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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 POST-HEARING
POSITION STATEMENT**

Docket No. 09-888-01

At issue in this case is the status of an at-grade rail 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. The Commission held a two-day evidentiary hearing on August 17 and 18, 2010. In support of its petition, Union Pacific now submits this Post-hearing Position Statement.

Factual Background

At the location of the Crossing, Union Pacific's predecessor, the Denver & Rio Grande Western Railroad, acquired the right of way by deed dated 1881 from private property owner

Stagg. The right of way extends fifty feet on either side of the center line of the Union Pacific track.

At some point, 400 North came to cross Union Pacific's right of way at grade. To date, no documents have been located that reveal a legal arrangement by which this road became an authorized crossing of Union Pacific's right of way. Trans. of Hrg., Aug. 17-18, 2010, Vol. II ("Trans. Vol. II") at 20. Nor have any documents been found that reveal a dedication or other indication of the origin of the road. *Id.*

On August 3, 1942, the County Commissioners of Utah County passed a Resolution and Order vacating portions of 400 North and giving title to property on the north and east sides of the Crossing to the Defense Plant Corporation, predecessor of Geneva Steel, for the construction of a steel mill. See UP/UDOT Joint Ex. 72. 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 the 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." *Id.*

Specifically, 400 North was vacated and abandoned to the section line on the west side of the Crossing and going over the Crossing. Trans. Vol. II at 19. In addition, 400 North was vacated and abandoned in its entirety on the east side of the Crossing at Union Pacific's east right of way boundary, which was also established as the Defense Plant Corporation's west property line. *Id.*

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 and served for the next approximately sixty years to control access to the steel mill site. Beyond the gate was a parking lot. At the entrance to the parking lot was a guard shack. From the date the steel mill became operational in the 1940s until it ceased operation in the 1980s, 400 North beyond Vineyard Road (which runs parallel to the railroad tracks on the west side of the Crossing) was used solely as access for the employees and other business invitees of operators of the steel mill.

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

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

Standards have been established that should be applied to determine whether an at-grade highway-rail crossing is public or private. UDOT's Chief Engineer, Eric Cheng, agreed that the following standards are the proper standards applicable to this decision in this case. Trans. Vol. II at 179-80. Mr. Cheng also testified that it is his opinion that application of the following standards indicates that the Crossing at issue here is private. *Id.* at 181.

“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.” Private Highway-Rail Grade Crossing Safety Research and Inquiry at 3, UP/UDOT Joint Ex. 70. 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.” *Id.*

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.” The Instructions and Procedures Manual for the Federal Railroad Administration Highway-Rail Crossing Inventory Data Maintenance Program (“FRA Manual”) at 1-5, UP/UDOT Joint Ex. 16. 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.” 23 C.F.R. § 460.2(d).

Further, 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).

“If the primary function of the road is to provide public access to a publicly owned facility for the principal purpose of on-site use by the public, then the facility may be deemed a logical terminus of a public roadway. . . . Thus, crossings which exist for the primary purpose of providing public access to publicly owned and operated facilities such as fairgrounds, parks, schools, libraries, hospitals, clinics, airports, bus terminals, beaches, piers, boat launching ramps, recreational facilities, etc., which permit access to or invite use by the general traveling public would satisfy the definition ‘open to public travel,’ even if the entrance thereto is equipped with gates to effect seasonal or periodic closures (such as overnight), or limit access, or require an entry fee for use.” FRA Manual 1-6.

Therefore, “[i]n general, a roadway across railroad track for which both approaches are maintained by a public authority and which is open to the public is considered a ‘public’ crossing. These are roadways that are part of the general system of public streets and highways. Some jurisdictions accept a crossing as ‘public’ when only one approach is publicly maintained. If a public authority accepts a crossing as ‘public,’ it is a public crossing. *All others are considered ‘private.’*” FRA Manual at 1-6 (emphasis added).

A “private crossing is one that is on a private roadway which may connect to part of the general system of public streets and highways but is not maintained by a public authority. Usually, it is a crossing where the property on both sides *or at least one side* of the railroad tracks is private property. It may also be on a roadway that is publicly owned but which is either restricted or not intended for use by the general public. *Private crossings are generally intended for the exclusive use of the adjoining property owner and the property owner’s family, employees, agents, patrons and invitees.* Crossings are classified as private where the normal need or use is for residential, farm, recreation/cultural, industrial or commercial activities.” FRA Manual 1-7 (emphasis added).

Analysis

The Crossing at issue here does not meet the definition of a public crossing, and is therefore private.

A. Under applicable standards, the Crossing is private

1. The Crossing leads to private property and has not been used by the public at least since 1942

UDOT’s Chief Engineer, Eric Cheng, agrees that, under the only applicable standards, the Crossing is private. This fact was apparent to Mr. Cheng as soon as he saw the Crossing. Trans. Vol. II at 131. Mr. Cheng’s opinion should be given great weight in light of his position and experience. Further, his opinion that the Crossing is private is more reliable because it is based on objective facts and criteria, whereas UDOT’s later acceptance of the Crossing as public was based on other considerations.

400 North leads into private property. The property is fenced and has a gate at the entrance that has been locked at various times. The fence bears a “No Trespassing” sign. UP/UDOT Joint Ex. 154. Mr. Cheng, testified, referring to the photo at UP/UDOT Joint Ex. 154, “I think everyone would agree with me, if you see this, you know this is a private crossing. And based on my prior knowledge, if the road goes to a private property, it’s a private crossing.” Trans. Vol. II at 129. Again, Mr. Cheng testified that, in his own personal opinion as an engineer, exercising engineering judgment, he believes the Crossing is private. *Id.* at 164. Mr. Cheng also testified that, while he has reviewed hundreds of crossings, he has never seen a *public* crossing that goes into private property and is gated. *Id.* at 130.

For the Crossing to be public, the roadway on either side must be a public roadway. The Crossing has not been open to public travel since the property on the east side was quitclaimed to Defense Plant Corporation on August 10, 1942. The 1942 Resolution and Order recognized that the general public no longer needed access to the steel mill property. 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 mill property and was used by steel mill owners as an entrance to the mill for employees and others. As Mr. Cheng testified, “[P]ublic road means open to the *general* public. *General*. I think that’s the key word.” Trans. Vol. II at 163 (emphasis added). The Crossing has not been open to the *general* public since 1942.

Since closure of the steel mill, 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.”

2. Even if a public right of way exists, it does not extend through the Crossing

Further, whether or not any part of 400 North was located north of the section line in 1942 when the steel mill property was vacated and abandoned to that section line, there is not a public right of way today that extends all the way through the Crossing. Trans. Vol. II at. The Crossing was reconfigured in the 1970s. Even if there was a public right of way extending over the Crossing before the reconfiguration, the reconfiguration relocated the Crossing in such a way as to move it off the public right of way, either substantially or totally. Any public right of way that remains in the Crossing does not extend all the way over the Crossing from the west side to the east side. Trans. Vol. II at 36, 38, 42-43, 86, 115-18; UP/UDOT Joint Ex. 134.

Anderson Geneva suggests that 400 North, at the time of the vacation in 1942, was located well south of the section line, and well south of where 400 North is located presently. Union Pacific’s expert, William L. Clark, investigated the site and found no evidence that a road ever existed south of the current location of the road. Trans. Vol. II at 31-35, 83.

Further, if 400 North were located in 1942 in the area where Anderson Geneva suggests, the 1970s relocation and reconfiguration of the Crossing would have removed the Crossing completely off of the former public right of way. This would have resulted in an interruption of the continuous use of the public right of way. If the 1970s relocation of the Crossing removed

the Crossing completely away from the former public right of way, the former right of way is no longer paved but crosses Union Pacific's railroad tracks in the grass south of the Crossing. Trans. Vol. II 60, 118. If the public right of way is now located in the grass, the public obviously has not been using this unpaved swath of land to traverse Union Pacific's private property.

The former public right of way was not deeded or dedicated. Therefore, it was acquired, if at all, by implied dedication through use. However, if the Crossing was relocated away from the former public right of way, public use has been interrupted. Under Utah law, “[a]n overt act that is intended by a property owner to interrupt the use of a road as a public thoroughfare, and is reasonably calculated to do so, constitutes an interruption sufficient to restart the running of the required ten-year period under the Dedication Statute.” *Wasatch County v. Okelberry*, 226 P.3d 737, 742 (Utah Ct. App. 2010) (quoting *Wasatch County v. Okleberry*, 179 P.3d 768 (Utah 2008)).

Union Pacific has been using its private property in this area continuously since the 1970s. Trans. Vol. II at 60-61. The property is used as a railroad corridor and Union Pacific's tracks are active in this area. Freight traffic is eight to twenty trains per day. Union Pacific recently sold the westernmost twenty feet of its right of way to UTA for commuter rail construction. Trans. Vol. II at 13-14. Further, Union Pacific has not provided a means for the public to cross its railroad tracks safely in the grassy area south of the Crossing. Union Pacific has reasserted its private property rights. At this point, a public right of way can be reestablished

only by deed, dedication, or implied dedication, which would require a new ten-year period of uninterrupted use. None of these circumstances has occurred. Therefore, any public right of way has terminated

3. No public entity has conducted maintenance

Lack of public maintenance also indicates that the Crossing is private. There is no evidence that the Crossing has been maintained by a public agency—on either side of the railroad tracks. There have been no pavement markings at the Crossing since at least 1970. Trans. Vol. II at 311. Public maintenance is required if the road traversing the Crossing is to be considered a public road. UDOT’s Chief Engineer, Eric Cheng, testified to the critical importance of public maintenance to a determination that a crossing is public. Trans. Vol. II at 165. Anderson Geneva’s proffered expert, Scott Hendricks, testified that his search revealed no evidence of public maintenance at the Crossing. *Id.* at 304-05. Since there is no evidence that 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.

4. UDOT’s decision that the Crossing is public is not based on applicable standards and should not be upheld by the Commission

For all of these reasons, the Crossing is a private crossing under the applicable standards.¹ UDOT’s Chief Engineer, Eric Cheng, testified that UDOT’s decision that the Crossing is public

¹ The testimony of Scott Hendricks on whether the Crossing is public or private should not be given any weight by the Commission. Mr. Hendricks had never, until this case, had occasion to

was not based on application of standards, but was a compromise. Trans. Vol. II at 143, 165-66. The compromise was “[d]esigned to take into consideration the conflicting interests of the Railroad and the developer.” *Id.* at 181. The compromise also was intended to protect the Town of Vineyard’s “possible future need for access at [the] point where the crossing is.” *Id.*

Importantly, Mr. Cheng testified that UDOT *accepted* that the Crossing was public and *considered* the Crossing to be public, rather than *concluded* or *decided* that the Crossing was public. *Id.* at 191-92. In fact, Mr. Cheng testified that while he *accepted* that the Crossing was public, he did not *agree* that the Crossing was public. *Id.* at 191. Instead, Mr. Cheng testified repeatedly that he believes the Crossing is private, and that application of the appropriate standards led him to this conclusion. *Id.*, *e.g.*, at 129-30, 131-32, 179-80. When asked whether legal issues surrounding the road and the Crossing affected UDOT’s decision, Mr. Cheng testified: “Yeah. Because that is, that is basically the City—or Geneva-Anderson’s side. Your, your supporting information. But on the engineering side, on the Railroad side, you know, the definition, all—everything, I’m sorry, I have to say I support—that it’s a private crossing.” *Id.* at 194.

consider the question whether a railroad crossing was public or private. He testified that, until this case, his “exposure to private crossings was limited to reading road signs.” Trans. Vol. II at 297. He was totally unfamiliar with the applicable standards until he was asked to read them for his work on this case. When asked whether he knew how “individuals who actually, as part of their job, have to figure out whether a crossing is public or private might use those manuals” containing the relevant standards, he answered, “That’s really not for me to say. I mean, that’s not my purview. My purview as an engineer is to design roadways.” *Id.* at 299. Mr. Hendricks’ opinion that the Crossing is private goes beyond his admitted purview. He is not qualified to give an opinion on this subject and the Commission should disregard his testimony.

5. A ruling that the Crossing is private comports with federal safety policy

The Federal Railroad Administration has made recommendations concerning crossing closure. Trans. of Hrg., Aug. 17-18, 2010, Vol. I (“Trans. Vol. I”) at 81. Specifically, the FRA recommends closure of twenty-five per cent of all active crossings in the United States. *Id.* The initiative is aimed at improving public safety, and it is an initiative that Union Pacific supports. *Id.* at 81-82. As at-grade railroad crossings have been closed, there has been a reduction in vehicular crossing accidents on Union Pacific’s system. *Id.* at 84.

Safety is Union Pacific’s primary concern. The Crossing is private. In the interest of public safety, and in accordance with the federal policy supporting crossing closures to reduce incidents at highway-rail grade crossings, the Crossing should be closed.

B. The FRA database does not serve as notice to developers of the status of a crossing

Union Pacific acknowledges that the Crossing has been categorized as public in the FRA database. However, as UDOT’s Chief Engineer, Eric Cheng testified, the FRA database was never intended to be used or relied upon by a private developer such as Anderson Geneva. Trans. Vol. II at 169. The National Highway-Rail Crossing Inventory Data File is maintained by the Federal Railroad Administration (“FRA”) “*for use by States and railroads.*” FRA Manual at 1-1. Further, there is no legal support for the argument that Union Pacific’s contributions of information to a federal database can be construed as representations to every member of the public, and may be enforced under the doctrine of equitable estoppel.

The FRA database (formally named the National Highway-Rail Crossing Inventory Data File) arose out of a 1972 report of the United States Department of Transportation to Congress, which was aimed at providing recommendations “for alternative courses of action which would lead to a significant reduction in accidents, fatalities, personal injuries and property damage at highway-rail crossings. The report recommended the development of an adequate information system.” *Id.*

The FRA “entered into a contract with the Association of American Railroads to develop a ‘Comprehensive National Highway-Rail Crossing Information and Numbering System.’ The project was established as a cooperative effort between all the nation’s railroads and the U.S. Department of Transportation” *Id.* at 1-2 to 1-3.

Under the contract, the “railroad companies, with direction and guidance from the Association of American Railroads and the American Short Line Railroad Association, were assigned the responsibility for making a site-specific inventory of each highway-rail crossing and for installing a unique identifying number at each location. The railroads were also identified as being responsible for periodic update of certain inventory information and maintenance of the crossing number.” *Id.* at 1-3. It is, therefore, inaccurate to state that Union Pacific has a statutory obligation with respect to the database.

Importantly, the FRA maintains two data files, the Inventory Data File and the Accident Data File. “Routinely, the highway-rail crossing accident data is integrated with inventory data and the information from the combination is used for the development of Federal programs,

funding alternatives for crossing improvement, studies related to railroad safety programs, effectiveness of warning devices, high-speed railroad corridors, accident costs, public awareness and driver training, and other safety program development and research opportunities.” Id. at 1-3 (emphasis added). The information is not used to communicate to the public the whether railroad crossings such as the one at issue here are public or private.

UDOT’s Mr. Cheng testified that he agreed with Union Pacific’s foregoing analysis of the purposes and limitations of the FRA database. Trans. Vol. II at 171. Mr. Cheng testified that the purpose of the FRA database is to promote safety. *Id.* at 169. He testified that it is not intended to be consulted by developers to determine private property rights or property access. *Id.* Moreover, as Mr. Cheng also testified, designation of a crossing as public or private in the FRA database can be incorrect. *Id.* at 137. Finally, as set forth above, the definition of a public crossing in the FRA database is consistent with Union Pacific’s analysis and conclusion that the Crossing is private.

Conclusion

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. A ruling by the Commission that the Crossing is private does not foreclose any party's ability to seek access over the rails at 400 North, including Anderson Geneva and the Town of Vineyard. Trans. Vol. I at 85; Trans. Vol. II at 175. A party seeking access would simply have to follow the proper process as determined by UDOT. *Id.*

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 15th day of September, 2010.

Reha Kamas
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Certificate of Service

I hereby certify that on the 15th day of August, 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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