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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 : DOCKET NO. 09-888-01
of Transportation :
: **UTAH DEPARTMENT OF**
: **TRANSPORTATION’S**
: **SUPPLEMENTAL POST- HEARING**
: **BRIEF**
:
:

Utah Department of Transportation (“UDOT”) submits its Supplement Post-Hearing Brief.

On October 20, 2010, the Commission requested additional legal authority and analysis on the following: 1) the standard of Review the Commission should follow in resolving disputes arising out of an action of UDOT; and 2) the deference which the Commission should give

UDOT as UDOT interprets its own rules or enabling statutes, including any relevant case law which details, interprets or clarifies how the Commission should treat UODT's interpretation of its rules or enabling statutes.

ARGUMENT

UDOT HAS EXCLUSIVE JURISDICTION OVER ANY PUBLIC RAILROAD CROSSING

UDOT has exclusive jurisdiction over public railroad crossings. Utah Code Ann. §54-4-15. This authority includes the power to determine and prescribe the manner, point of crossing, terms of installation, operation, maintenance, use and protection of each public crossing. Pursuant to Utah Code Ann. §54-4-15, UDOT adopted Utah Administrative Code R930-5 concerning the establishment and regulation of at-grade railroad crossings.

The Public Service Commission retains exclusive jurisdiction for the resolution of any dispute upon petition by any person aggrieved by any action of UDOT. Utah Code Ann. §54-4-15(4)(a). However, the statute does not provide the standard of review to be used by the Commission.

A. The Commission Should Apply an Intermediate Standard of Review of Reasonableness in Reviewing UDOT's Interpretation and Application of its Rule.

Although there is no case or statute on point providing the Commission its standard of review of UDOT's decisions concerning the public railroad crossings, accepting the standards of

review from cases concerning UAPA would be appropriate.¹ In this case, the Commission, which does not have the expertise concerning safety with railroad crossings, will be performing the appeal review of UDOT's decision. UDOT has the expertise and knowledge concerning the safety and mitigation measures to address safety concerns for railroad crossings.

“When the operative terms of a statute are broad and generalized, these terms bespeak a legislative intent to delegate their interpretation to the responsible agency.” LPI Services v. Labor Commission, 2009 UT 41, ¶8, 215 P.3d 135 (citation omitted). In LPI, the Court determined that the legislature granted the Labor Commission discretion to determine what constitutes reasonably available for work. Id. at ¶27. The Court further ruled that the Commission did not abuse its discretion when it adopted a rule that considered the injured worker's past wages in determining whether work is reasonably available. Id. Therefore, the Commission could only promulgate its rules that required the Commission to consider a worker's salary history if the rule was a reasonable interpretation of the governing statute. Id. at ¶25.

With the railroad crossings, the legislature granted UDOT broad powers and discretion in describing the manner and point of crossing, including the terms of the installation, operation, maintenance, use and protection. UDOT adopted Utah Administrative Code R930-5 concerning the establishment and regulation of at-grade railroad crossings. None of the parties are

¹ The Court in Kelly v. Salt Lake City Civil Service Commission, 2000 UT App. 235, ¶29, 8 P.3d 1048, agreed with the parties that although UAPA did not apply to the case involving the employee discipline, the reasoning and logic given in the UAPA cases applied.

contesting UDOT's rule. However, the Anderson Entities challenge UDOT's interpretation of its rule regarding public notice for permanent closures only.²

The Commission should use an intermediate standard to review claims of the agency's failure to follow its own rules. The Utah Supreme Court has previously held that appellate courts will use an intermediate standard (one of some, but not total, deference) in reviewing the claim that the agency erred in applying its rules. Holland v. Career Service Review Board, 856 P.2d 678, 681 (Utah App. 1993) Because courts should uphold agency rules if they are reasonable and rational, courts also should uphold reasonable and rational departures from agency rules unless the party challenging the departure demonstrates the departure violated some other right. Union Pacific R.R. v. Auditing Division, 842 P.2d 876, 879 (Utah 1992); accord SEMECO Indus., Inc., v. Utah State Tax Comm'n, 849 P.2d 1167, 1174 (Utah 1993) (Durham, J., dissenting).

Interpreting R930-5 as requiring public notice for temporary closures would negatively impact UDOT's ability to ensure the safety of the crossings. Any maintenance or emergency work that would be needed for the crossing could not be performed until the notice was given, including the appropriate period to provide comments. Such an interpretation would expose the public to unsafe conditions contrary to UDOT's purpose to ensure safe railroad crossings.

More importantly, an interpretation requiring public notice for temporary closures would be contrary to UDOT's authority granted in Utah Code Ann. §72-6-114. According to this statute, UDOT can close or restrict travel on a highway under its jurisdiction due to construction,

² The Commission also requested any information whether any state court has dealt with the distinction between temporary or permanent closures. Counsel for UDOT did not find cases on point as requested by the Commission.

maintenance work or emergency. UDOT is only required to put barriers and notices posted and maintained in accordance with Section 41-6a-301, which is the MUTCD. The MUTCD does not require public notice as stated in R930-5-14. Based upon the evidence provided during the hearing, UDOT's actions were reasonable and rational concerning its application of R930-5.

B. The Commission Should Apply an Intermediate Standard of Review of Reasonableness in Upholding UDOT's Decision that the Crossing is Unsafe and the Crossing be Temporarily Closed.

An agency's interpretation of the key provisions of the statute it is empowered to administer, a court should afford great deference to the technical expertise or more extensive experience of the responsible agency. Dep't of Administrative Services v. Public Service Commission, 658 P.2d 601, 610 (Utah 1983). "When the decision being reviewed represents the agency's weighing of competing values to select a particular goal, its interpretation of a special law, or its application of its findings of fact to a finding or conclusion on the 'ultimate facts' in the case, judicial review necessarily involves the independent judgment of the reasonableness of the agency decision." Id. at 611.

An agency should also be granted deference on the basis of its experience and on the basis of an explicit or implicit grant of discretion contained in the governing statute. Tasters Ltd. v. Dep't of Employment Security, 819 P.2d 361, 364 (Utah App. 1991). Agency decisions that apply the law to facts are entitled to discretion and are only subject to judicial review to ensure that the decisions are within the limits of reasonableness and rationality. Allen v. Dep't of Workforce Services, 2005 UT App. 186, ¶6, 112 P.3d 1238.

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing **UDOT's Supplemental Post-Hearing Statement**, postage prepaid, this 10th day of November, 2010, to the following:

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