

UNION PACIFIC RAILROAD COMPANY

LAW DEPARTMENT
101 NORTH WACKER DRIVE, SUITE 1920
CHICAGO, ILLINOIS 60606
FAX NO. 312-777-2065

RONALD J. CUCHNA
GENERAL SOLICITOR
312-777-2040



GEORGE H. BRANT
312-777-2051
MACK H. SHUMATE, JR.
312-777-2055
DANIEL R. LA FAVE
312-777-2046
LINDA J. COYLE
312-777-2056
THOMAS W. CUSHING
312-777-2053
FREDERICK P. JOHNSTON, JR.
312-777-2047

205506

May 28, 2002

VIA Facsimile #202/565-9004 and UPS OVERNIGHT DELIVERY

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

ENTERED
Office of the Secretary

MAY 30 2002

UP's SUPPLEMENTAL FILING TO ITS REPLY

Part of
Public Record

**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)
UP Real Estate Counsel Response to MAR Real Estate Counsel
Legal Opinion**

Dear Mr. Williams:

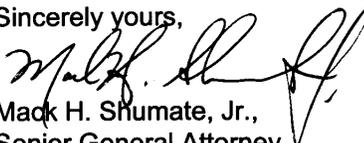
The Union Pacific Railroad Company ("UP") has received a letter response prepared by Bruce Johnson of Lewis, Webster, Johnson & Van Winkle, L.L.P. responding directly to Mark McCormick's Memorandum attached to Mid-America Railroad, L.L.C. ("MAR's") Request to Establish Terms as Exhibit 4 to Appendix A. A copy of Mr. Johnson's letter is attached hereto as Exhibit "A" and hereby made a part hereof.

In accordance with 49 C.F.R. § 1152.27(g)(1) UP has five (5) days to file its reply to MAR's Request to Establish Terms. The 5th day is today May 28, 2002.

This filing is being made pursuant to the former Interstate Commerce Commission's procedures for receiving submissions in emergency/rush situations by facsimile, Acceptance of Mail by Fax, 54 Fed. Reg. 52857, December 22, 1989, 1989 WL 294480 ("1989 Notice").

As required by the 1989 Notice, an original and ten (10) copies of the attached filing will be provided to the Board and to all parties of record under separate cover.

Sincerely yours,



Mack H. Shumate, Jr.,
Senior General Attorney

MHS/taf
Enclosures

cc: Joseph Dettmar (STB) <202/565-9002>
(Courtesy Copy)



Law Offices

Lewis, Webster, Johnson & Van Winkle, L.L.P.

Bruce Johnson

620 Liberty Building
418 Sixth Avenue
Des Moines, IA 50309-2407Telephone: (515) 243-1000
Facsimile: (515) 288-7000
E-mail: LWJVDlaw@AOL.com

May 28, 2002

**VIA FACSIMILE 312-777-2065
AND REGULAR U.S. MAIL**Mr. Mack Shumate
Union Pacific Railroad Company
Law Department
101 North Wacker Drive
Suite 1920
Chicago, Illinois 60606

Re: Bell Avenue Yard Real Estate, Des Moines, Iowa

Dear Mack:

Prior to preparing the earlier memo I sent you on this subject, I had reviewed Hawk v. Rice, 325 N.W.2d 97 (Iowa 1982), and Macerich Real Estate Company v. City of Ames, 433 N.W. 2d 726 (Iowa 1988). Those cases do not affect the conclusion reached in my earlier memo.

The relevant clauses in the Gray deed are set out at page 1 of my memo. That deed states:

... Samuel Gray and Sallie B. Gray. . . Do hereby sell and convey. .

... A strip of land one hundred feet in width. . . Also all that portion of said lot fourteen. . . Also all that part of lot six. . .

The grantors reserve the right to the coal under the lands hereby conveyed. . .

It is understood that the premises hereby conveyed are to be used for right of way, division terminal grounds, shops, yards and other railway purposes only. [Emphasis added]

The Perkins deed has similar language. The deed in Hawk provided:

[The grantors] grant, sell and convey, to the said Toledo and Northwestern Railway, its successors and assigns, for the purpose of constructing a Railroad thereon, and for all uses and purposes connected with the construction and use of said Railroad, the right of way for the said Railroad over and through the [described tract]. . . [Emphasis added]

The grant of a "right of way" for railroad purposes conveys only an easement and not a fee estate. Notelzah, Inc. v. Destival, 489 N.W.2d 744, 746 (Iowa 1992). If the court in Hawk meant something else, it did not say it. The Notelzah court held that a warranty deed that "conveyed a five-acre tract. . . 'for the purpose of right of way and Depot grounds'" granted a fee estate. 489 N.W.2d at 745 - 746.

The Iowa Supreme Court later explained that in Hawk the court's decision was based on the use of the term "right of way" in the granting clause of the deed. In Macerich Real Estate Company v. City of Ames, 433 N.W.2d at 728, the court said:

In attempting to discern the grantor's interest, [in Hawk] we relied primarily on the words of the deed. We found the granting clause expressly described the conveyance as a right-of-way for construction and operation of a railroad. *Id.* In the present case, the deed similarly provided that it was for a "right-of-way . . . for a single or double railroad track."

Despite apparent disagreement among other jurisdictions as to the effect of a deed for "right-of-way" purposes, *e.g.*, annotation, *Deed to Railroad--Fee or Easement*, 6 A.L.R.3d 977 (1966), our cases have not equivocated in the face of such language. *See, e.g.*, *Chicago & N.W. Ry. v. Sioux City Stockyards Co.*, 176 Iowa 659, 668, 158 N.W.769, 772 (1916) ("[A] grant or gift of ground for right of way is presumed to be of an easement therein only."); *Brown v. Young*, 69 Iowa 625, 626, 29 N.W. 941, 941 (1886) ("A mere right-of-way over land is, we believe, always regarded as an easement.").

We conclude that the deeds in this case conveyed to the railroad only an easement for railroad purposes.

Sincerely,



Bruce Johnson

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing document by
facsimile at 515/243-1408 and overnight delivery service on:

Steven E. Zumbach
William D. Bartine
Holly M. Logan
Christopher M. Miller
BELIN LAMSON McCORMICK ZUMBACH FLYNN, P.C.
606 Walnut Street, Suite 2000
Des Moines, Iowa 50309

Dated this 28th day of May, 2002.


Mack H. Shumate, Jr.

CERTIFICATE OF SERVICE

William D. Bartine, Esq.
Senior General Attorney
Steven E. Zumbach
Holly M. Logan
Christopher M. Miller
BELIN LAMSON MCCORMICK
ZUMBACH FLYNN, P.C.
606 Walnut Street, Suite 2000
DesMoines, Iowa 50309

Ringling Brothers and Barnam
and Bailey Circus
8607 Westwood Center Drive
Vienna, Virginia 22182

Smurfit-Stone Container Corporation
2201 Bell Avenue
DesMoines, Iowa 50321

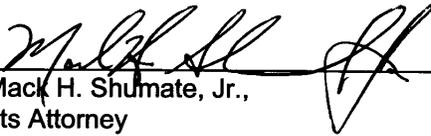
DesMonies Water Works
2201 Valley Drive
DesMoines, Iowa 50321

Iowa Interstate Railroad, Ltd.
Terry Bailey
1300 DesMoines Building
405 Sixth Avenue
DesMoines, Iowa 50309

Iowa Transportation Department
800 Lincoln Way
Ames, Iowa 50010

Dated this 29th day of May, 2002.

UNION PACIFIC RAILROAD COMPANY

By: 
Mack H. Shumate, Jr.,
Its Attorney