited liability company ("L.L.C."), which insulates Mid-America Group from MAR's obligations and liabilities. Simply put, Mid-America Group's financial resources are not MAR's resources. The Group's resources would be relevant only to the extent that those resources have been committed to MAR, see Docket No. AB-1 (Sub-No. 249X), Chicago & North Western – Abandonment, supra, p. 7. Without evidence of such a commitment, the Mid-America Group's resources are irrelevant. As such, the Board should affirm the Director's finding that MAR had failed to demonstrate financial responsibility.

II. REASONABLENESS OF THE OFFER.

The Director's January 30 decision did not address the reasonableness of MAR's OFA, since it was unnecessary. However, the OFA is unreasonable on its face, and the OFA can properly be rejected for this reason alone.

MAR has offered only \$5,000 for a 3.72-mile rail line, including track and underlying real estate. Quite apart from the huge disparity between MAR's offer and UP's estimate of the value of the line, MAR's offer is unreasonable on its face. Essentially, MAR is proposing that UP give away the line practically for free.

While MAR made a number of arguments in its OFA as to why 3.72 miles of track and real estate are worth only \$5,000, its major justification for its valuation was the cost of removing the bridge over the Des Moines River (\$750,000) which, it claimed, should be deducted from the salvage value of the line. In other words, MAR is claiming that the bridge has \$750,000 in "negative" salvage value.

MAR's proposed reduction for "negative" salvage value is impermissible. The Board specifically addressed the "negative salvage" issue in Abandonment and Discontinuance of Rail Lines and Rail Transportation, 1 S.T.B. 894 (1996), stating as follows:

". . . no asset on the branch line will have a negative value unless the railroad intends to remove the structure, or it is proven by protestants, that the structure must be dismantled to comply with a Federal law, state law, or a local ordinance," 1 S.T.B. at 912, emphasis in original.

MAR has not even attempted to meet the above standard, and cannot do so. Indeed, Mid-America Development Co. (MAR's parent) has already claimed in this proceeding that the bridge would not have to be dismantled (Mid-America Development Protest, p. 11), a claim which is fatal to MAR's position that the bridge has negative salvage value. The fact is that UP does not intend to remove the Des Moines River bridge. UP intends to leave it in place. We expect that the bridge will, sooner or later, be acquired by a governmental entity, probably for trail use.¹ Moreover, UP is aware of no Federal law, state law, or local ordinance that would require bridge removal.

Local precedent confirms that the bridge will not have to be removed. There are two other nearby railroad bridges over the Des Moines River that were left in place following rail line abandonments. The first is a former C&NW bridge on the north side of Des Moines which was left in place following a 1982 abandonment approved in Docket No. AB-1 (Sub-No. 133), Chicago & North Western Transp. Co. – Abandonment in Polk County, IA, served May 24, 1982. This bridge remained unused for over a decade following the abandonment, until it was incorporated into a trail in the late 1990's. The second is a former Norfolk & Western bridge about a mile north of the UP bridge, which was left in place following an abandonment authorized in Docket No. AB-290 (Sub-No.

¹ As shown in the abandonment application (Appendix J), the City of Des Moines has expressed interest in the bridge. MAR, in its OFA, tries to create the impression that the City is no longer interested in the structure. However, the letter from the City that MAR furnishes does not say that the City has no interest in the bridge. All that it says is that the City has not yet made a decision.

176X), Norfolk & Western R. Co. – Abandonment – Des Moines, IA, served December 15, 1995, and has remained unused to the present time. Photos of both these bridges taken within the last week are attached to this Reply.

Accordingly, MAR's offer should be rejected on the additional ground that it is unreasonable. Not only is the amount of the offer facially unreasonable, but MAR's attempted explanation of the disparity between its offer and UP's valuation is without merit, and is inconsistent with the position that MAR's parent took in the abandonment proceeding.

III. "BAD FAITH".

MAR's primary argument is that UP somehow misled MAR into believing that it did not have to submit evidence of financial responsibility because of UP's professed willingness to negotiate an OFA. Further, MAR claims that UP is acting in "bad faith" by urging rejection of its OFA. There is no merit to any of this. Indeed, if anyone has acted in "bad faith," it is MAR itself.

The undersigned counsel was one of the UP representatives involved in the telephone conversation, which lasted less than three minutes, with Mid-America's lawyers on January 22, 2002, in which these "representations" were supposedly made. All that UP ever represented to Mid-America is that it was willing to negotiate an OFA as required by the Board's rules. At no time did we agree to negotiate the OFA that MAR actually filed. In fact, Mid-America's lawyers did not disclose to us that they were creating a new subsidiary ("MAR") to make the offer without any apparent backing from Mid-America Development. And they did not disclose to us that the amount of the offer

would be only \$5,000. At no time did UP represent that it would agree to a waiver of the Board's requirements applicable to OFA's – the issue was never discussed. And, at no time did UP represent that UP would forego any of its rights to oppose an OFA. Again, the matter was never discussed. MAR's actual witness for what transpired during the January 22nd telephone call, Holly M. Logan, makes no claim that any such representations were made.² She claims only that UP agreed to negotiate with Mid-America, and that it raised no concerns about Mid-America's financial responsibility during the call (MAR Response to UP Reply to Offer of Financial Assistance, January 30, 2002). Mid-America had no basis to assume from this call that UP had agreed to waive anything. Further, Mid-America failed to mention the amount of the offer would be only \$5,000, or the fact that the offer would be made by a newly created, and apparently cashless entity (MAR), rather than Mid-America Development.³ As such, it had no basis to assume that UP would not challenge the reasonableness of the offer or the financial responsibility of the offeror.⁴ It was Mid-America which showed "bad faith" during the January 22nd phone call, by withholding this material information

² "MAR" itself had not been formed as of January 22, 2002.

³ Since the actual offer was verified on January 24, 2002, only two (2) days later, they had to have been aware of these facts when the January 22nd phone conversation took place.

⁴ Mid-America has relied on the decision of the Board in Consolidated Rail Corporation -- Abandonment -- In Huntingdon County, PA, Docket No. AB-167 (Sub-No. 1175), served February 19, 1997, for the proposition that the Board has indicated that the reasonableness of an offer of financial assistance can be based in part upon the abandoning railroad's expressed willingness to negotiate with the offeror. There is a major distinction between the Consolidated Rail Corporation Abandonment referenced above and the current matter. In the Consolidated Rail Corporation Abandonment, the offeror informed Conrail of its intention to make an OFA at the \$1.00 offer price and Conrail agreed to enter into negotiations on that basis. Mid-America never informed UP that it was only going to offer \$5,000 for the line during the telephone conversation between counsel. Therefore, there was no agreement reached between UP and Mid-America as to Mid-America's financial responsibility prior to the filing of Mid-America's attempted OFA as was clearly the case in the Consolidated Rail Corporation Abandonment.

from UP. Had Mid-America fairly disclosed what it was going to do in its OFA, it would have been left with no doubt as to UP's position.

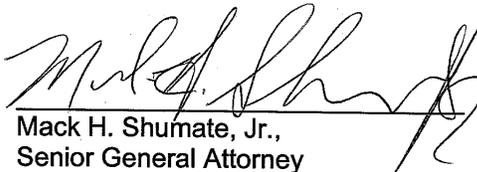
IV. CONCLUSION.

For the reasons stated above, MAR's offer of financial of assistance does not comply with the Board's OFA rules in that MAR has failed to demonstrate that it is financially responsible or that its offer is reasonable. Accordingly, UP respectfully requests that MAR's appeal be denied and that the Director's decision of January 30, 2002 rejecting the OFA be affirmed.

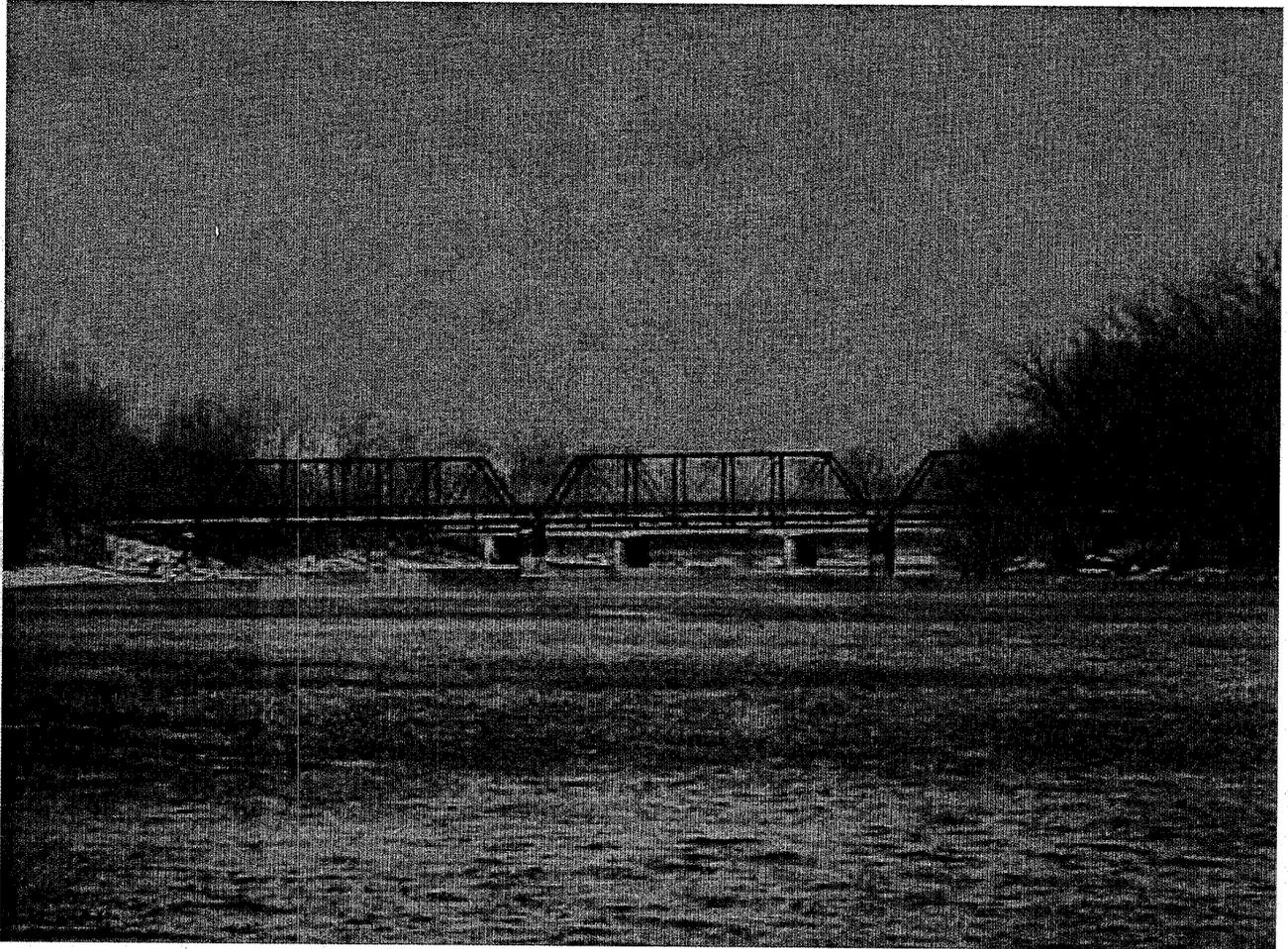
Respectfully submitted,

UNION PACIFIC RAILROAD COMPANY

By:


Mack H. Shumate, Jr.,
Senior General Attorney

Des Moines River Railroad Bridge – Chicago & North Western Transportation Co. (former Des Moines & Central Iowa). Abandoned in Docket No. AB-1 (Sub-No. 133), Chicago & North Western Transp. Co. – Abandonment in Polk County, IA, served May 24, 1982. Photo taken February 26, 2002.

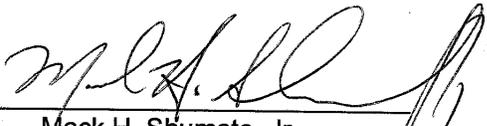


Des Moines River Railroad Bridge – Norfolk & Western Railroad. Abandoned in Docket No. AB-290 (Sub-No. 175X), Norfolk & Western R. Co. – Abandonment – Des Moines, IA, served December 15, 1995. Photo taken February 22, 2002.



STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

Mack H. Shumate, Jr., makes oath and says that he is the Senior General Attorney of Union Pacific Railroad Company, applicant herein; that he has been authorized by the applicant to verify and file with the Surface Transportation Board the foregoing Reply to the Appeal of Mid-America Railroad, L.L.C. in STB AB-33 (Sub-No. 170); that he has carefully examined all of the statements in the Reply; that he has knowledge of the facts and matters relied upon in the Reply; and that all representations set forth therein are true and correct to the best of his knowledge, information and belief.



Mack H. Shumate, Jr.

Subscribed and Sworn to before me
this 1st day of March, 2002.



NOTARY PUBLIC

