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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the matter of Union Pacific Railroad's
Petition for Relief against the Utah Department
of Transportation

**UNION PACIFIC RAILROAD
COMPANY'S PRE-HEARING
POSITION STATEMENT**

Docket No. 09-888-01

This matter concerns a crossing at the location where 400 North crosses the Union Pacific and UTA right of way in Vineyard, Utah (the "Crossing"). The Utah Department of Transportation, reversing an earlier decision, has determined that the Crossing is a public crossing. Union Pacific challenges that conclusion and asks the Commission to find that the Crossing is a private crossing. In support of its petition, Union Pacific submits this Pre-hearing Position Statement. Union Pacific reserves the right to supplement and/or amend this Position Statement before the hearing on this matter.

Factual Background

In this area, Union Pacific's predecessor, the Denver & Rio Grande Railroad, acquired the right of way by deed dated 1881 from private property owner Stagg. The right of way extended fifty feet on either side of the center line of the Union Pacific track. Obviously, when the railroad acquired the right of way from private property owner Stagg, no public road existed.

At some point between 1881 and 1942, 400 North came to cross Union Pacific's right of way at grade, and was apparently a public road. To date, no documents have been located that reveal the legal arrangement by which this public road was an authorized crossing of Union Pacific's right of way. If such documents are located before the hearing of this matter, Union Pacific reserves the right to supplement its document production and amend this Position Statement.

On August 3, 1942, the County Commissioners of Utah County passed a Resolution and Order vacating portions of 400 North. The Resolution and Order stated: "It further appearing that certain county roads traverse said plant site, which roads are no longer needed for use by the general public or freeholders living with thi vicinity of said plant site, and that it is advisable that such county roads be vacated and abolished, and that Utah County quitclaim said plant site to the said Defense Plant Corporation." Specifically, the north half of 400 North was vacated and abandoned on the west side of the Crossing and going over the Crossing. And 400 North was vacated and abandoned in its entirety at the Defense Plant Corporation property line on the east side of the Crossing.

At this time, the steel mill property was fenced, with the fence extending across what was once 400 North on the east side of the Crossing. A gate was installed there to provide access, and the gate served for the next approximately sixty years to control access to the steel mill site. From the date the steel mill became operational in the 1940s until it ceased operation in the 1980s, what had been 400 North was used on the east side of the Crossing as access for the employees and other business invitees of operators of the steel mill as access to a parking lot.

Anderson Geneva acquired the property on the east side of the Crossing on December 23, 2005. The gate closing off what was once 400 North on the east side of the Crossing was closed when Anderson Geneva began work on the development and remained closed until it was re-opened during the pendency of this action.

No documents have been produced or located during discovery in this matter that show that any public entity has conducted maintenance on the Crossing since 1942. No documents show any request to enter the Union Pacific right of way to perform maintenance. There were no pavement markings or advanced warning signs on the west side of 400 North at the time this dispute arose.

However, the Crossing was reconfigured by operators of the steel mill in the 1980s. There is no evidence that any other entity or municipality was involved or gave their permission for this major work on the Crossing and the west approach to the Crossing.

Union Pacific's tracks are active at this Crossing. Freight traffic over the Crossing is approximately eight to twenty trains per day. When the UTA commuter rail project is completed, commuter rail traffic is estimated to be sixty trains per day.

Standards

The Manual on Uniform Traffic Control Devices "defines a public highway-rail grade crossing as any intersection between a public roadway and railroad. The roadway on either side of the crossing must be a public roadway, i.e. under the jurisdiction of, and maintained by, a public authority and open to public travel. If either approach to a crossing does not qualify as a public roadway, then the crossing is typically classified as a private crossing." Private Highway-

Rail Grade Crossing Safety Research and Inquiry at 3.

Similarly, the National Highway-Rail Crossing Inventory Instructions and Procedures Manual states that a “public crossing” is “the location where railroad tracks intersect a roadway which is part of the general system of public streets and highways, and is under the jurisdiction of and maintained by a public authority and open to the general traveling public.” Introduction and Procedures Manual § 1-5. “A crossing shall be classified as public if, and only if, the roadway is deemed a *public road* in accordance with 23 CFR Part 460.2.” *Id.*

Under the Code of Federal Regulations, a public street or highway is “any road under the jurisdiction of and maintained by a public authority and open to public travel.” 23 C.F.R. § 460.2(a). A street or highway is “open to public travel” when it is “available, except during scheduled periods, extreme weather or emergency conditions, passable by four-wheel standard passenger cars, and open to the general public for use without restrictive gates, prohibitive signs, or regulation other than restrictions based on size, weight or class of registrations.” *Id.* § 460.2(d).

In addition, in order to be a “public crossing” under the national Highway-Rail Crossing Inventory Instructions, the location where railroad tracks intersect a roadway must be “under the jurisdiction of and maintained by a public authority and open to the general traveling public.” Introduction and Procedures Manual § 1-5. Under the Code of Federal Regulations, “maintenance” means “preservation of the entire highway, including surfaces, shoulders, roadsides, structures, and such traffic control devices as are necessary for its safe and efficient utilization.” *Id.* § 460.2(d).

Analysis

For two main reasons, the Crossing at issue here does not meet the definition of a public crossing, and is therefore private. First, under the definitions above, for the Crossing to be public, the roadway on either side must be a public roadway. This Crossing has not been open to public travel since the property on the east side of the Crossing was quitclaimed to Defense Plant Corp. on August 10, 1942. The Resolution and Order quitclaiming the property stated that “certain county roads traverse said plant site, which roads are no longer needed for use by the general public or freeholders living within the vicinity of said plant site, and that it is advisable that such county roads be vacated and abolished . . .”

The 1942 Resolution and Order recognized that the general public no longer needed access to the Geneva Works site. At that time, a gate was placed and the road was no longer open to public travel. The east side of the Crossing enters the site and was used by steel mill owners as an entrance to the plant for employees and others. Since closure of the steel mill site, the Crossing has seen little traffic. In fact, the current landowners, Anderson Geneva, have placed a fence at or near the property line and have blocked off the road entering the property. The fence has been in place since some time in 2005. Therefore, the crossing has been closed to the public for approximately 67 years. It enters a “privately-owned roadway[] utilized only by the owner’s licensees and invitees.” Therefore, it is a private crossing under the definition set forth in the Railroad-Highway Grade Crossing Handbook at page 223.

The second requirement of the above definition is that the roadway on either side of the crossing must be under the jurisdiction of and maintained by a public authority. There is no

evidence that the Crossing has been maintained by a public agency—on either side of the railroad tracks. In fact, the only significant alterations to the Crossing were made by steel mill operators in the 1980s without the participation of a public entity or of Union Pacific.

Public maintenance is required if the road traversing the Crossing is to be considered a public road. Since public maintenance has not been performed on the approaches to the Crossing, the road over the Crossing cannot be considered public. If the road over the Crossing is not public, the Crossing is not public.

Union Pacific acknowledges that the Crossing has been categorized as public in the FRA database. However, the FRA database is often incorrect. Moreover, the definition of a public crossing in the FRA database is consistent with Union Pacific’s analysis and conclusion that the Crossing is private.

UTA will be operating commuter rail in this location shortly. The addition of commuter rail widens the Crossing, increases train volume, and places freight trains and commuter trains, operating at different speeds, in the Crossing, potentially at the same time. Public use of an at-grade crossing with these characteristics potentially subjects Union Pacific to increased claims. In addition, public safety demands that a careful and accurate determination be made whether the Crossing is public or private. The evidence, as measured against the applicable standards, indicates that the Crossing is private. Union Pacific urges the Commission to so rule.

Conclusion

For the reasons set forth above, Union Pacific respectfully requests that the Commission grant Union Pacific’s petition and find that the Crossing is private.

DATED this 30th day of June, 2010.

Reha Kamas
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Certificate of Service

I hereby certify that on the 30th day of June, 2010, a true, correct and complete copy of the foregoing was served upon the following attorneys in the manner indicated below:

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