BEFORE THE
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35141

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U.S. RAIL
– CONSTRUCTION AND OPERATION EXEMPTION –
BROOKHAVEN RAIL TERMINAL

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# REPLY TO MOTION TO STRIKE

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October 20, 2008.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35141

U.S. RAIL
– CONSTRUCTION AND OPERATION EXEMPTION –
BROOKHAVEN RAIL TERMINAL

REPLY TO MOTION TO STRIKE

Set forth below is the Reply of the Town of Brookhaven ("Town" or "Brookhaven") to the Motion to Strike the Town of Brookhaven's September 18, 2008 Response to the Exemption Petition ("Motion to Strike") filed by U.S. Rail Corporation ("U.S. Rail" or "Petitioner") on October 1, 2008.

## PRELIMINARY STATEMENT

U.S. Rail's motion to strike is an unfair tactic designed to delay the proceedings and intimidate or coerce the Town. As counsel for U.S. Rail knows, the Town has not filed an "impermissible reply to a reply," under 49 C.F.R. § 1104.13. Rather, it filed a letter responding to a scheduling matter in advance of filing a substantive reply to the merits of a petition. As explained herein, this is a common practice before the Board, particularly with respect to petitions that contain requests for "expedited handling" or "expedited processing." U.S. Rail's motion has no merit and should be denied. In addition, given U.S. Rail's history in this and other proceedings before the Board,[1] the Town requests

[1] See Finance Docket No. 35036 relating to the proposed rail facility in Brookhaven, New York. See also U.S. Rail Corporation—Lease And Operation Exemption—Shannon G., A New Jersey Limited Liability Company, STB Finance Docket No. 35042 (served October 8, 2008)(rejecting a notice of exemption filed by U.S. Rail because the Board found that U.S. Rail had provided false and misleading information in violation of 49 C.F.R. § 1150.42(c))(annexed hereto at Exhibit 1). Specifically, the Board found that U.S. Rail was "*not candid* in its notice of exemption," and "was attempting to *use the federal preemption* that the use of our notice of exemption process would confer on [the property] as *a means of avoiding the City's authority*." Id. at 4 (emphasis added).

that the Board in its ruling on this motion explicitly prohibit the filing of any additional "replies" by U.S. Rail to the Town's Reply to the Petition or this Reply to the motion to strike.

## PROCEDURAL BACKGROUND

On August 7, 2008, Petitioner filed a Construction and Operation Exemption Petition ("Petition") claiming that it is a common carrier seeking to construct and operate a line of railroad. With its five exhibits, the Petition totaled 38 pages. The brief was organized into five sections: (I) Introduction; (II) Factual Background; (III) Description of Proposed Line and Planned Operations; (IV) Argument; and (V) Request for Expedited Handling. As evident from the captions, the section entitled "Request for Expedited Handling" was separate and apart from the argument section relating to the merits of the brief. Specifically, it was set forth at the last two and a half pages of the brief and referred the reader to Exhibit "E," which was a "Proposed Schedule." That Schedule is appended hereto at Exhibit 2. The Proposed Schedule set forth a collapsed timetable under which the environmental analysis, public comment and Board review would be completed by December 2008, resulting in a final decision from the Board by the end of the year.

On August 25, 2008, at the Town's request, the Board granted the Town a 20-day extension to file its Reply. U.S. Rail Corporation—Construction and Operation Exemption—Brookhaven Rail Terminal, STB Finance Docket No. 35141 (served August 25, 2008). Given the tight timeline contemplated by the Proposed Schedule, however, the Town did not want its interim silence – from August 7, 2008 until September 18, 2008 – to be interpreted as consent to U.S. Rail's request for expedited handling of the Petition. As such, on September 2, 2008, the Town filed and served a 3-page letter (annexed hereto at Exhibit 3) responding solely to the request for expedited handling and Proposed Schedule set forth in the Petition at pages 17-19 and

Exhibit E thereto. That letter did not respond to any of the arguments set forth in the "Argument" section of the Petition, nor did it address the merits of whether the Petition should be granted; it simply addressed the request for expedited handling. See Exhibit 3.

In the meantime, the parties planned a meeting to discuss settlement on the date that the Reply was due, September 18, 2008. In view of this meeting, on September 11, 2008, Jessica P. Driscoll, counsel for the Town, sent an email (annexed hereto at Exhibit 4) to James H.M. Savage, counsel for U.S. Rail, requesting consent to a 20-day extension of time for the Town to file its Reply, until October 8, 2008. Attorney Driscoll wrote the following email to Attorney Savage at 10:15 a.m:

> Jim:
>
> As you may know, the parties are meeting on September 18, 2008 in an effort to discuss resolution of the issues between them. In light of the upcoming meeting, I am writing to request a 20-day extension of time (to October 8, 2008) for the Town to file its reply to the Petition for Exemption.
>
> Please let me know whether you consent to such an extension.
>
> Thank you.
> Jessica

See September 11, 2008 Email from Jessica P. Driscoll, Esq. to James H.M. Savage, Esq. annexed hereto at Exhibit 4. Attorney Savage replied to the email at 11:18 a.m., stating:

> Jessica,
>
> I don't understand your request. The Town filed its single permissible reply on 9/3/08. Any further reply would be subject to being stricken as an impermissible second reply.
>
> Cordially,
>
> James H. M. Savage

See September 11, 2008 Email from James H.M. Savage, Esq. to Jessica P. Driscoll annexed hereto at Exhibit 4. Although U.S. Rail included this exchange in its Motion to Strike at Exhibit

A, it failed to include Attorney Driscoll's subsequent response (annexed hereto at Exhibit 5). Specifically, at 2:30 p.m., Attorney Driscoll replied to Attorney Savage as follows:

> Thank you for your response, however, the Town strongly disagrees with your position. I presume that the 9/3 submission you reference was the 2-page[2] letter dated September 2, 2008 which explicitly noted that the Town had received an extension of time to file its reply but that "in the meantime" it would address the request for expedited schedule. As you know, that letter narrowly addressed one issue set forth in the petition (scheduling) and did not respond in any way to the merits of US Rail's 20-page Petition. It has always been the intention of the Town to file a substantive reply to the Petition on or before September 18th, as permitted by the Board's August 26th decision.
>
> Given that US Rail does not consent to the requested extension of time, the Town will file its substantive response as planned.

See September 11, 2008 Email from Jessica P. Driscoll, Esq. to James H.M. Savage, Esq. annexed hereto at Exhibit 5. U.S. Rail's counsel did not respond to the email. As stated in Attorney Driscoll's email, the Town then filed its substantive "Reply" to the Petition on September 18, 2008, as contemplated by the Board's August 26th decision.

On October 1, 2008, U.S. Rail filed its Motion to Strike, alleging that the Town's September 18, 2008 Reply was an impermissible "second reply." For the reasons set forth below, U.S. Rail is wrong on the law and the facts and the motion must be denied.

## ARGUMENT

### Point I
### The Town's Reply to the Petition for Exemption is Not an Impermissible Second Reply.

U.S. Rail hangs its hat on the Board's rule prohibiting replies to replies. See Motion to Strike at 4 (citing 49 C.F.R. § 1104.13). However, U.S. Rail misinterprets the letter of the rule, which reads, "A reply *to a reply* is not permitted." 49 C.F.R. § 1104.13(c)(emphasis added). Section 1104.13 means that when one party files an initial pleading, and the other party files a

[2] The email contains a typo: the letter was 3 pages.

reply, the party that filed the initial pleading cannot then file a reply to the reply. Indeed, *all* of the cases cited by U.S. Rail involve instances where a moving party responded to a reply filed in opposition to its original pleading, and the moving party's responsive pleading was struck as an impermissible second reply. See Consolidated Rail Corporation – Exemption – Abandonment of the Western Secondary Track in Harrison and Tuscarawas Counties, OH, ICC Docket No. AB 167 (Sub-No. 1088X)(served Oct. 23, 1990)(Tuscarawas County Commissioners ["TCC"] filed a pleading to which Conrail replied; Board found that TCC's subsequent "motion to strike" Conrail's reply was actually an impermissible reply to a reply); St. Louis Southwestern Railway Company – Trackage Rights Over Missouri Pacific Railway Company – Kansas City to St. Louis, ICC Finance Docket No. 30,000 (Sub-No. 16)(served Dec. 18, 1987)(Union Pacific Railroad Company ["UP"] filed a petition to reopen, to which Denver Rio Grande Western Railroad Company ["DRGW"] replied; Board found that UP's subsequent letter "to correct certain mistakes" in DRGW's reply was an impermissible reply to a reply); Missouri Pacific Railroad Company and Consolidated Rail Corporation – Joint Petition for Declaratory Order – Recovery of Transportation Charges, ICC Docket No. 40139 (served Nov. 9, 1987)(Kansas City Southern Railway Company ["KSC"] filed a motion to dismiss, to which Missouri Pacific Railroad Company ["MP"] replied; Board ruled that KSC's subsequent motion to strike MP's reply was "in essence a reply to a reply" that responded to MP's arguments).

Unlike a moving party responding to an opposing party's reply, the Town has simply filed one letter addressing the request for expedited schedule, and one pleading addressing the merits. The Town did not repeat arguments in its reply that were previously submitted in the letter. Cf. Missouri Pacific Railroad Company, ICC Docket No. 40139 (served Nov. 9, 1987) at 1 (finding that the "motion to strike" was "in essence a reply to a reply" and noting that "KSC

simply restate[d] arguments previously made"). In fact, letters regarding scheduling are often filed with the Board separate and apart from the substantive pleading. See Canadian National Railway Company and Grand Trunk Corporation Control EJ&E West Company, STB Finance Docket No. 35087 (served November 26, 2007) at 11. This of course happens often when a party requests an extension of time, as was the case here. See Letter from Jessica P. Driscoll to the Board requesting extension of time (Document No. 223278 in this matter).

With particular relevance to this case, the practice of responding by letter to a request for expedited handling and then responding by formal filing to the substantive merits of a petition is fairly standard. See, e.g., Union Pacific Railroad Company – Petition for Declaratory Order – Forced Abandonment of Rail Line in Salt Lake City, Utah, STB Finance Docket No. 34090 (served November 9, 2001)(annexed hereto at Exhibit 6).

In Union Pacific, the railroad filed a Petition for Declaratory Order (Document No. 203229, annexed hereto at Exhibit 7), which sought a decision from the Board declaring that Salt Lake City could not sever an existing line or prevent operations over it. Separate and apart from the argument on the merits, the Petition also included a request for expedited action in the proceeding. See Exhibit 7 at 2. The Petition for Declaratory Order was filed on August 22, 2001 and the responsive pleading was due September 12, 2001. Prior to filing the responsive pleading, however, Salt Lake City filed a letter with the Board (Document No. 203351, annexed hereto at Exhibit 8) objecting specifically to the request for expedited action contained in the railroad's petition. Salt Lake City subsequently obtained a 2-day extension for the time for filing its Reply, which it filed on September 14, 2001 (Document No. 203229, annexed hereto at Exhibit 9). The Board permitted the filing of the Reply, without any discussion of an

"impermissible second reply." See, e.g., Union Pacific Railroad Company, STB Finance Docket No. 34090 (served November 9, 2001).

Similarly, here, the letter sent by the Town on September 2, 2008, was merely a response to U.S. Rail's request for an expedited schedule. See Exhibit 3. The Town filed the letter because Brookhaven did not want its silence to be taken as a basis for the Board to adopt the expedited schedule proposed by U.S. Rail. Much like Salt Lake City in the Union Pacific case, the Town felt compelled to respond quickly to the "emergency" request for "expedited handling" and chose to do so prior to the time allotted for the substantive reply, which it filed separately and timely.

## Point II
## Denying U.S. Rail's Motion Will Not Result in a "Windfall" of "Bifurcated" or "Second" replies

From a policy standpoint, there is nothing new in the Town's Reply. U.S. Rail's suggestion to the contrary is simply smoke and mirrors. As explained above, the practice of filing separate letter responses to scheduling issues – particularly with respect to requests for expedited handling – is fairly standard. By allowing the Town to repeat the usual practice here, the Board would not "be tacitly permit[ing] heretofore unauthorized and prohibited multiple, segmented, and bifurcated filings." Motion to Strike at 8. Much like its failure to attach the entire email chain between counsel, see Exhibit 5, U.S. Rail's "policy" argument is disingenuous and deserves short shrift.

## Point III
## The Board May Consider Any Public Comments Filed In Response To A Petition For Exemption

In the unlikely event that the Board determines the letter sent by the Town on September 2, 2008 was a "reply" and construes the Reply filed on September 18, 2008 as an impermissible

pleading, the Board may still consider the September 18, 2008 filing in its determination of the merits. The Board may consider the Reply as a public comment filed in response to a petition for exemption. See 49 C.F.R. § 1121.4(A).

## Point IV
## U.S. Rail Should Not Be Permitted to Reply to The Town's September 18, 2008 Reply or to This Reply to its Motion to Strike.

U.S. Rail is not permitted to reply to Brookhaven's reply, regardless of what U.S. Rail has argued in its motion to strike. First, if U.S. Rail were to file a response to Brookhaven's Reply to the Petition, it would actually be the type of prohibited reply to reply that U.S. Rail so adamantly opposes in its motion to strike. See, e.g., Consolidated Rail Corporation, ICC Docket No. AB 167 (Sub-No. 1088X)(served Oct. 23, 1990); St. Louis Southwestern Railway Company, ICC Finance Docket No. 30,000 (Sub-No. 16)(served Dec. 18, 1987); Missouri Pacific Railroad Company and Consolidated Rail Corporation, ICC Docket No. 40139 (served Nov. 9, 1987).

Second, U.S. Rail elected to follow the exemption process, which requires the petitioner to file its case in chief, see 49 C.F.R. § 1121.3(a), and does not permit a reply as a matter of right. U.S. Rail is represented by skilled counsel who are familiar with the Board's procedures and with federal railroad laws and regulations. If U.S. Rail had expected opposition, as it clearly should have from the history of these proceedings,[3] it should have filed an application under 49 U.S.C. § 10901 to ensure itself of a right to reply. See 49 C.F.R. § 1150.10(h). If U.S. Rail's Petition for Exemption is insufficient for the Board to determine the environmental and

[3] The parties have a long history relating to the proposed fail facility in Brookhaven, NY. In addition to this proceeding, numerous pleadings have been filed under STB Docket No. 35036 (including an appeal to the Second Circuit from one of the Board's decisions in that matter) and before the U.S. District Court for the Eastern District of New York in Sills Road Realty LLC, U.S. Rail Corporation, Watral Brothers, Inc., Pratt Brothers, Inc., Adjo Contracting Corp., and Suffolk & Southern Railroad LLC v. the Town of Brookhaven, E.D.N.Y. Case No. 07-CV-4584 (TCP)(ETB).

economic impact, the Board can exercise its discretion to request additional information, seek public comments, or deny the petition. See 49 C.F.R. § 1121.4(c).

## CONCLUSION

For the reasons set forth above, the Town respectfully requests that the Board deny the Motion to Strike filed by U.S. Rail on October 1, 2008 and enter an order prohibiting U.S. Rail from filing any further replies relating to the Motion to Strike or the Petition for Exemption.

Respectfully submitted,

MARK A. CUTHBERTSON
Law Offices of Mark A. Cuthbertson
434 New York Avenue
Huntington, New York
(631) 351-3501

*Attorneys for Town of Brookhaven*

Dated: October 20, 2008.

## CERTIFICATE OF SERVICE

I, Mark A. Cuthbertson, certify that, on this 20th day of October, 2008, I caused a copy of the foregoing document to be served by e-mail on all parties of record in STB Finance Docket No. 35141.

Mark A. Cuthbertson (SS)

Mark A. Cuthbertson

# EXHIBIT 1

38467
EB

SERVICE DATE – OCTOBER 8, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35042

U S RAIL CORPORATION—LEASE AND OPERATION EXEMPTION—SHANNON G., A NEW JERSEY LIMITED LIABILITY COMPANY

Decided: October 7, 2008

On June 6, 2007, U S Rail Corporation (U S Rail) filed a verified notice of exemption to lease and operate approximately 1,400 feet of track then under construction. The Board delayed the effectiveness of the exemption pending additional evidence and further order of the Board. The City of Paterson, NJ (City), and the New Jersey Department of Environmental Protection (NJDEP) submitted filings in opposition to the notice of exemption. As discussed below, we are rejecting U S Rail's notice of exemption.

BACKGROUND

On June 6, 2007, U S Rail, a Class III rail carrier, filed a verified notice of exemption under 49 CFR 1150.41 to lease from Shannon G. (SG), a New Jersey limited liability company and noncarrier, approximately 1,400 feet of track that U S Rail stated SG was then constructing in Paterson, NJ, and to operate over it. As a result of this transaction, U S Rail stated that it would provide exclusive common carrier rail freight service over the trackage serving a transload terminal owned by SG.[1]

In a decision served June 15, 2007, the Board held that it would not allow U S Rail's exemption to become effective until further notice and that the applicant should provide additional information. Noting that the track which SG was constructing might be a line of railroad that requires prior Board approval, the Board directed U S Rail to file supplemental information to explain its claim that the track was not subject to the Board's jurisdiction because it was so called "private" track. U S Rail timely filed its supplement on July 3, 2007.

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[1] U S Rail claims that it would interchange traffic with The New York, Susquehanna and Western Railway Company (NYS&W). On June 11, 2007, NYS&W submitted a filing in which it explains that it has not entered into an interchange or switching agreement with U S Rail, and that it currently has no rail connection with SG's facility. NYS&W further stated that, should the exemption become effective, it would be prepared to negotiate arrangements to provide service to the facility.

The City, in its opposition, explained that, on April 25, 2007, it began eminent domain proceedings on the property upon which the track in question was located. In its reply in opposition, NJDEP explained that it believes that U S Rail is using the notice of exemption process to shield the carrier's handling of waste from state and local environmental laws. U S Rail filed a rebuttal to the City's submission on August 17, 2007, and a reply to NJDEP's submission on August 30, 2007.

POSITIONS OF THE PARTIES

The City argues that we should reject the notice as being void ab initio because U S Rail omitted information or presented a number of facts and issues inaccurately. The City claims that U S Rail failed to tell the Board in its notice of exemption that the City had already initiated a condemnation action involving the property at issue here. The City also claims that U S Rail was not truthful when it stated that it did not intend to handle waste.

Additionally, the City argues that the carrier's proposed operations appear to meet or exceed our thresholds for an environmental review and that U S Rail's claims to the contrary are false and misleading.

The City argues that the transaction is not suited for the notice of exemption process, as the project is controversial. The City also points out that the transaction does not involve the continuation of rail service on the line, because U S Rail is actually seeking to lease and operate newly constructed track on SG's property.

The City further asserts that the Board should reject the notice of exemption based on another Board proceeding, Jefferson Terminal Railroad Company—Acquisition and Operation Exemption—Crown Enterprises, Inc., STB Finance Docket No. 33950 (STB served Mar. 19, 2001) (Jefferson Terminal). The City explains that the Board revoked the exemption in that case for a number of reasons that also apply here, including that the applicant there also failed to be candid about a pending condemnation proceeding.

NJDEP echoes many of the arguments raised by the City. NJDEP asserts that U S Rail is attempting to use the Board's processes as a means of shielding waste activities at the site from state and local environmental laws and that U S Rail has not demonstrated that environmental review is unnecessary in this proceeding. NJDEP argues further that the Board should reject the notice because U S Rail has not sufficiently explained why the track that SG was constructing is private track and thus beyond the Board's jurisdiction.

In its replies to the arguments presented by the City and NJDEP, U S Rail asserts that it no longer handles solid waste at any of its other locations and that it does not seek to handle waste, including construction and demolition debris, at the SG transloading site. U S Rail claims that its plans with SG to bring rail service to the site significantly predated the City's condemnation action and that U S Rail, a bona fide rail carrier, had no intent to deceive anyone by failing to disclose the existence of the condemnation suit in its notice of exemption.

Specifically, U S Rail contends that it was unaware of the condemnation proceeding prior to filing the notice of exemption.[2] U S Rail thus argues that this case is unlike Jefferson Terminal.

U S Rail reiterates why none of the environmental thresholds would be exceeded here. U S Rail further argues that the fact that there is controversy in this case should not prevent the Board from allowing the notice of exemption to go into effect. U S Rail adds that SG has indeed constructed a private track on its property, and that no prior Board approval was necessary.

## PRELIMINARY MATTERS

On August 30, 2007, the City filed a motion asking the Board to strike potions of U S Rail's August 17, 2007 rebuttal or, in the alternative, to accept its arguments refuting some of the applicant's assertions. U S Rail filed a reply in which it claims that the City's motion to strike is nothing more than a reply to a reply, a pleading prohibited by our regulations.[3]

We will accept the arguments proffered by the City and not strike U S Rail's arguments. The parties' pleadings and attached exhibits provide for a more complete record regarding the proposed transaction. For this same reason, we will also grant NJDEP's request to intervene in the proceeding.

## DISCUSSION AND CONCLUSIONS

An exemption under 49 CFR Part 1150 Subpart E is void *ab initio* if the notice contains false or misleading information. 49 CFR 1150.42(c). U S Rail's notice of exemption (at 3) describes the property to be leased as "a rail-served transload terminal owned by Shannon," and the caption summary attached as Exhibit C to the notice states that the property to be leased is "currently owned by Shannon G." However, the record shows that, at the time the notice of exemption was filed on June 6, 2007, the City had begun a condemnation action – the very purpose of which was to end SG's ownership. Moreover, although U S Rail claims that it did not know about the condemnation proceeding when it filed its notice of exemption, we find that it did. The record shows that U S Rail leased the subject property from SG on August 10, 2006,[4] and that the City offered to buy the property in a letter dated February 13, 2007.[5] The record further shows that the City initiated the condemnation proceeding on April 25, 2007, by filing a verified complaint in state court. The City also submitted a fact certification by Gabriel Hall, as President and CEO of U S Rail, dated May 22, 2007, as evidence of U S Rail's acknowledgment of the condemnation proceeding.[6] That document demonstrates that, despite its assertion to the contrary, U S Rail had actual notice of the condemnation action before it filed its notice of exemption on June 6, 2007. We find that U S Rail's failure to disclose the condemnation action

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[2] See U S Rail's August 17, 2007 Reply, V. S. Hall at 1.

[3] See 49 CFR 1104.13(c).

[4] See NJDEP's August 10, 2007 Reply, Exhibit A.

[5] See City's July 26, 2007 Reply at 6.

[6] See City's Motion to Strike, filed August 30, 2007, at 2-3 and Appendix at 1.

in its notice of exemption renders the notice's assertions regarding SG's ownership of the property materially misleading by omission, rendering the notice void *ab initio*.

Additionally, Mr. Hall states in his verified statement on behalf of U S Rail that he learned of the condemnation proceeding and that a representative of NYS&W then advised him "to do what he had to do" and seek STB operating authority.[7] Not only does Mr. Hall's verified statement indicate that U S Rail was not candid in its notice of exemption, but the statement leaves us with the clear impression that U S Rail was attempting to use the federal preemption that the use of our notice of exemption process would confer on SG's property as a means of avoiding the City's authority to pursue the condemnation proceeding. In Jefferson Terminal, we found similar actions to be unacceptable.[8] These actions are unacceptable here too, and the false and misleading information U S Rail provided warrants rejecting the notice of exemption.

Because we are rejecting the notice of exemption, this proceeding is terminated.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. NJDEP's motion to intervene is granted.

2. The City's motion to strike is accepted, but it is denied as described above.

3. As described above, U S Rail's notice of exemption is rejected, and this proceeding is terminated.

4. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary

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[7] See U S Rail's July 3, 2007 Supplement, V. S. Hall at 3.

[8] See Jefferson Terminal, slip op. at 5.

# EXHIBIT 2

**EXHIBIT E: PROPOSED SCHEDULE**

| | |
|---|---|
| COMPLETED | Initial Meeting between Petitioner, SEA and proposed independent third party Environmental Consultant. |
| COMPLETED | Petitioner selects and advises Board of its selection of independent third party environmental consultant. |
| COMPLETED | SEA grants waiver of six months advance notice. |
| COMPLETED | SEA approves choice of environmental consultant, furnishes Petitioner and consultant with memorandum of understanding (MOU) for review. |
| COMPLETED | MOU executed; consultant begins work. |
| 08/07/08 | Petition for Exemption filed. |
| 08/28/08 | STB publishes notice of Petition. |
| 09/05/08 | SEA or consultant sends out consultation letter to affected state, local, and federal agencies. |
| 09/18/08 | Public comments due on Petition for Exemption. |
| 10/06/08 | Responses to consultation letters due. |
| 10/20/08 | Site visit occurs. Need for public scoping meeting and/or detailed studies to be determined based upon results of consultation letters and site visit. |
| 11/06/08 | Consultant distributes draft work plan, SEA issues class of action determination. Consultant formally begins preparation of the NEPA documentation. |
| 11/26/08 | Consultant in conjunction with SEA publishes Draft EA/EIS. |
| 12/16/08 | Comments on Draft EA/EIS due. |

| | |
|---|---|
| 12/24/08 | Consultant in conjunction with SEA publishes Final EA/EIS. |
| 12/31/08 | STB issues decision on merits of Petition. Decision becomes effective absent any stay. |

# EXHIBIT 3

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of
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September 2, 2008

**VIA ELECTRONIC FILING**
Anne K. Quinlan, Acting Secretary
Surface Transportation Board
395 E. Street Southwest
Washington, DC 20024

RE: US Rail – Construction and Operation Exemption – Brookhaven Rail Terminal
STB Finance Docket No. 35141

Dear Ms. Quinlan:

I represent the Town of Brookhaven, New York ("Brookhaven") in the above-captioned matter. I am writing in response to the request by U.S. Rail Corporation ("U.S. Rail") for "expedited handling" of the "Petition for Exemption" it filed on August 7, 2008. As you know, Brookhaven has been granted an extension to file a reply to the Petition pursuant to § 1104.13.

In the meantime, Brookhaven strongly opposes the proposed schedule submitted at Exhibit E to U.S. Rail's Petition for Exemption.

The requested schedule would obliterate all opportunity for any meaningful environmental review. As the Board is aware, U.S. Rail commenced construction without any federal, state or local approval in July 2007 and construction continued until the Board issued its cease and desist order on October 12, 2007. The Board's October 12th decision relied in part on a letter from Brookhaven that it received on October 2, 2007 and a news article appearing in Newsday on October 2, 2007. A copy of that letter and article are annexed as Exhibit "A." The Newsday article noted that an estimated 30,000 cubic yards of sand had been mined and 18 acres of land had been cleared by the time construction was halted. This unauthorized work has already had a significant unmitigated impact on the environment. Clearly it will take more than 4 months to both assess the environmental impact that have already occurred much less to evaluate the effects of future construction plans for the 28-acre site.

The site in question is in an environmentally-sensitive area based on its location in a deep flow recharge zone, which is ecologically part of the Long Island Pine Barrens. The Pine Barrens overlays and recharges a portion of a federally designated sole source

acquifer for Long Island's drinking water and therefore development of the property may cause significant hydrological and ecological impacts.

As such, in making any decisions with respect to the environmental setting, it will be necessary to carefully analyze the resources and features of the property, the impacts of the proposed development, the strategies that can be implemented to mitigate those impacts, and reasonable alternatives to U.S. Rail's proposed configuration of the site.

In this case, in particular, it will be necessary to carefully scrutinize the removal of sand between the land surface and the water table because the land surface is the uppermost expression of the groundwater system that acts as a filtering agent for water that is recharged into the aquifer.

In sum, a project of this size (28 acres) and intensity (11,000 square feet of rail trade and associated facilities and equipment) will require a comprehensive review and assessment of the many environmental impacts and potential mitigation measures, which will include, but not be limited to:

a) The layout of the facility and whether there were other alternative layouts of the site to minimize disturbance to the environment and thereby create layer buffer areas.

b) The grading of the property and the mining of materials that takes place in connection therewith. There is a significant change of grade from the northern portion of the property as you go south to the middle of the property. Based on the plans submitted by U.S. Rail it appears that the whole northern portion of the project would be lowered approximately ten feet. Such a proposed change in elevation would require a tremendous amount of grading.

c) The traffic to be generated by the site and traffic mitigation measures (*e.g.*, reconfiguration of the site, requirement of road widening and turning lanes) that might be required.

U.S. Rail has requested an extremely aggressive review schedule based on cases that are completely inappropriate. First, all of the cases cited involve "conditional approvals" pending environmental review. As you know, the Board recently announced a change in policy on handling construction petitions: the Board will no longer grant conditional approval while the environmental process is ongoing absent some "unique or compelling circumstances." See Alaska Railroad Corporation – Construction and Operation Exemption – Rail Line between Eielson Air Force Base (North Pole) and Fort Greely (Delta Junction), AK, STB Finance Docket No. 34658 (served October 4, 2007)(" we believe that the better course is that we not decide the transportation merits of a construction proposal until a complete record, including the environmental record, is before us.")

Second, not one of the cases cited as being "expedited" resulted in a final decision issued in less than one year. According to the Board's electronic database, Ellis County's petition for exemption (FD 33731) was filed on November 17, 1999 and final decision was not served until November 27, 2000; Alamo North Texas Railroad's petition for exemption (FD 34002) was filed on August 28, 2001 and final decision was not served until September 3, 2002; and Pemsicot County Port Authority's petition for exemption (FD 34117) was filed on April 3, 2002 and the final decision was not served until August 26, 2003. Perhaps the most egregious case of mischaracterization is the Southwest Gulf case (FD 34284), in which the petition for exemption was filed on February 27, 2003 and a final decision still has not been served. In fact, the final EIS was just filed on May 30, 2008. The "expedited" timelines in these cases clearly illustrate the impracticality of U.S. Rail's request.

Further, based on the Board's current caseload, the compressed environmental schedule is totally unreasonable. U.S. Rail is in effect asking the Board to give its petition higher priority than all others, including those that have been under review for years, without offering any rational justification for doing so.

Finally, the purported reason for the expedited schedule is because "Sills Group and US Rail have entered into commitments for the delivery of aggregate stone that contemplate that the rail construction will be approved during late 2008 and completed during early 2009." Petition at 17. The fact that the petitioners have entered into contracts without even preliminary authority from the STB to proceed (and – in fact – a directive from the Board to "cease and desist" all construction) is not a *reason* for the Board to now rush through its regulatory process. The process was designed to ensure public input and address environmental and safety concerns. Any inconvenience to U.S. Rail due to its own error in committing itself to an unreasonable timeline should not factor into the Board's analysis. It is also important to note that U.S. Rail began construction in July 2007 and was ordered to cease and desist in October 2007. It chose to wait 10 months since October 2007 to finally seek exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 for authority to construct. Having made that choice, U.S. Rail is hard-pressed to justify the expedited schedule it now seeks.

For the reasons stated herein, Brookhaven respectfully requests that U.S. Rail's request for "expedited handling" be denied. Thank you for your consideration of this request.

Very truly yours,

Mark A. Cuthbertson

cc: James Savage, Esq.

## CERTIFICATION OF SERVICE

I, Mark A. Cuthbertson, certify that on 2nd day of September, 2008, a copy of this document, as submitted to the Board via electronic filing, was sent via email to James Savage, (counsel for U.S. Rail Corporation).

LAW OFFICES OF MARK A. CUTHBERTSON

By: _____

Mark A. Cuthbertson
Of Counsel to Karen M. Wilutis, Esq.
Town Attorney
Town of Brookhaven
Attorney for Respondent
434 New York Avenue
Huntington, New York 11743
631-351-3501

# EXHIBIT A

# Town of Brookhaven
# Long Island

Brian X. Foley, Supervisor

October 2, 2007

Surface Transportation Board
Attention: Nancy Beiter, Esq.
395 E Street, S.W.
Washington, DC 20423-001

Re: U.S. Rail Corporation Facility/Yaphank, New York

Dear Ms. Beiter:

The Town of Brookhaven, New York has been in communication with representatives of U.S. Rail Corporation ("U.S. Rail") concerning a proposed rail facility on property that they have leased in Yaphank, Town of Brookhaven, New York. U.S. Rail has alleged that as a common carrier railroad, their construction and operation of this "Rail Yard" is governed by federal law, rules and regulations and subject to the exclusive jurisdiction of the Surface Transportation Board. They, therefore, claim that local laws, rules and regulations have no applicability to this project. A copy of identical letters from their counsel, John D. Heffner, one faxed July 12, 2207 and the other received by mail on July 27, 2007 are attached.

Although representatives of the Town have demanded proof of that authority, such as a copy of any documents or exemptions, U.S. Rail has not provided them. They appear to be relying on their authority to act because they are an authorized rail corporation.

Without obtaining the necessary permits under New York State and Town of Brookhaven laws, rules and regulations, representatives of U.S. Rail have commenced clearing and possibly sand mining on the premises. We are particularly disturbed that apparently no environmental review under either NEPA or New York State's SEQRA was undertaken.

Department of Law
Robert F. Quinlan, Town Attorney
One Independence Hill • Farmingville • NY 11738 • Phone (631) 451-6500 • Fax (631) 698-4489 • Fax (631) 451-6505
www.brookhaven.org
Litigation papers are NOT to be served by FAX except by express prior written permission
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Re: US Rail Corporation Facility/Yaphank, New York

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The Town realizes that if U.S. Rail is acting under the authority of the Surface Transportation Board, than their actions may be justified. As we have not received adequate documentation from U.S. Rail or their counsel to prove their authority, the Town of Brookhaven will be filing a formal petition for a declaratory order with the Surface Transportation Board shortly.

The purpose of this letter is to advise you of that intended action as well as to ascertain if there is any existing process initiated by U.S. Rail on this action.

Very truly yours,

Robert F. Quinlan
Town Attorney

RFQ:dah
Enclosures

# Newsday.com

## Work started for Yaphank rail site without approvals

BY JENNIFER SMITH AND ERIK GERMAN

jennifer.smith@newsday.com
erik.german@newsday.com

10:59 PM EDT, October 1, 2007

★macy's

An Ohio rail company working with Long Island asphalt plant owners has cleared 18 acres in Yaphank and excavated mountains of sand in preparation for building a rail-to-truck transfer site -- without having sought any government approvals.

The state Department of Environmental Conservation has issued citations for mining without a permit to Watral Bros., the Bay Shore subcontractor preparing the site, and to the owner of the land -- Sills Road Realty, a consortium of local asphalt plant and construction business owners with offices in Syosset.

Work at the site was voluntarily halted by Wednesday evening, said DEC regional director Peter Scully. "The most serious concern is that a development project that calls for the clearing of a 28-acre site and the mining of hundreds of thousands of cubic yards of material could move forward without any environmental review," Scully said last week.

**Federal defense**

The railroad involved -- U.S. Rail Corp. of Toledo, Ohio, which has signed a 30-year lease with Sills Road Realty -- says federal law allows railroads to undertake such projects without state and local permits. Earlier this year, the same landowners attempted to set up their own railroad to operate a rail spur at the site only to abandon the tack when the process became "unduly complex and complicated," said Gerard Drumm, the chief financial officer and council for Sills Road Realty. And this summer, the state rejected the company's bid for rail bond funding in part because the Department of Transportation didn't have evidence that Sills Road Realty or U.S. Rail were authorized to operate as rail companies in the state.

The DEC visited the Yaphank site Monday to make sure work had not resumed, said Scully. Drumm and U.S. Rail president Gabriel Hall said their companies are "in discussions" with the DEC about the citations, which could lead to an administrative hearing if the parties cannot resolve their differences.

**A big haul**

Brookhaven town spokesman Tom Burke said a town inspector estimated about 1,000 cubic yards of sand was being removed from the site each day. "Judging by the size of the hole it could have been going on for six weeks," Burke said. At that rate, at current prices, the sand could sell for $330,000 to $750,000.

"We're not a sand-mining operation," said Drumm. "We're excavating for a construction project ... under state law that isn't mining." Drumm said Friday the sand was being sold.

Residents say they first learned of the project in late August, when they saw machinery toppling trees at the site, which is about a mile from homes.

"We had no clue who, when, where, what was going on," said Fran Hurley, president of the Yaphank Taxpayers and Civic Association. Hurley said residents are concerned about the traffic from the project, and whether the excavation could affect groundwater resources deep below the site.

Representatives of U.S. Rail and Sills Road Realty say they have communicated a number of times with the town and that they are working to address residents' concerns.

Drumm said the industrially zoned site is suited for their facility because it is close to the LIE. He added that it also lies within the town's Empire Zone -- an area where businesses get state tax credits for ventures that attract capital and create jobs. He also said the facility would reduce local truck traffic.

Sills Road Realty first discussed the project with Brookhaven officials in January. They then met with the Suffolk planning department, Drumm said. Town and county officials characterized the discussions as preliminary.

**Quite a surprise**

County public works department's chief engineer William Hillman said his department had no idea that work had started until late August, when they saw bulldozers in action. Hurley said the company only met with her group after she contacted them herself.

Brookhaven town spokesman Burke said the town exercised "due diligence" and recommended that the railroad contact local civic groups.

U.S. Rail told Brookhaven officials in a July 12 letter that they intended to start work in the next 30 days. On July 20, town officials met with a project backer, who they said repeated that they could bypass local and state controls because railroads are overseen by the federal Surface Transportation Board. Said Burke: "It is arguable whether the town should have demanded to see the exemption, but it certainly exists in law and ... we presumed they qualified for the exemption," Burke said.

Earlier this year Sills Road Realty had tried to set up its own short-line rail company under the name Suffolk and Southern Rail Road. In May, Suffolk and Southern filed a notice of exemption with the Surface Transportation Board seeking federal authority for the project. But the board indicated that the project would require Board authorization -- as well as an environmental review.

**Fall into disfavor**

That's when Suffolk and Southern withdrew its application. The board's decision in the matter, released last week, said that it would "view with disfavor any future request for authority to commence rail operations of trackage at this location unless the construction of that trackage has first been authorized

by the Board."

U.S. Rail has not submitted filings on the Yaphank project to the Board. Railroad president Gabriel Hall said his company does not have to file a notice of exemption because U.S. Rail is already recognized by the Board as a common carrier in Ohio.

A Surface Transportation Board staff attorney said the board could not determine whether U.S. Rail has operating authority for the Yaphank project unless a complaint is filed. As of Monday, nobody had formally done so.

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# EXHIBIT 4

From: Jim Savage <jsavagelaw@aim.com>
To: jdriscoll@cuthbertsonlaw.com
Bcc: j.heffner@verizon.net; gdh@usrailcorp.com; akaufman@lbiequip.com; gdrumm-sills@optonline.net
Subject: Re: US Rail/Brookhaven: STB FD 35141
Date: Thu, 11 Sep 2008 11:18 am

---

Jessica,

I don't understand your request. The Town filed its single permissible reply on 9/3/08. Any further reply would be subject to being stricken as an impermissible second reply.

Cordially,

James H. M. Savage
Attorney at Law
1750 K Street, N.W. - Suite 350
Washington, DC 20006
Tel. (202) 296-3333
Fax (202) 296-3939
jsavagelaw@aim.com

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-----Original Message-----
From: Jessica Driscoll <jdriscoll@cuthbertsonlaw.com>
To: James Savage <jsavagelaw@aim.com>
Cc: mcuthbertson@cuthbertsonlaw.com
Sent: Thu, 11 Sep 2008 10:15 am
Subject: US Rail/Brookhaven: STB FD 35141

Jim:

As you may know, the parties are meeting on September 18, 2008 in an effort to discuss resolution of the issues between them. In light of the upcoming meeting, I am writing to request a 20-day extension of time (to October 8, 2008) for the Town to file its reply to the Petition for Exemption.

Please let me know whether you consent to such an extension.

Thank you.
Jessica

Jessica P. Driscoll, Esq.
Law Offices of Mark A. Cuthbertson
434 New York Avenue
Huntington, NY 11743
(631) 351-3501
jdriscoll@cuthbertsonlaw.com

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# EXHIBIT 5

## Jessica Driscoll

**From:** Jessica Driscoll [jdriscoll@cuthbertsonlaw.com]
**Sent:** Thursday, September 11, 2008 2:30 PM
**To:** James Savage (jsavagelaw@aim.com)
**Cc:** 'mcuthbertson@cuthbertsonlaw.com'
**Subject:** RE: US Rail/Brookhaven: STB FD 35141

Jim:

Thank you for your response, however, the Town strongly disagrees with your position. I presume that the 9/3 submission you reference was the 2-page letter dated September 2, 2008 which explicitly noted that the Town had received an extension of time to file its reply but that "in the meantime" it would address the request for expedited schedule. As you know, that letter narrowly addressed one issue set forth in the petition (scheduling) and did not respond in any way to the merits of US Rail's 20-page Petition. It has always been the intention of the Town to file a substantive reply to the Petition on or before September 18th, as permitted by the Board's August 26th decision.

Given that US Rail does not consent to the requested extension of time, the Town will file its substantive response as planned.

Jessica

Jessica P. Driscoll, Esq.
Law Offices of Mark A. Cuthbertson
434 New York Avenue
Huntington, NY 11743
(631) 351-3501
jdriscoll@cuthbertsonlaw.com

# EXHIBIT 6

19 of 105 DOCUMENTS

UNION PACIFIC RAILROAD COMPANY - PETITION FOR DECLARATORY ORDER

STB Finance Docket No. 34090

SURFACE TRANSPORTATION BOARD

*2001 STB LEXIS 853*

**SERVICE DATE:** November 9, 2001

November 7, 2001

**PANEL:**
[*1]

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

**OPINION:**

DECISION

In a petition filed on August 23, 2001, the Union Pacific Railroad Company (UP) seeks institution of a declaratory order proceeding and a finding that Salt Lake City, UT (City) cannot sever, or prevent operation over, a 1.32-mile UP line of railroad (the Line) n1 without first obtaining adverse abandonment authority under *49 U.S.C. 10903*. n2 In its September 14, 2001 reply, n3 the City argues that UP contractually agreed to remove the tracks over the street crossings at issue, an assertion which UP disputes. As discussed below, there is no need for the Board to institute a declaratory order proceeding because the issues presented are well settled.

n1 The track in dispute is a portion of UP's "900 South Line," which is located between milepost 781.0 and milepost 782.32.

n2 UP requests expedited action because the City, in an August 3, 2001 letter to UP (August 3 Letter), states that it is directing UP to remove its tracks from all crossings of city streets east of Redwood Road by November 1, 2001. See UP Petition for Declaratory Order, Exhibit 1 at 2. On September 6, 2001, the City responded that the expedited handling request should be denied because there is no urgent need for UP to use the Line and no action to physically impair use of the Line is imminent. This is inconsistent with the August 3 Letter. UP subsequently submitted two additional responses seeking expedited handling. To provide guidance, this decision is being issued as expeditiously as possible.

[*2]

n3 On September 12, 2001, the date its reply was due, the City filed a request for an extension of time to file a reply until September 14, 2001. The City has represented that UP has no objection to the extension. The request for an extension of time will be granted.

MOTION TO CONSOLIDATE

Simultaneously with its September 14, 2001 reply, the City filed a notice of intention to file an adverse abandonment application in STB Docket No. AB-33 (Sub-No. 183) n4 and a motion to consolidate this proceeding with the anticipated adverse abandonment proceeding. n5 The two proceedings, however, are procedurally incompatible. First, abandonments are governed by strict procedural rules, see 49 CFR 1152, that do not apply to proceedings addressing requests for declaratory order. Second, a decision in this proceeding must necessarily precede the adverse abandonment

proceeding, as it addresses whether an adverse abandonment proceeding is required. Third, the factual and legal issues necessary to determine whether the Line should be authorized to be abandoned are not presented in this proceeding. Finally, this proceeding may be decided on the present record, while the City's anticipated adverse [*3] abandonment application has not yet been filed. Therefore, the motion to consolidate will be denied.

n4 The City filed an amended notice of intent to seek adverse abandonment authority on October 12, 2001.

n5 UP replied to the motion to consolidate on September 27, 2001.

BACKGROUND

In 1906, the Line was constructed to link a then-new UP passenger depot in downtown Salt Lake City to UP's main line to Los Angeles, CA. In so doing, the Line became a part of an important freight route and major main line used by passenger, mail and express trains between Salt Lake City and Los Angeles. Over time, the use of the Line has changed and diminished. In 1971, passenger service was transferred to the National Railroad Passenger Corporation, which re-routed its service away from the Line in the mid-1980s. By the 1990s, many of the on-line shippers had converted to truck transportation or left the area. By then, the only service consisted of a daily local train serving the Line's remaining customers and nearby trackage. The Line also continued to be used by trains seeking an alternate through-route.

In 1997, UP agreed to cooperate with the City on a project designed to facilitate a major [*4] commercial and residential development in the area near the Line by rearranging track through the downtown area and the area known as Grant Tower, immediately north of the Line. According to UP, it initially planned to abandon the Line, but ultimately limited its abandonment filing to a contiguous 0.47-mile segment of the 900 South Line. See Union Pacific Railroad Company--Abandonment Exemption--in Salt Lake County, UT, STB Docket No. AB-33 (Sub-No. 116X) (STB served Sept. 30, 1998). UP explains that it retained the Line so that the Line could form part of a freight bypass route between UP's Roper Yard and its main line track to the Los Angeles/Oakland Bay area. n6 No trains have operated over the Line since March 1999.

n6 According to UP, this alternate route will be possible once it builds a connection to an intersecting main line.

UP states that its decision to reactivate the Line is related to the 2002 Winter Olympics and is designed to allow approximately 8-10 trains per day to be routed away from the Olympic event sites. UP submits that the project is also being pursued for its long-term transportation benefits, which are reduced transit time and reduced congestion on [*5] the UP route through the Grant Tower area. In response to UP's statement of intent to reactivate the Line, the Honorable Ross C. Anderson, Mayor of the City, sent the August 3 Letter to UP purporting to exercise the City's option, under a Franchise Agreement dated March 20, 1989 (the Franchise Agreement), to void and terminate that agreement and UP's rights to use street crossings on the Line and directing UP to remove its tracks at such crossings by November 1, 2001.

In response to the City's actions, UP filed the instant petition for declaratory order. UP states that the City's attempt to void its rights under the Franchise Agreement to use street crossings, and to direct removal of UP's tracks at these crossings, if carried out, would sever the Line and prevent rail operations over it. UP argues that, under *49 U.S.C. 10903,* the City cannot take any action to sever a line of railroad, or prevent its reactivation, without first obtaining adverse abandonment authority from the Board.

The City contends that the Franchise Agreement allows it to require removal of UP's tracks over street crossings on the Line. The City argues that UP agreed to such [*6] removal if it failed to use the Line for 9 consecutive months and the City terminated the Franchise Agreement. The City believes that these conditions have been met and that UP is obligated to take whatever regulatory steps are necessary for such removal, including seeking authority to abandon the Line. n7

n7 According to UP, the City has filed a lawsuit in Federal district court relating to the matter.

UP contests the City's interpretation of the Franchise Agreement and seeks a declaratory order that the City may not interfere with UP's reactivation and operation of the Line without obtaining adverse abandonment authority under *49 U.S.C. 10903.* In essence, UP argues that the Board has exclusive jurisdiction over the Line until abandonment is au-

thorized and exercised and that enforcement of the Franchise Agreement by the City requiring removal of track on the Line is preempted.

DISCUSSION AND CONCLUSIONS

Under *5 U.S.C. 554*(e) and *49 U.S.C. 721,* the Board may issue a declaratory order to terminate a controversy or remove uncertainty. It will not be necessary for the Board [*7] to institute a declaratory order proceeding here, however, because it is well settled that, without abandonment authority from the Board, a state or local order, regulation or civil enforcement action that would sever a line of railroad or prevent operation over it is precluded. See *49 U.S.C. 10501*(b), 10903.

Congress gave the Board exclusive and plenary authority over rail line abandonments, and Board authority is required before a railroad line can be lawfully abandoned. *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 319-21 (1981); Phillips Co. v. Denver and Rio Grande Western R., 97 F.3d 1375 (10th Cir. 1996),* cert. denied, *521 U.S. 1104 (1997).* The courts have been clear that "absent . . . valid . . . abandonment [authority] . . . a state may not require a railroad to cease operations over a right-of-way." *National Wildlife Federation v. ICC, 850 F.2d 694, 704 (D.C. Cir. 1988)* (citing *New Orleans Terminal Co. v. Spencer, 366 F.2d 160 (5th Cir. 1966)* (New Orleans [*8] Terminal)). Thus, any party seeking the abandonment of a line of railroad, or discontinuance of rail service, must first obtain appropriate authority from the Board. See *Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994).*

The City's actions are admittedly to prevent reactivation of, n8 and operation over, the Line. The City argues that the Franchise Agreement allows it to terminate UP's franchise rights with respect to the right-of-way and require UP to remove its tracks. Yet, even assuming that the City's interpretation of the Franchise Agreement is correct, its enforcement of the Franchise Agreement is no less an attempt to regulate the abandonment of an interstate line of railroad than if the City promulgated laws for the same purpose. n9 The Board and the courts have consistently held that such local regulation is precluded. In *New Orleans Terminal, 366 F.2d at 163-64,* the court found unenforceable a Parish ordinance directing the Parish attorney to take action, by suit, or otherwise to compel the removal of rail street crossings. Similarly, in *Des Moines v. Chicago & N.W. R. Co., 264 F.2d 454, 457-60 (8th Cir. 1959),* [*9] the court found that the city could not, by suit, oust a railroad from use of city streets upon "forfeiture" of a "grant" and "contract" without abandonment authority.

n8 Reactivation of service over a rail line that has not been abandoned does not require Board approval. See *Lee's Summit, MO v. STB, 231 F.3d 39, 42-43 at n.3 (D.C. Cir. 2000); Detroit/Wayne County Port Authority v. ICC, 59 F.3d 1314, 1316-17 (D.C. Cir. 1995);* Union Pacific Railroad Company - Petition for Declaratory Order - Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX, STB Finance Docket No. 33611 (STB served Aug. 21, 1998).

n9 In *Thompson v. Texas Mexican R. Co., 328 U.S. 134, 147 (1946),* the Supreme Court found that a contract, whether expired by its terms or terminated by operation of an escape clause, could not affect the ICC's power. The Court went on to state that "until abandonment is authorized, operations must continue." Id.

In short, the abandonment of a line of railroad may occur only if authorized by the Board. See *49 U.S.C. 10903;* [*10] 49 CFR 1152. In its reply, at 6, the City appears to recognize that the appropriate procedure for it to seek removal of the street crossings on the Line is to file an application for adverse abandonment. In fact, the City has filed a notice of its intention to do so. See Salt Lake City Corporation - Adverse Abandonment - in Salt Lake City, UT, STB Docket No. AB-33 (Sub-No. 183) (filed Oct. 12, 2001).

Finally, UP expresses concern that the City will attempt to interfere with reactivation of the Line through lengthy and onerous local permitting, zoning or environmental regulations and UP requests that the Board issue guidance on the matter. Based on the discussion above and the City's notice of its intention to file an adverse abandonment application, there is no reason to believe that the City will seek removal of the tracks by anything other than lawful means. In any event, court and agency precedent addressing the scope of *49 U.S.C. 10501*(b) n10 has made it clear that, under this broad preemption regime, zoning ordinances and local land use permits are preempted and state and local regulation cannot be used to veto or unreasonable interfere [*11] with railroad operations. See, e.g., Norfolk S. Ry Co. v. City of Austell, No. 1:97-cv-1018-*RLV, 1997 U.S. Dist. LEXIS 17236,* at *17 n.6 (N.D. Ga. Aug. 18, 1997); *Village of Ridgefield Park v. New York, Susquehanna & Western Ry, 750 A.2d 57 (N.J. 2000);* Auburn & Kent, WA - Pet. for Declar. Order - Stampede Pass Line, 2 S.T.B. 330, 338 (1997), aff'd, City of Auburn; Joint Petition for Declaratory Order - Boston and Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971 (STB served May 1, 2001, and

Oct. 5, 2001); Friends of the Aquifer, et al. - Declaratory Order, STB Finance Docket No. 33966, slip op. at 4 (STB served Aug. 15, 2001). Thus, there is no need for the Board to issue additional guidance through a declaratory order proceeding at this time.

n10 In the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), Congress broadened the express preemption provision at *49 U.S.C. 10501*(b), so that both the jurisdiction of the Board over transportation by rail carriers and the remedies provided under *49 U.S.C. 10101*-11908 are exclusive and preempt the remedies provided under Federal or state law. *49 U.S.C. 10501*(b). See *City of Auburn v. STB, 154 F.3d 1025, 1029-31 (9th Cir. 1998)*, cert. denied, *527 U.S. 1022 (1999)* (City of Auburn).

[*12]

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The City's petition for an extension of time to file a reply is granted.

2. The City's motion to consolidate STB Finance Docket No. 34090 and STB Docket No. AB-33 (Sub-No. 183) is denied.

3. Petitioner's request for a declaratory order proceeding is denied and this proceeding is terminated.

4. This decision is effective on December 9, 2001.

# EXHIBIT 7

465

203229

LAWRENCE E. WZOREK
Assistant Vice President-Law

UNION PACIFIC RAILROAD COMPANY

1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-3597
Fax (402) 271-3610

010181800 2

ENTERED
Office of the Secretary

AUG 23 2001

Part of
Public Record

August 22, 2001

RECEIVED

Via UPS Next Day Air

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

RE: Finance Docket No. 34090; Union Pacific Railroad Company -- Petition For Declaratory Order -- Forced Abandonment Of Rail Line In Salt Lake City, Utah

Dear Mr. Williams:

Enclosed for filing in the above-referenced proceeding is an original and 10 copies of Union Pacific's Petition For Declaratory Order, a word processing diskette containing the Petition in WordPerfect 6.1 for Windows, and a check in the amount of $1,400 for the filing fee required by 49 CFR § 1002.2(f)(58)(ii).

Please acknowledge receipt of the enclosed materials by returning a stamped copy of this letter in the self-addressed, stamped envelope enclosed for this purpose.

Very truly yours,

FEE RECEIVED

AUG 23 2001

SURFACE
TRANSPORTATION BOARD

FILED

AUG 23 2001

SURFACE
TRANSPORTATION BOARD

cc (w/att): Person shown on Certificate of Service

203229

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Office of the Secretary

AUG 23 2001

Part of
Public Record

EXPEDITED ACTION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

---

FINANCE DOCKET NO. 34090

UNION PACIFIC RAILROAD COMPANY
-- DECLARATORY ORDER --
FORCED ABANDONMENT OF RAIL LINE IN SALT LAKE CITY, UTAH

---

PETITION FOR DECLARATORY ORDER

---

FEE RECEIVED

AUG 23 2001

SURFACE
TRANSPORTATION BOARD

FILED

AUG 23 2001

SURFACE
TRANSPORTATION BOARD


UNION PACIFIC RAILROAD COMPANY

Lawrence E. Wzorek
Assistant Vice President-Law
Robert T. Opal
General Commerce Counsel
1416 Dodge Street, Room 830
Omaha, NE 68179
(402) 271-3072


Dated: August 22, 2001
Filed: August 23, 2001

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ATTACHMENTS


EXHIBIT 1 - August 3, 2001 Letter from Mayor Anderson

EXHIBIT 2 - Map from Environmental/Historical Report, Docket No. AB-33 (Sub-No. 116X)

EXHIBIT 3 - Map from Petition for Exemption, Docket No. AB-33 (Sub-No. 116X)

EXHIBIT 4 - Recent news articles

EXPEDITED ACTION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 34090

UNION PACIFIC RAILROAD COMPANY
-- DECLARATORY ORDER --
FORCED ABANDONMENT OF RAIL LINE IN SALT LAKE CITY, UTAH

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PETITION FOR DECLARATORY ORDER

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I.

## INTRODUCTION AND REQUESTED ORDER

This Petition is filed on behalf of Union Pacific Railroad Company ("UP"). It requests that the Board institute a declaratory order proceeding pursuant to 5 U.S.C. § 554(e) to resolve a major controversy which has arisen between UP and Salt Lake City, Utah ("City"). The controversy involves the attempt by the City to force the abandonment of a UP rail line known as the "900 South Line" (the "Line") by purporting to revoke franchises covering locations where the Line crosses city streets, and requiring the track to be removed from these crossings by November 1, 2001. The effect of the City's actions, if carried out, would be to sever the line and prevent it from being operated. A copy of the City's letter of August 3, 2001, advising UP of the revocation and directing track removal is attached as Exhibit 1.

UP requests the Board to declare that, under 49 U.S.C. § 10903, the City may not sever the Line or prevent operations over it, by purported franchise revocation or by any other means, unless the City first obtains abandonment authority from the Board. UP also requests that the Board issue guidelines to the parties on the permissible scope of state or local regulation over the operation, upgrading and maintenance of the Line, consistent with prior Board decisions. In view of the November 1, 2001, deadline for track removal unilaterally set by the City, UP requests expedited action in this proceeding.[1]

II.

## BACKGROUND

The 900 South Line was originally constructed in 1906 in connection with the construction of the then, new UP Passenger Depot in downtown Salt Lake City. The Line linked the depot to UP's line to Los Angeles. Historically, it was a major main line used by passenger, mail and express trains operating between Salt Lake City and the Los Angeles line. It was also an important freight route. There were extensive freight facilities located along the Line near the passenger depot, including a large freight depot, and an auto unloading facility. Traffic moving between these facilities and the UP Los Angeles line would move over the Line. There was extensive local freight service on the line, as there were at least 15 spur and industrial tracks that branched from the Line to serve nearby industries. The Line was also used as an alternate route for trains operating through the Salt Lake City area.

[1]UP reserves the right to seek administrative injunctive relief from the Board under 49 U.S.C. § 721(b)(4) should the City attempt to interfere with the Line prior to an Order in this proceeding.

The use of the Line has changed as the nature of the railroad business changed over the years. Passenger service over the Line diminished in the post-World War II era, and was transferred to Amtrak in 1971. Amtrak trains continued to use the Line until the mid-1980's, when they were shifted to a routing over DRGW tracks. The once extensive freight operations south of the passenger depot gradually diminished, and the freight facilities closed. Many of the on-line shippers converted to truck transportation, or left the area. By the 1990's, the Line was used primarily as a route for a daily local serving the remaining customers on the Line and nearby trackage in the area. The Line also continued to be used as an alternate through route, when other routes were congested or unavailable.

In 1997, UP agreed to cooperate with the City on the "Salt Lake City Gateway Area Rail Consolidation Project" (the "Gateway Project"). This project was designed to facilitate a major commercial and residential development in the passenger depot area. The project required rearrangement of UP and former DRGW track through the downtown area and an area known as Grant Tower, immediately to the north. Several track segments in the area were to be abandoned, including a portion of the Line.

UP requested an exemption for the desired abandonments in Docket No. AB-33 (Sub-No. 116X). Initially, UP planned to abandon 1.79 miles of the 900 South Line (referred to in the abandonment filings as the "Passenger Line Industrial Lead") from milepost 781.0 just east of Redwood Road to milepost 782.79, where it connected with UP's Provo Subdivision. The environmental/historic report filed in Docket AB-33 (Sub-No. 116X) reflected these limits (see map attached as Exhibit 2, which accompanied the Report).

However, prior to the filing of the Petition for Exemption covering the abandonment, UP decided to retain the segment of the Line between milepost 781.0 and milepost 782.32 (where the Line crossed the former DRGW main line). The reason UP decided to retain this segment is that, once a connection was built to the former DRGW main, the Line would form part of a freight bypass route between UP's Roper Yard and its Los Angeles/Oakland Bay Area main line track, which would remove some of the freight traffic from the congested downtown and Grant Tower areas. Accordingly, when the Petition for Exemption was filed in Docket AB-33 (Sub-No. 116X), it covered only the segment of the Line between the DRGW crossing, milepost 782.32, and the Provo Subdivision, milepost 782.79 (see map attached as Exhibit 3, which accompanied the Petition).[2] The City was well aware of the abandonment proceedings before the STB, and the fact that UP had decided to retain the portion of the 900 South Line between Redwood Road and the DRGW crossing.

The STB granted an exemption for the abandonments related to the Gateway Project (including the 0.47-mile segment of the 900 South Line) in Docket No. AB-33 (Sub-No. 116X), Union Pacific Railroad Company -- Abandonment Exemption -- In Salt Lake County, UT (not printed), served September 10, 1998. In March 1999, UP temporarily ceased operating trains on the surviving segment of the Line east of Redwood Road; and the diamond crossing between the Line and former DRGW main line was removed in June

[2] The Petition stated as follows: "UP initially proposed to abandon a 1.79 segment [of the Passenger Line Industrial Lead] beginning at milepost 781.0 but subsequently reduced the proposed abandonment to a 0.47 mile segment to begin a milepost 782.32. The longer 1.79-mile segment was shown in UP's Combined Environmental and Historical Report dated December 10, 1997." June 12, 1998, Petition for Exemption, p. 2.

of that year. At no time was this intended to be a permanent cessation of service. UP always intended to resume service on the Line once a connection was built to the DRGW main. This was, of course, the very reason this segment of the line had been excluded from the Gateway Project abandonments.

In mid-2001, UP advised Utah Department of Transportation and the City of its intention to reactivate the Line. The timing of this project is related to the 2002 Winter Olympics, as the new route would allow approximately 8-10 trains per day to be routed away from some of the Olympics event sites. However, the project is also being pursued for its long-term transportation benefits. UP anticipates that the trains using the new routing will save as much as 7½ hours in transit time and that the routing will significantly reduce congestion on the UP route through the Grant Tower area.

In response to the planned reactivation of the Line, the City sent its letter of August 3, 2001 (Exhibit 1), purporting to revoke the franchises covering street crossings on the Line, and demanding the removal of the track from the crossings. The letter was unexpected as we believed that the City had been aware, since the Gateway abandonments were filed, that UP was retaining the Line for future freight service.[3] The letter is quite candid about the City's reasons for these actions: "Salt Lake City is opposed to the reactivation of the 900 South Line."[4] All of the street crossings in question

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[3]A possible explanation is that there has been a change in City administrations since the Gateway Project abandonments were filed.

[4]Recent newspaper articles confirm that the City's reason for purporting to revoke the franchise is to prevent the line from being reactivated in response to opposition by local residents. See Exhibit 4.

are located on the segment between Redwood Road and the DRGW crossing, the very segment which was eliminated from the Sub-No. 116X abandonment before it was filed.

Since receiving the City's August 3rd letter, UP has endeavored to meet with the mayor and City officials, including the city attorney, to discuss reactivation of the Line and mitigation of impacts train operations may have on local residents.[5] That meeting took place on August 22, 2001. The City stated the position that it would take whatever legal action necessary to enforce termination of UP's franchise rights to operate across City streets under the franchise agreement and prevent the reactivation of the Line. It is clear that the City will persist in its attempts to prevent rail operations on the Line. As a result, UP has no choice but to file this Petition.

## III.

## ANALYSIS

The City's attempt to sever the Line by revoking the franchises covering the street crossings is unlawful under 49 U.S.C. § 10903. The City cannot take any action to sever the Line, or to prevent its reactivation, unless the City first obtains abandonment authority from the Board.

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[5]One of the Exhibit 4 newspaper articles refers to a meeting scheduled for August 14th that UP canceled. This was a meeting that had been scheduled prior to the mayor's August 3rd letter primarily to discuss a new Salt Lake Franchise Agreement on a number of UP lines in the area and, possibly, some implementation issues connected with the reactivation of the Line. In light of the mayor's August 3rd letter, we thought it best to meet with the mayor or city attorney before going ahead with the scheduled meeting, since the matter was obviously out of the hands of the people with whom we were to meet. There is another meeting of this group scheduled for September.

### A. The Board Has Exclusive And Plenary Jurisdiction Over The Abandonment of Rail Lines

The exclusive and plenary nature of the authority of the Board and the former Interstate Commerce Commission over abandonment of rail lines has long been recognized by the courts. In Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981), the Supreme Court pointed out that the Commission had broad power to regulate permanent or temporary cessation of service over lines used for interstate commerce (Id. at 319). The Court then went on to hold that "the authority of the Commission to regulate abandonments is exclusive . . . (and) also plenary. So broad is this power that it extends even to approval of abandonment of purely local lines operated by regulated carriers . . ." (Id. at 320). The Court explained that the Commission's broad authority over abandonments was intended by Congress to eliminate the evils associated with multiple control over railroads (Id.). The actions of the City in the instant case are a good illustration of the "evil" of "multiple control" that Congress intended to address. The City is attempting to permanently shut down an interstate rail line for purely local reasons without any apparent consideration of the effects of its action on interstate rail transportation.

### B. The 900 South Line Is A "Line Of Railroad" Subject To The Board's Abandonment Authority Under 49 U.S.C. § 10903

There can be no question that the 900 South Line is a "line of railroad" under 49 U.S.C. § 10903.[6] As previously discussed, the Line is a segment of a track that was

[6]However, even if the Line were exempt "spur" track under § 10906, the Board's authority over abandonment of exempt track is also "exclusive" under the 1996 I.C.C. Termination Act, 49 U.S.C. § 10501(b)(2). As such, the City still could not interfere with reactivation of the Line, or force its abandonment, see Finance Docket No. 34020, Fletcher Granite Co., L.L.C. - Petition

historically part of a major main line used by interstate passenger and freight trains. There were multiple shippers served by the Line, both along the Line itself, and along the larger line segment of which it was part. The Line is constructed with heavy rail (131 pounds), which is far heavier than the rail typically used on shipper spurs. While there are no "stations" on the surviving line segment itself, prior to the 1999 abandonment, the Line was an integral part of a main line that served UP's Salt Lake City passenger depot.

This kind of trackage easily qualifies as a line of railroad under the "traditional factors" used to determine whether a railroad track is an exempt spur or a railroad line, see Docket No. 41068, Valley Feed Co. v. Greater Shenandoah Valley Development Co. (not printed), served December 11, 1998;[7] CNW - Aban. Exempt. - In McHenry County, IL, 3 I.C.C.2d 366, 367-8 (1987), rev'd other grounds 879 F.2d 917 (D.C. Cir., 1989). The character of the Line is very much like the trackage held to be a "line of railroad" subject to I.C.C. abandonment requirements in Interstate Com. Com'n. v. Memphis Union Station Co., 360 F.2d 44 (6th Cir., 1966) (cessation of railroad operations on tracks accessing a union passenger station held to be an unlawful abandonment of rail line).

The status of the Line as a "line of railroad" is not affected by the changes in use that have occurred over the years, or the temporary cessation of operations in 1999. The former I.C.C. has repeatedly held that, once a track is a "line of railroad," subsequent changes in usage, or even complete cessation of operations and removal of track cannot

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for Declaratory Order (not printed), served June 29, 2001 (state and local governments cannot prevent reactivation of an exempt shipper spur track).

[7] For the benefit of others who may receive copies of this Petition, STB decisions for 1997 and later years are generally available on the STB website by year and month of service date, www.dot.STB.gov.

change its status as a "line of railroad" unless and until abandonment authority is secured, Docket No. AB-52 (Sub-No. 71X), The Atchison, Topeka & Santa Fe Rwy. Co. -- Abandonment Exemption -- In Lyon County, KS (not printed), served July 17, 1991 ("where a carrier decides to extinguish or reduce service and/or remove track, the carrier's common carrier obligation remains and the line continues to be a line of railroad subject to the Commission's abandonment jurisdiction"); Oregon Short Line R. Co., Abandonment, 267 I.C.C. 633, 635-6 (1947) (carrier cannot change the status of a track segment from a rail line to a spur by reducing service). Nor can the temporary cessation of service in 1999 be treated as a de facto abandonment of the line. As a matter of law, a rail line cannot be abandoned unless and until the requisite abandonment authority is obtained from the Board. Phillips v. The Denver and Rio Grande Western R. Co., 97 F.3d 1375 (10th Cir., 1996); Docket No. AB-33 (Sub-No. 132X), Union Pacific R. Co. -- Abandonment Exemption -- In Rio Grande and Mineral Counties, CO (not printed), served May 24, 2000, p. 5.

Finally, as previously noted, the portion of the 900 South Line between milepost 782.32 and milepost 782.79 was abandoned in 1999, as exempted in STB Docket No. AB-33 (Sub-No. 116X). Neither the City (which supported the abandonment) nor anyone else questioned that this segment was a "line of railroad" subject to the Board's abandonment authority under § 10903. If the abandoned segment was a "line of railroad" under § 10903, the surviving segment of the same line must necessarily have the same status.

### C. The City Cannot Sever The Line By Revoking Street Crossing Franchises Without First Obtaining Abandonment Authority From The Board Under 49 U.S.C. § 10903

The Board, the former I.C.C., and the courts have frequently considered attempts by state and local governments, or other third parties, to oust railroads from rail lines or to sever rail lines without obtaining abandonment authority under § 10903. The decisions arising from these attempts consistently hold that such an ouster or severance cannot be accomplished unless abandonment authority is first obtained from the Board or (prior to 1996) the I.C.C.

These cases include attempts to oust railroads from city streets or street crossings. New Orleans Terminal Company v. Spencer, 366 F.2d 160 (5th Cir., 1966), cert denied, 386 U.S. 160 (1967), involved an attempt by Jefferson Parish, Louisiana, to revoke railroad's rights to cross city streets, which is exactly what Salt Lake City is attempting to do as to the 900 South Line. The court held flatly that attempted revocation was an abandonment, and could not be accomplished unless the Parish first obtained abandonment authority from the I.C.C., 366 F.2d at 163, 166. City of Des Moines, IA v. Chicago & N.W. Ry. Co., 264 F.2d 454 (8th Cir., 1959), was an attempt to oust a railroad from a rail line that was actually constructed in a city street by revoking the ordinance that gave the railroad the right to use the street. The court reached the same result as New Orleans, holding that the City could not accomplish the ouster without first going to the I.C.C., 264 F.2d at 457-460. Similarly, in Finance Docket No. 32776, Central Cal. Traction Co. -- Petition for Declaratory Order -- City of Lodi, the Board held that, in order for Lodi to remove a rail line that ran in a city street, the city had to first obtain abandonment authority.

Attempts to oust railroads from rail lines, or to sever rail lines by other means, have similarly resulted in holdings that I.C.C. or STB authority must first be obtained, see, e.g., Thompson v. Texas Mexican Ry. Co., 328 U.S. 134, 145-149 (1946), and Smith v. Hoboken R. Co., 328 U.S. 123,130 (1946) (termination of railroad's contractual rights to use rail line); Kansas City Area Transp. Authority v. Ashley, 555 S.W.2d 9, 10 (Missouri, 1977), and Commonwealth of Mass. v. Bartlett, 266 F.Supp. 390, 393 (D. Mass., 1967), aff'd in relevant part, 384 F.2d 819 (1st Cir., 1967) (exercise of eminent domain); Phillips, supra, 97 F.2d 1375, and Louisiana & Arkansas R. Co. v. Bickham, 602 F.Supp. 383 (D., M.D. Louisiana, 1985), aff'd (table) 775 F.2d 300 (5th Cir., 1985) (reversion for nonuse). See, also, National Wildlife Federation v. I.C.C., 850 F.2d 694, 704 (absent a valid certificate of abandonment from the I.C.C., a state may not require a railroad to cease operations over a right-of-way, nor may state law cause a reverter of a right-of-way prior to an I.C.C.-approved abandonment).

Accordingly, under the authorities discussed above, the City cannot revoke UP's rights for the Line to cross city streets unless the City first obtains abandonment authority from the Board, which requires an application for "adverse abandonment" authority, see Modern Handcraft -- Abandonment, 363 I.C.C. 969 (1981); Lodi, supra.[8] The City has not obtained such authority, or even applied for it.

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[8]To our knowledge, neither the Board nor the I.C.C. has ever approved an adverse application for complete abandonment of a rail line where the carrier desired to operate the line and had reasonable prospects for successful operation. Where adverse abandonments have been granted, they have typically involved a change of operators without cessation of rail service, or lines that have been inactive for long periods with no reasonable prospects of successful reactivation, see Modern Handcraft, Inc. -- Abandonment, supra; Chelsea Property Owners -- Abandonment, 8 I.C.C.2d 773 (1992).

D. The City Cannot Lawfully Interfere With Reactivation Of The Line

We anticipate that, once the City realizes that it cannot force the abandonment of the Line by its purported revocation of the street crossing rights, it will attempt to interfere with the reactivation of the Line by other means, such as by requiring permits for the work and then not issuing them, prohibiting all or some of the work because of purported zoning restrictions, or requiring onerous measures to "mitigate" the effects of the reconstruction work, or train operations on the Line.[9]

We recognize that the Board may not wish to address this matter in the absence of an actual or threatened attempt by the City to interfere with the reactivation. There is even some possibility that this issue will never arise, as UP fully intends to work with the City on reasonable measures to address the City's concerns. Nevertheless, by providing guidance to the parties, as it has in recent decisions, see Finance Docket No. 34020, Fletcher Granite Co. -- Petition for Declaratory Order (not printed), served June 29, 2001, the Board may make a future dispute less likely.

Specifically, we request the Board to advise the parties that railroads have the right, under Federal law, to operate their rail lines, to maintain their lines to keep them in operating condition, and to improve them to meet the changing needs of the market for

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[9]The reactivation of the 900 South Line does not require Board authority under § 10901. The reactivation would simply augment the capacity of UP's existing main line operations, and does not result in a penetration or invasion of new markets, Finance Docket No. 33611, Union Pacific R. Co. -- Petition for Declaratory Order -- Rehabilitation of M-K-T Railroad Between Jude and Ogden Jct., TX (not printed), served August 28, 1998. The fact that there may be opposition by the City or local residents based on alleged environmental or safety concerns does not give the Board authority to regulate the project under § 10901, or to impose measures to "mitigate" the claimed adverse affects of the reactivation (Id., p. 7). The instant case, in fact, is a much stronger case than M-K-T. M-K-T involved the reactivation of a line which had previously been fully abandoned. The 900 South Line has never been abandoned.

rail services, Auburn & Kent, WA -- Petition for Declaratory Order -- Stampede Pass Line, 2 S.T.B. 330, 338 (1997), aff'd, City of Auburn v. STB, 154 F.3d 1025 (9th Cir., 1998), cert. denied, 119 S.Ct. 2367 (1999) ("Auburn"). State and local permitting or preclearance requirements (including environmental requirements) are preempted because, by their very nature, they unduly interfere with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations, Finance Docket No. 33971, Joint Petition For Declaratory Order -- Boston and Maine Corp. and Town of Ayer, MA (not printed) ("Ayers"), p. 8, and cases cited; Finance Docket No. 33966, Friends of the Aquifier, et al. -- Declaratory Order (not printed), served August 15, 2001 ("Friends"), p. 4, n. 8.

Similarly, zoning ordinances and local land use permit requirements are preempted as to facilities which are an integral part of the railroad's interstate operations, Friends, p. 4, and cases. This includes the actual line of railroad, as well as ancillary trackage and facilities used to conduct interstate operations, Auburn, 2 S.T.B. at 338-339; Borough of Riverdale -- Petition for Declaratory Order (not printed), served September 10, 1999, ("Riverdale I"), p. 10; Friends, p. 4.

On the other hand, state and local governments may impose reasonable, nondiscriminatory "police power" regulations to railroads such as laws that prohibit dumping of excavated dirt into a local waterway, discharge of harmful materials, or disposal of waste, and can enforce local codes for electrical, building, fire, and plumbing, so long as these regulations do not require permitting or other forms of preclearance. Similarly, the role of state and local agencies in implementing Federal environmental statutes is not preempted unless the regulation is applied in such a manner as to unduly restrict the

railroad from conducting its operations, Friends, pp. 5-6; Ayers, pp. 9-10 (holding that town's purported enforcement of Federal Clean Water Act and Safe Drinking Water Act is preempted because it was being used as a pretext for preventing construction of a railroad automotive unloading facility). Valid safety regulation under the Federal Railroad Safety Act is also not preempted, Friends, p. 6.

## V.

## CONCLUSION

For the reason stated above, UP respectfully requests that the Board institute a declaratory order proceeding to resolve the issues raised in this Petition.

Respectfully submitted,

Lawrence E. Wzorek
Assistant Vice President-Law
Robert T. Opal
General Commerce Counsel
Union Pacific Railroad
1416 Dodge Street, Room 830
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CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing Petition for Declaratory Order on the person listed below by First Class U.S. Mail with postage prepaid.

Roger F. Cutler, Esq.
Salt Lake City Attorney
451 South State Street, Room 505
Salt Lake City, Utah 84111

Dated this 22nd day of August 2001.

Lawrence E. Wzorek

# EXHIBIT 8

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203351

September 6, 2001

**BY HAND DELIVERY**

Hon. Vernon A. Williams
Secretary
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1925 K Street, N.W.
Washington, D.C. 20423

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Office of the Secretary
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MANAGEMENT

Re: Finance Docket No. 34090, *Union Pacific R. Co. – Petition for Declaratory Order*

Dear Sir:

We have been retained by Salt Lake City, Utah, ("the City") to address the issues raised by the Union Pacific Railroad Company ("UP") in the above-referenced proceeding. This is to advise that the City plans to respond to UP's Petition for Declaratory Order, filed on August 23, 2001 (the "Petition"), in due course, in accordance with the STB's procedural rules. However, UP's fervent attempt in the Petition and subsequently in its letter dated August 31, 2001 to create an appearance of urgency with respect to the need for expedited handling of this matter requires a response sooner. This letter responds only to the assertions in that letter and in the Petition with respect to the need for expedited action on this matter.

There is no need for hasty decision making here. While the City has expressed its frustration with UP's decision to abrogate the agreement[1] with respect to the line at issue in this proceeding, no action that would physically impair UP's ability to use the line is imminent and no immediate action by UP or this Board is required. UP has not alleged that the traffic patterns in and around Salt Lake City that it wishes to change have created a bottleneck. UP is planning to use the line at issue here as part of a new line it plans to construct in the area, but it does not face an urgent need to build this line to remedy existing or imminent congestion or delay. To the best of the City's knowledge, the increase in traffic volume presents a slowly developing

[1] This is an agreement between the City and the Union Pacific Railroad Company dated March 20, 1989, effective as of July 1, 1988, in which UP agreed in Section 9.A., that it would remove its tracks or facilities upon request by the City if UP ceased "to operate in the Franchise Area or a portion thereof for a continuous period of nine (9) months". Since the factual predicate for the City's exercise of its rights under the agreement has occurred, the City is astonished that UP has elected to hide behind the federal regulatory structure. UP should instead be taking the steps necessary to comply with any obligations imposed by the STB statute and rules that would permit UP to fulfill its promise to the City. The City will address this agreement and UP's obligations more fully in the response to the Petition for Declaratory Order.

problem, not an emergency. Moreover, UP has made no allegation here that this is the only route in the region that it can use to address the situation it hopes will arise if traffic volumes continue to grow. Finally, notwithstanding UP's reference to the 2002 Olympics in the Petition, neither the City nor the Salt Lake Olympic Committee has asked UP to move traffic from any of the routes currently utilized through the area.

Not only is haste not required here, the opposite is true. UP apparently requires additional time to develop plans that will allow it to fulfill its transportation objectives at the same time that it complies with its promises to the City in the 1988 agreement. The City will be pleased to negotiate alternatives with UP, and that process takes time.

I am providing a copy of this letter to Lawrence E. Wzorek, Assistant Vice President – Law and Robert T. Opal, General Commerce Counsel, both at UP, by overnight delivery.

I am also providing an additional copy of this letter, which I will appreciate your date stamping and returning to our messenger.

Very truly yours,

Charles A. Spitulnik

cc: Steven Alfred, Esquire
Christopher Bramhall, Esquire

# EXHIBIT 9

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203439

September 14, 2001

RECEIVED
SEP 14 2001
MAIL MANAGEMENT SER

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

Re: *Union Pacific Railroad Company – Declaratory Order – Forced Abandonment of Rail Line in Salt Lake City, Utah*
Finance Docket No. 34090

Dear Sir:

I am enclosing an original and ten (10) copies of the Reply of the Salt Lake City Corporation to the Petition for Declaratory Order. An additional copy is enclosed for date-stamp and return to our messenger.

Sincerely,

Charles A. Spitulnik

ENTERED
Office of the Secretary
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Enclosure

cc: Parties of Record

Before the
Surface Transportation Board

RECEIVED

Finance Docket No. 34090

UNION PACIFIC RAILROAD COMPANY
- DECLARATORY ORDER -
FORCED ABANDONMENT OF RAIL LINE IN SALT LAKE CITY, UTAH

# REPLY OF SALT LAKE CITY CORPORATION TO PETITION FOR DECLARATORY ORDER

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Dated: September 14, 2001

Before the
Surface Transportation Board

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UNION PACIFIC RAILROAD COMPANY
- DECLARATORY ORDER -
FORCED ABANDONMENT OF RAIL LINE IN SALT LAKE CITY, UTAH

# REPLY OF SALT LAKE CITY CORPORATION TO PETITION FOR DECLARATORY ORDER

Salt Lake City Corporation (the "City"), through counsel and pursuant to the Surface Transportation Board ("STB") rules at 49 C.F.R §1104.13, hereby files this reply ("Salt Lake City Reply") to the Petition For Declaratory Order ("Petition for Declaratory Order") filed by Union Pacific Railroad Company ("UP") on August 23, 2001.[1] The Petition for Declaratory Order must be denied because UP, by virtue of satisfying the conditions of the Franchise Agreement between UP and City dated March 20, 1989 (the "Franchise Agreement"), has relinquished its right to object to the City's notice requiring the removal of the tracks that are at issue in this proceeding. Indeed, by agreeing to remove the track, UP has implicitly agreed to take all regulatory steps required to implement removal of the track. However, in violation of those agreements, UP has filed this proceeding.

The STB should deny UP's Petition for Declaratory Order to the extent it seeks a declaration that the City cannot lawfully interfere with the abandonment of the line at issue and

[1] This reply was due on Wednesday, September 12, 2001. The City has filed a Petition for Extension of Time for filing this reply through and including today, and is filing this Reply in anticipation of a favorable ruling on that Petition.

direct UP, instead, to comply with all regulatory requirements required for it to fulfill its obligations to the City under the Franchise Agreement. Moreover, as a result of UP's failure to fulfill its obligations to the City under the Franchise Agreement and file an abandonment application with the Board, the City is, today, filing a Notice of Intent to File an Application for Adverse Abandonment and a Petition for Waivers with respect to such an abandonment proceeding and plans to file the Application within 15 days, but in no event later than October 15, 2001.

**Statement of Facts**

UP operates an interstate railway that, in part, is located within the municipal boundaries of the City. One of the lines is the 900 South Line, which was constructed in 1906 and was part of the line that served the Passenger Depot in downtown Salt Lake City. UP's predecessor in interest had been granted the right by a City ordinance in 1905 to construct and operate the 900 South Line over various City streets. On March 20, 1989, the City and UP entered into the Franchise Agreement governing the rights and obligations of UP and the City with respect to various tracks within the defined "Franchise Area."

In 1998, UP filed and the STB granted a Petition for Exemption with respect to .47 miles of the 900 South Line ("Abandoned Line"), that ran from milepost 782.32 to milepost 782.79. STB Docket No. AB-33 (Sub-No. 116X), *Union Pacific R. Co. – Abandonment Exemption - - In Salt Lake County, UT*, not printed, Service Date September 10, 1998. The abandonment petition was filed because of the "Salt Lake City Gateway Area Rail Consolidation Project", that is a commercial and residential development in the passenger depot area. The project rearranged track through the downtown area of the City and severed the 900 South Line.

As a result of the abandonment, rail traffic, including freight service, has not operated on the 900 South Line since early 1999. In fact, the diamond crossing between the 900 South Line and the (former) DRGW main line was removed in June 1999. *See* Petition for Declaratory Order at 4. UP states, as well, in that Petition that UP temporarily ceased operating trains on the surviving segment of the Line. Backpedaling from that earlier statement about cessation of operations over the Line, in a September 7 letter to the City's Mayor Anderson (attached as "Exhibit 5" to a September 7 letter filed in this proceeding), UP attempts to create the impression (at p. 2, first paragraph) that its inspection of the line segment to satisfy FRA regulations constitutes the type of use that will salvage its ability to avoid fulfilling its part of the bargain in the Franchise Agreement, described more fully below. This is not the case and does not justify the STB's grant of the declaratory relief requested by UP.

I. **Pursuant to the terms of the Franchise Agreement, UP has waived its franchise rights on the 900 South Line.**

UP has, in this case, agreed to waive its right to contest an abandonment of the 900 South Line and should not be allowed to hide under the Board's jurisdictional umbrella.[2] In the Franchise Agreement, UP agreed that, in certain circumstances, the City could require it to remove lines that met the criteria described in that Agreement. The obvious implication of such provision is that UP would take the necessary steps to permit that removal to occur. Now, not only is UP refusing to comply with its obligations under that Agreement, it is trying to use the federal regulatory structure as an excuse not to comply. The STB should not sanction contractual breaches and should deny UP's request for declaratory relief.

The Franchise Agreement states in pertinent part that:

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[2] Due to UP's failure to comply with the terms of the Franchise Agreement and file an abandonment application with respect to the 900 South Line, the City is filing an application for adverse abandonment pursuant to 49 U.S.C. §10903.

> This franchise shall expire on June 30, 2003, provided however, that if, for any period time of nine (9) consecutive months during the term of this franchise, the Franchise Area, or any part thereof, is not used for the purpose for which this franchise is granted, or if there is any abandonment or non-use of the Franchise Area, or any part thereof, the franchise or applicable part thereof, shall be voidable at the option of the City

*See Franchise Agreement* §6, p. 6-7. The "purpose for which the franchise is granted" is "to construct, operate and maintain standard gauge railroad tracks within the streets of Salt Lake City." *Id.* at §2, p. 1. UP has not used the 900 South Line since before it filed the Petition for Exemption in Docket No. AB-33 (Sub-No. 116X) in June 1998. The cessation of use and removal of portions of the line for which abandonment was approved in that proceeding, that is contiguous to the segment involved in this proceeding, has resulted in the non-use, including no rail traffic or freight service, of the 900 South Line for well over two years. Consequently, UP was waived its franchise rights with respect to the 900 South Line.

Based on this non-use and waiver, the City notified UP that it was exercising its rights under the Franchise Agreement to terminate UP's franchise rights with respect to the remaining portion of the 900 South Line. Upon receipt of the notification from the City, UP was then required to seek abandonment of the line by filing an abandonment application with the Board. However, now that UP has other plans, it is attempting to justify its contractual breach by hiding behind the regulatory shield created by the STB's statute and regulations and prevent the City from exercising the rights that UP agreed the City would have with respect to this Line. Piously citing the need to preserve its ability to maintain its freight franchise, as well as the legitimate need and policy recognized by Congress to preserve uniform regulation of the rail freight industry nationwide, UP begs this Board to declare that the City cannot lawfully interfere with the reactivation of the 900 South Line and require UP to do what UP uncontrovertibly agreed to do, that is, to leave the line segments behind upon the occurrence of clearly defined

circumstances. The City can lawfully interfere with the reactivation of the 900 South Line by filing an application for adverse abandonment based on the Franchise Agreement and specifically UP's waiver of its rights with respect to the 900 South Line as a result of its nonuse of that line.

UP has introduced no evidence that its current infrastructure is inadequate to fulfill its transportation needs and objectives. UP has introduced no evidence that its transportation needs cannot be fully met through the use of different routes, or existing routes, with modifications, that will not frustrate the City's objectives or that are not subject to the restrictions to which UP agreed as recently as 1998.[3] UP provides no evidence that the uses of the line it alleges (in its September 7 letter to Mayor Anderson) have occurred are the types of uses contemplated in the Franchise Agreement. There have been no freight operations over this line for many years, and UP knows it.

The Franchise Agreement clearly contemplates at least two separate and distinct reasons whereby the City can choose to require removal of the tracks, to wit: (1) nine consecutive months of non-use or (2) an abandonment of the line.

UP argues that the City had notice of its intent to reinstitute this line and acquiesced, either implicitly or explicitly. The facts are to the contrary. The City knew nothing more than the fact that the 900 South line was not included in UP's 1998 abandonment petition. The City was not formally advised by UP of its intention to reconstruct and reactivate the line until August 7, 2001. The City has consistently intended that such line remain inactive and has advised UP accordingly.

[3] The City has proposed a modification of the tracks through the Grant Tower as an alternative to the reactivation of the 900 South Line. UP summarily rejected that alternative while readily admitting that Grant Tower modifications will be necessary, in any event, in the near future.

For all intents and purpose, the line has borne all the characteristics and indicia of an abandoned line sufficient to support the City's action on that basis. UP's efforts to convince the Board that it did not abandon (that is, cease operations on) the line are grossly insufficient, and in any event, largely immaterial and irrelevant. However, even if the facts, *arguendo*, were to the contrary, they avail UP nothing.

The Agreement provides, in addition to abandonment, a separate and independent basis for the City's action, i.e. non-use for nine months. In spite of UP's protestations, the line has not been used for a period of in excess of two years, well in excess of the nine month contractual period accepted by UP in the Franchise Agreement and relied upon by the City in its dealings with UP and in its urban planning. UP's intentions and the City's knowledge or lack thereof simply have no bearing on the fact of UP's non-use.

UP, in its most recent filings, would have this Board believe that it used this line on a regular and continuous basis for FRA inspections. Such a claim, if true, is a most recent assertion by UP[4] and one that, where examined, will be seen as the misleading claim that it is. The City tenders, and will demonstrate in its application for Adverse Abandonment, that UP has admitted that the line has not been used for the purposes set forth in the Agreement. The simple act of performing FRA mandated inspections does not fulfill those purposes and UP's reliance upon such a claim is as transparent and it is immaterial.

The simple, uncontroverted fact is that this line has not been used for train traffic, of any kind, since 1998, and such fact, in and of itself, is sufficient to support the City's action for non-use pursuant to the terms of the Agreement – an Agreement freely and knowingly entered into by

[4] UP, in its Petition for Declaratory Order in this matter, admits that in "March 1999, UP temporarily ceased operating trains on [the 900 South Line] and the diamond crossing between the Line and former DRGW main line was removed in June of that year". At no time has Union Pacific alleged that it provided freight service on that line since March 1999 to the present and it cannot factually make such allegation.

Union Pacific. This Board should reject the efforts of UP, or any railroad, to acquire benefits from local governments and then, when convenient for its corporate purposes, unilaterally renounce the contractual *quid pro quo*. Such a result cannot have been within the collective minds of Congress and this Board should not countenance such conduct under the cloak of national interest. This Board cannot permit UP to abuse the statute and the Board's regulations in this way. Granting the Petition for Declaratory Order, without, at the same time, requiring UP to take all steps that are required to relinquish its right to operate freight service over this line segment[5], would be contrary to the Board's consistent refusal to permit abuse of its processes. *See, e.g., Jefferson Terminal Railroad Company – Acquisition and Operation Exemption – Crown Enterprises, Inc.*, STB Finance Docket No. 33950 (Service Date March 15, 2001). Accordingly, UP's Petition for Declaratory Order should be denied.

## II. Conclusion

Pursuant to the terms of the Franchise Agreement, as a result of the non-use of the line that followed the abandonment of a contiguous line segment, UP has waived its right to continue operation over the remaining portion of the 900 South Line. UP agreed to grant to the City the right to terminate the franchise rights granted to UP. Now that the City is attempting to exercise that right, UP is attempting to hide behind the federal statutes this Board administers by seeking a Declaratory Order in this proceeding. The Board should deny that request to avoid creating a precedent for abuse of the Board's processes. Furthermore, the Board should either order UP to submit a Notice of Exemption for abandonment of the rail line or should grant the City's application for adverse abandonment of the line in order to preserve the integrity of the rights negotiated in the Franchise Agreement and of the Board's processes.

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[5] If UP refuses to take the necessary actions, the STB could also grant the application for adverse abandonment that the City is filing today in Docket AB No. 33 (Sub. No. 183).

In view of all of the foregoing, the City respectfully requests this Board to deny UP's Petition for Declaratory Order.

Respectfully Submitted,

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Counsel for the Salt Lake City Corporation

Dated: September 14, 2001

## CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a copy of the foregoing Reply of the Salt Lake City Corporation to the Petition for Declaratory Order to be served by first class mail, postage prepaid upon the following:

Robert T. Opal, Esquire
Union Pacific Railroad Company
1416 Dodge Street, Room 830
Omaha, Nebraska 68179

Date: September 14, 2001

Charles A. Spitulnik