



April 1, 2009

**Via Electronic Filing**

The Honorable Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423

**RE: STB Docket No. AB-102 (Sub-No. 13)—Missouri-Kansas-Texas  
Railroad Co.—Abandonment—In St. Charles, Warren, Montgomery,  
Callaway, Boone, Howard, and Pettis Counties, MO**

Dear Secretary Quinlan:

Union Pacific Railroad Company ("UP") responds to the "Petition for Leave to File a Reply" ("Petition") and the "Reply of the State of Missouri, ex rel. Missouri Attorney General" ("Reply") filed by the Missouri Attorney General ("AG") on March 23, 2009 in this matter.

The Board should deny the AG's Petition and should not consider its Reply, as Board rules do not allow a party to file a reply to a reply, and AG offers no valid reason for the Board to make an exception here. It appears that the AG is submitting its Reply in an attempt to further delay removal of the Boonville Bridge (the "Bridge"), a matter that has already been stalled in litigation for nearly four years. In its Reply the AG charges that UP has misrepresented and mischaracterized the record. But instead of demonstrating this, the AG simply rehashes its prior arguments and attempts to mislead the Board.

**I. The Board Should Deny the AG's Petition for Leave to File a Reply**

The AG seeks leave to file its Reply to UP's March 16, 2009 Reply, in which UP responded to the AG's Petition for Declaratory Order, filed with the Board on February 12, 2009. Under Board regulations, "A reply to a reply is not permitted." 49 C.F.R. §1104.13(c). The Board adopted this rule to ensure the orderly development of a record in a fair manner, and the AG's actions demonstrate its wisdom. As grounds for an exception to the rule, the AG accuses UP of "misrepresent[ing] the facts of record" and making "distortions and mischaracterizations." (*Petition* at 1.) As explained below, it is the AG that misrepresents and distorts the record, not UP. Furthermore, much of

the AG's filing is directed at issues that UP first addressed in its May 25, 2005 Notice of Consummation. The AG offers no explanation of why it failed to address them earlier.

## **II. The AG's Reply**

The AG submits its reply in an attempt to further delay completion of the Coast Guard's historic review of the Boonville Bridge, which must be completed before its removal. In its Reply, the AG once again asks the Board to review an abandonment consummation notice that UP filed nearly four years ago, in a matter whose origins date back more than twenty years. The AG takes a scattershot approach, charging without basis that UP has engaged in a wide range of misrepresentations and mischaracterizations, and argues that the Board must step in.

UP addresses the AG's allegations in turn:

### **A. The State of Missouri never assumed responsibility and liability necessary to use the Bridge as a trail.**

The AG claims that the ICC "did not require the Missouri Department of Natural Resources ("MDNR") to assume full responsibility and liability for operating the MKT's abandoned right-of-way. Rather, the MDNR volunteered to do so, consistently with the provisions of 49 C.F.R. 1152.29." (*Reply* at 5.) In fact, the MDNR "volunteered" because it had to. Under Board regulations, any party interested in acquiring a railroad right-of-way for trail use must first file a statement of financial willingness, indicating its willingness to assume responsibility and liability for the trail. 49 U.S.C. §1152.29(a)(2). The MDNR filed its statement with the ICC on September 16, 1986.

However, the AG fails to distinguish between the MDNR's expression of willingness to assume liability and responsibility, and actually assuming liability and responsibility for the Bridge pursuant to a trail use agreement, which the MDNR never did. The AG claims that the ICC's April 27, 1987 Certificate of Interim Trail Use and Abandonment ("CITU") in this proceeding "would not, indeed could not, have been issued by the ICC if the MDNR had not" assumed the responsibility and liability necessary for trail use. (*Petition* at 7.) The AG ignores the plain language of the CITU, which states, "If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use . . . ." (*CITU*, ordering par. 1.) The CITU recognized that there would have to be a further agreement under which the MDNR would assume liability and responsibility for the Bridge.<sup>1</sup> The

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<sup>1</sup> A CITU does not show that a party has assumed liability and responsibility, only that it has expressed willingness to do so. See, e.g., *Policy Statement on Rails to Trails Conversions*, Ex Parte No. 274 (Sub-No. 13B), ICC served January 29, 1990.

MDNR never assumed such responsibility, and gave up any chance to do so when it relinquished its option to acquire the Bridge for trail use in 2005.

**B. The CITU did not need to be vacated.**

UP was not required to ask the ICC or the STB to vacate the CITU, as the AG claims. The CITU in this proceeding expressly authorized abandonment without further ICC action if a proper trail use agreement was not made. The ICC stated, "If no agreement is reached by the 180th day, applicant may fully abandon the line." (*CITU*, ordering par. 5.) This also would have applied to any portion of the Line not covered by a trail use agreement, as there is no requirement that a trail use agreement cover the entire line segment subject to a CITU. The Board requires vacation of a CITU only if trail use is terminated.<sup>2</sup> In this matter, no party ever made a proper trail use agreement for the Bridge, since no party ever assumed liability or responsibility for it. Therefore, there was no trail use to terminate.

**C. UP properly abandoned the Boonville Bridge.**

As UP previously showed, prior to the 1997 rules revision, the STB and the ICC generally did not require rail carriers to fulfill historic conditions prior to abandonment consummation. When the ICC or the Board required advance compliance, they said so.<sup>3</sup> In this matter, the ICC ruled, "If abandonment is effected under the CITU, MKT must (a) comply with the procedures in section 106 of the [National Historic Preservation Act] . . . ." This language clearly contemplated that the historical conditions would be met **after** the "abandonment is effected."

Additionally, the AG misstates UP's explanation of the abandonment authority it received from the ICC in 1987. UP did not suggest in its March 16 Reply that it abandoned the Bridge in 1987. The AG is fully aware that while the ICC's 1987 decision in this matter **authorized** abandonment, UP did not act upon that authority until May 25, 2005, when it submitted its Notice of Consummation to the Board.

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<sup>2</sup> In its CITU in this matter, the ICC noted, "If the **user** intends to terminate trail use, it must send the Commission a copy of this certificate and request that it be vacated on a specified date." *CITU*, ordering par. 4. (Emphasis added.)

<sup>3</sup> See, e.g., *Decision and Certificate of Interim Trail Use or Abandonment—Union Pacific RR Co.—Abandonment—Barr-Girard Line in Menard, Sangamon, and Macoupin Counties, IL*, STB Docket No. AB-33 (Sub-No. 96), STB served Sept. 10, 1996. Ordering paragraph 5 stated: "If an agreement for interim trail use/rail banking is reached by the 180th day after the effective date of this CITU, interim trail use may be implemented. If no agreement is reached by that time, UP may fully abandon the line, **provided any conditions imposed have been met.**" (Emphasis added.)

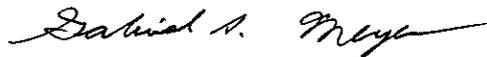
**D. The Missouri Court of Appeals did not find that the State may still acquire the Bridge for trail use.**

The AG also grossly misrepresents the Missouri Court of Appeals' decision in this matter<sup>4</sup> and it quotes the Court's 2007 decision out of context. (*Reply* at 10.) According to the AG, the Court "recognized that MDNR '**can** obtain rights to use the bridge for trail purposes **if** waivers of liability are accepted by MKT.'" (Emphasis in original.) By quoting the Court in this way, the AG attempts to create the impression that the Court found that the MDNR can still acquire the Bridge for trail use. It did not.

In fact, the Court was simply describing the 1987 Interim Trail Use Agreement. The Court stated, "Paragraph six [of the Interim Trail Use Agreement] also describes how [M]DNR **can** obtain rights to use the bridge for trail purposes **if** waivers of liability are accepted by MKT."<sup>5</sup> The AG fails to mention that the Court also recognized that the MDNR duly gave up its rights under Paragraph 6 on May 24, 2005.<sup>6</sup> Moreover before the MDNR gave up its rights, neither MKT, nor UP as its successor, accepted MDNR liability waivers necessary to acquire the Bridge for trail use.<sup>7</sup> As a result, contrary to the AG's assertion, the MDNR cannot "obtain rights to use the Bridge."

For the reasons discussed above, UP respectfully requests that the Board deny the AG's Petition for Leave to File a Reply and further requests that the Board deny the AG's Petition for Declaratory Order in this matter.

Sincerely,



Gabriel S. Meyer  
Assistant General Attorney

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<sup>4</sup> *State ex rel. Nixon v. Childers*, 243 S.W.3d 403 (Mo.App. W.D., 2007); *review denied State ex rel. Nixon v. Childers* (Mo. Feb. 19, 2008).

<sup>5</sup> *Id.* at 406 (emphasis in original).

<sup>6</sup> *Id.* at 405.

<sup>7</sup> *State ex rel. Nixon v. Childers*, NO. 05AC-CC00673 (Mo.Cir. Apr. 25, 2006) (trial order), ordering pars. 11, 12; *aff'd State ex rel. Nixon v. Childers*, 243 S.W.3d 403 (Mo.App. W.D., 2007); *review denied State ex rel. Nixon v. Childers* (Mo. Feb. 19, 2008). UP attached a copy of each of these decisions to its March 16 Reply as Exhibit 2.

## CERTIFICATE OF SERVICE

I, Gabriel S. Meyer, certify that on this 1st day of April, 2009, I caused a copy of the above filing in STB Docket No. AB-102 (Sub-No. 13) to be served upon the following parties via first class U.S. mail:

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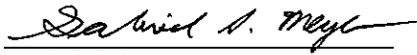
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