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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's Responsive
Post-hearing Position Statement**

Docket No. 09-888-01

Petitioner, Union Pacific Railroad Co., by and through counsel of record, respectfully submits this Responsive Post-hearing Position Statement.

INTRODUCTION

The parties have briefed this matter at length. As the dust settles here at the end, it all still comes down to answering just three questions:

1. What standards must one follow to determine whether a crossing is public or private?
2. What are the relevant facts regarding the history and current circumstances of the 400 North crossing (the "Crossing")? and
3. When those facts are applied to the standards, is there substantial evidence to support UDOT's determination that 400 North is a public crossing?

Union Pacific's efforts throughout this proceeding have been to confront these questions directly because answering them leads to the unavoidable conclusion that whatever status this Crossing may have had at any other time in history, today this is—and for many years has been—

a private crossing, not a public one.

Respondents grasp at several arguments to try to distract the Commission from this outcome. For example, they argue that the FRA and MUTCD standards are merely engineering guidelines, not legal authorities to be relied upon. What they do not explain is why, even if this is true, the outcome would be affected. As very clearly established at the hearing, the standards that Respondents try to dismiss are actually the ones universally followed when determining the nature of a crossing. However else one wishes to characterize these standards, they are still the ones that matter.

UDOT's decision that the Crossing is public will stand if it was reasonable and rational. The point is that UDOT's decision fails these tests. Respondents consume pages of their brief listing their view of the facts. But it is the quality, not necessarily the quantity, of evidence that matters. After all, it can take as little as one piece of evidence to unequivocally establish a fact as true. But a pile of evidence as high as the moon would not necessarily qualify as sufficiently substantive to support a reasonable and rational decision. Again, as Union Pacific has already fully briefed, when one applies the evidence here to the standards to be followed, the outcome leads unavoidably to the conclusion that this Crossing is private.

On this same point, Respondents seem to want to have their cake and eat it too. They criticize UDOT for ordering the Crossing to be temporarily closed on the basis that UDOT did not follow correct procedures. But they insist that the same allegedly flawed process reached the right conclusion about the Crossing being public. They cannot have it both ways. Focusing solely on a desired outcome without genuine regard for process or standards is the very definition

of acting arbitrarily. UDOT's departure from its original conclusion to try to appease parties rather than applying and following standards shows such arbitrary action.

In short, the standards are clear. Of course there are facts on both sides of the issue. But when those facts are applied to the standards, it is plain that the evidence falls short of finding that 400 North is a public crossing. It is private, and has been for some time.

And again, as Mr. Cheng testified at trial, a finding that this is a private crossing does not mean that a public one could not be established here under proper circumstances. It simply means that the Crossing could be removed for now and the parties must start with a clean slate and a plan proposed through discussions and an application to UDOT for a public crossing.

ARGUMENT

A. UDOT's Determination that the Crossing Is Public Was Not Reasonable or Rational and Should Be Reversed

1. UDOT's determination must be reasonable and rational

In the Matter of an Appeal to I Road Closure in Draper, the Commission noted the separate standards of review urged by the opposing parties. In its Post-hearing Brief, Anderson Geneva and Vineyard quote one of the standards. The other standard urged by the parties was "whether UDOT's decision was reasonable and rational." Report & Order, Docket No. 05-999-02 at 5 (May 27, 2005). Without further analysis, the Commission stated, "This approach appears reasonable and we therefore proceed accordingly." *Id.* Therefore, in this case, the Commission should determine whether UDOT's decision that the Crossing is public was reasonable and rational based on relevant and applicable engineering standards.

2. *Union Pacific relies on the proper standards necessary to a reasonable and rational determination*

There is no dispute that UDOT has the jurisdiction and authority to decide whether the Crossing is public or private. There also is no serious question that the standards cited and discussed by Union Pacific are the proper standards UDOT should apply to reach its determination. Based on his specialized knowledge and skill as the UDOT Chief Engineer, Mr. Cheng testified to the proper standards that should be applied to determine whether the Crossing is public or private. Trans. Vol. II at 179-80. In fact, Mr. Cheng testified that Union Pacific set forth the proper standards in its Amended and Supplemental Pre-Hearing Position Statement, and that he agreed with the conclusion reached by Union Pacific in applying these standards. *Id.* at 181.

The standards may be characterized as “engineering standards” that do not, in and of themselves, decide legal rights. However, they are properly applied by UDOT and its Chief Engineer in the course of the exercise of UDOT’s statutory authority to determine whether an at-grade highway-rail grade crossing is public or private. UDOT’s exercise of this statutory obligation carries legal effect. Anderson Geneva & Vineyard challenge the standards but do not suggest alternatives, except to suggest that the determination is a legal one.¹

¹ Union Pacific notes that, despite Anderson Geneva’s and Vineyard’s protestations to the contrary, the MUTCD definition of a public road quoted on pages 23 and 24 of Anderson Geneva’s and Vineyard’s Post-hearing Brief are identical. The only difference is that the MUTCD definition quoted in the Private Highway-Rail Grade Crossing Safety Research and Inquiry is followed by additional information. Further the 1971 MUTCD definition still incorporates two definitional components, public travel and public maintenance. Anderson Geneva and Vineyard’s Br. at 25. It is undisputed that the steel mill was not open to the *general* public, and there is no evidence of public maintenance.

3. *The road on the east side of the Crossing was closed to public travel starting in 1942*

It is undisputed that the public road on the east, or Geneva, side of the Crossing was vacated and abandoned in 1942. Trans. Vol. II at 19. After that time, the Crossing was not open to the *general* public, but was used as an access to private commercial property. See Union Pacific's Post-hearing Position Statement, Section A(1); Trans. Vol. II at 163. For this reason, the interpretive letter discussed by Anderson Geneva and Vineyard is irrelevant. Anderson Geneva's and Vineyard's Post-hearing Br. at 24-25. That interpretive letter discusses circumstances that are not present here. The steel mill was not a shopping center or similar business where the public had reason to go. It was not an office park open to the public. Therefore, the letter adds nothing to the analysis.

4. *There is no evidence of public maintenance*

Anderson Geneva and Vineyard's assertion that Utah County and/or Vineyard maintained the Crossing is unsupported by the evidence. Anderson Geneva & Vineyard Post-hearing Br. at 15. In fact, at no time until this matter was raised before the Commission did Vineyard take any affirmative action in an effort to "accept" the crossing. Even now, there is no evidence that Vineyard has done any more than make verbal representations in its filings before the Commission. Anderson-Geneva & Vineyard's Post-hearing Brief at 8, ¶ 17.

Visualizing layers of asphalt alone is not enough to determine who conducted maintenance. This is the only evidence related to maintenance. And Mr. Hendricks, Anderson Geneva's expert, found no evidence of public maintenance whatsoever. Trans. Vol. II at 304-05. The absence of evidence that a public entity performed maintenance compels the conclusion that

the maintenance issue must be decided in favor of finding that the Crossing is private.

5. UDOT admits that application of the proper standards results in the conclusion that the Crossing is private

Eric Cheng, UDOT's Chief Engineer, testified that the standards set forth by Union Pacific are the appropriate, applicable standards that should be applied to determine whether an at-grade railroad crossing is public or private. Trans. Vol. II at 179-80. Mr. Cheng further testified that application of the relevant standards leads to the conclusion that the Crossing is *private*. Trans. Vol. II at 129, 131, 164. It is undisputed that UDOT's decision that the Crossing is public was not based on application of any standards. Instead, it is undisputed that the decision was the product of an effort to find a compromise position that would address the disparate interests of Union Pacific, the Town of Vineyard, and Anderson Geneva. Trans. Vol. II at 143, 165-66, 181.

6. UDOT effectively has abandoned its determination that the Crossing is public

Perhaps most persuasive and telling of all, UDOT makes absolutely no effort in either of its post-hearing briefs to support or defend its prior determination that the Crossing is public. UDOT's silence unmistakably signals the correctness of the conclusion that the Crossing is private. UDOT's determination to the contrary was not reasonable or rational and must be reversed.

B. The Crossing Was Relocated Away from the Former Public Right of Way

A legal analysis also results in the conclusion that the Crossing is private because it is no longer located on a public right of way. The combined effect of the 1942 Resolution and the subsequent reconfiguration of the Crossing was to move some or all of the Crossing off of the Union Pacific Railroad's Responsive Post-hearing Position Statement

former public right of way. *See* Union Pacific's Post-hearing Position Statement, Section A(2); Trans. Vol. II at 36, 38, 42-43, 86, 115-18; UP/UDOT Joint Ex. 134. While it is true that safety upgrades alone do not change ownership, the Crossing was not only upgraded but *relocated* in such a way that, at most, it was removed from the former public right of way entirely, and at least, the former public right of way no longer extended all the way through the Crossing.

C. Use of the Public Right of Way Was Interrupted

In response to Point 3 of Anderson Geneva and Vineyard's Post-hearing Brief, Union Pacific incorporates by reference as if fully set forth herein Section A(2) of its Post-hearing Position Statement.

D. Res Judicata and Estoppel Do Not Apply

In response to Points 4 and 5 Anderson Geneva and Vineyard's Post-hearing Brief, Union Pacific incorporates by reference as if fully set forth herein Sections B and C of its Amended and Supplemental Pre-hearing Position Statement.

CONCLUSION

For the reasons set forth above, and in Union Pacific's pre-hearing and other post-hearing filings, Union Pacific urges the Commission to rule that UDOT's determination that the Crossing is public was not reasonable or rational and must be reversed.

DATED this 29th day of September, 2010.

Reha Kamas
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Certificate of Service

I hereby certify that on the 29th day of September, 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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