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BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. AB-33 (Sub-No. 255)

UNION PACIFIC RAILROAD COMPANY
--ABANDONMENT--
IN CARVER AND SCOTT COUNTIES, MINN

**UNION PACIFIC RAILROAD COMPANY'S REPLY
TO NARPO'S PETITION TO REOPEN/REVOKE**

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Union Pacific Railroad Company ("Union Pacific") submits this reply to the Petition to filed by the National Association of Reversionary Property Owners ("NARPO") in this proceeding on February 28, 2019 ("Petition"). The Petition seeks to reopen this proceeding and revoke the Certificate of Interim Trail Use ("CITU") covering the portion of Union Pacific's line that is subject to the CITU from milepost 38.0 to milepost 33.0 (the "Trail"). The Board should deny the Petition because NARPO failed to meet the Board's standard for reopening this proceeding. Moreover, the CITU should not be revoked because the Trail has not been severed from the national rail network and reactivation of the Trail for rail service is still possible.

I. Background

Union Pacific filed an application to abandon its line from Milepost 38.6 to 33.0 in Scott and Carver Counties, Minnesota on December 13, 2007. On April 1, 2008, the Board, acting through its Director of Proceedings, issued a CITU for the entire line. The CITU negotiating period was extended multiple times. On September 2, 2010, the Board modified the CITU to remove .6 miles, between milepost 38.6 and milepost 38.0, and two bridges on the line located near milepost 36.17. In this decision, the Board also removed a Section 106 historic preservation

condition allowing Union Pacific to remove the two bridges. The Board noted that the trail use agreement would address replacement of the bridges should rail service be reactivated at some point in the future and the agreement does contain such a provision.¹

Following modification of the CITU, Union Pacific consummated the abandonment both from milepost 38.6 to milepost 38.0 and at the location of the two bridges and notified the Board of this in a letter dated September 8, 2010. The CITU negotiating period was then extended two more times before Union Pacific notified the Board on November 4, 2011 that a trail use agreement had been reached.

As shown on Exhibit 1, Union Pacific continues to own the right-of-way between Union Pacific's mainline and Milepost 38.0. Union Pacific uses the track on this right-of-way for storing cars and switching activities.

II. NARPO Failed to Meet the Standard for Reopening this Proceeding

A petition to reopen will be granted only if it presents new evidence, substantially changed circumstances, or a material error in the decision being challenged. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.4. The alleged grounds for reopening must be sufficient to show that, if accepted, they would lead the Board to materially alter its prior decision. *Canadian Nat'l Ry—Control—EJ&E W. Co.*, FD 35087 (Sub-No. 8) (STB served Apr. 26, 2017), slip op. at 4. If a party has presented no new evidence, changed circumstances, or material error that “would mandate a different result,” then the Board will not reopen. *Id.* (quoting *Montezuma Grain Co. v. STB*, 339 F.3d 535, 541-42 (7th Cir. 2003)).

¹ The facts in this reply with respect to the trail agreement and Union Pacific's property ownership are verified by James L. Hild, Director Real Estate Operations for Union Pacific.

The Board's role under the National Trails System Act, 16 U.S.C. §1247 ("Trails Act") is limited. *Burlington Northern Railroad Company—Aband. Exemption—Between Klickitat and Goldendale, Wa*, STB Docket No. AB-6 (Sub-No. 335X) (served June 8, 2005), slip op at 9. The Board's only responsibility when a request for an interim trail use condition is filed is to confirm that the trail sponsor agrees to assume full liability for the property during the interim trail use and to keep the property available for reactivation of rail service. *Id* at 9-10. *citing* 16 U.S.C. 1247(d) and 49 CFR 1152.29(a)(3). The Board has authority to revoke a trail use condition only if it is shown that the statutory requirements are not being met. *Id* at 10. *See also Jost v. STB*, 194 F.3d 79, 89-90 (D.C. Cir. 1999).

Although its cover letter states NARPO's intention to present new evidence and substantially changed circumstances, the Petition fails to allege either new evidence or changed circumstances. The Petition's sole basis for reopening this proceeding is the allegation that Union Pacific consummated its abandonment authority over portions of the line and thereby severed the Trail from the national rail network. NARPO makes the leap from this allegation to a conclusion that the CITU must be revoked. However, all of the facts and circumstances relied on by NARPO were known to the Board when the Board modified the CITU to remove the portions of the line to allow for the abandonment to be consummated. The Board later extended the CITU negotiating period after Union Pacific filed its consummation notice, thus allowing for the eventual execution of the trail use agreement. NARPO cannot plausibly claim Union Pacific's partial consummation is new evidence or represents a substantially changed circumstance in light of the Board's actions taken after the partial consummation.

NARPO's allegations would also fail to support any as yet unmade claim of material error. As previously stated, the Board's role under the Trails Act is limited. If the statutory

requirements are met the Board has no authority to revoke a CITU. Again, NARPO's only contention is that the CITU should be revoked because Trail has been severed from the national rail network. As explained below, the Trail has not been severed from the national rail network and reactivation of rail service on the Trail remains possible. Therefore, the Board did not commit material error in any prior Board decision or action.

III. The Trail Has Not Been Severed

Once a trail condition has been imposed, the Board's chief concern is whether statutory railbanking requirements have been compromised such that a railroad no longer has the ability to reactivate rail service. *Central Kansas Railway, Limited Liability Company—Abandonment Exemption—In Marion and Mcpherson Counties, KS*, STB Docket No. AB-406 (Sub-No. 6X) (served Dec. 8, 1999), slip op. at 14. In a situation like the one presented, the burden is on the petitioner to show that rail service cannot be restored. *Id.* Even if a railbanked line has been physically severed from the national rail network, the Board will still consider whether restoration of rail service has been rendered impossible before revoking a trail use condition. *Id.* at 19.

Here, the Trail has not been severed from the national rail network at milepost 38.0 because it maintains a connection from milepost 38.0 to Union Pacific's mainline track via property and track that is still owned and operated by Union Pacific. If rail service were to be reactivated on the Trail, shippers located on that line would have access to the national rail network through the connection to Union Pacific at Milepost 38.0. Indeed, even though Union Pacific consummated the abandonment from milepost 38.6 to milepost 38.0, this .6 miles of track

remains part of the national rail network as excepted track under 49 U.S.C. § 10906.² Thus, the Trail maintains a connection to the national rail network.

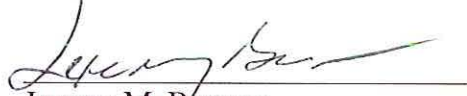
The Trail also has not been severed at the location where the bridges were removed. Under the trail use agreement, Union Pacific explicitly reserved the ability to replace these bridges in the event rail service is ever reactivated on the Trail. Even if the removal of the bridges were deemed to constitute a physical severance of the Trail, the entire Trail remains available for reactivation because of the provision allowing Union Pacific to replace the bridges. This provision was included in the trail use agreement for exactly this reason and the Board recognized the validity of such a provision when it modified the CITU to allow for abandonment of the bridges. NARPO provides no reason for the Board to revisit its prior decision.

IV. Conclusion

In the Trails Act, Congress recognized the need to preserve established rail lines for future reactivation of rail service. The Board now has the duty in this case to carry out this Congressional directive. NARPO did not meet the Board's well-established standard for reopening this proceeding and the facts demonstrate that the Trail is still available for reactivation of rail service. The Board should deny NARPO's petition.

² See, e.g., *Fox v. STB*, 379 Fed Appx. 767 (10th Cir. 2010) (Finding that continued use of track following consummation of an abandonment reclassifies that track as excepted track, removing it from certain Board authority but not from the Board's jurisdiction.)

Respectfully submitted,

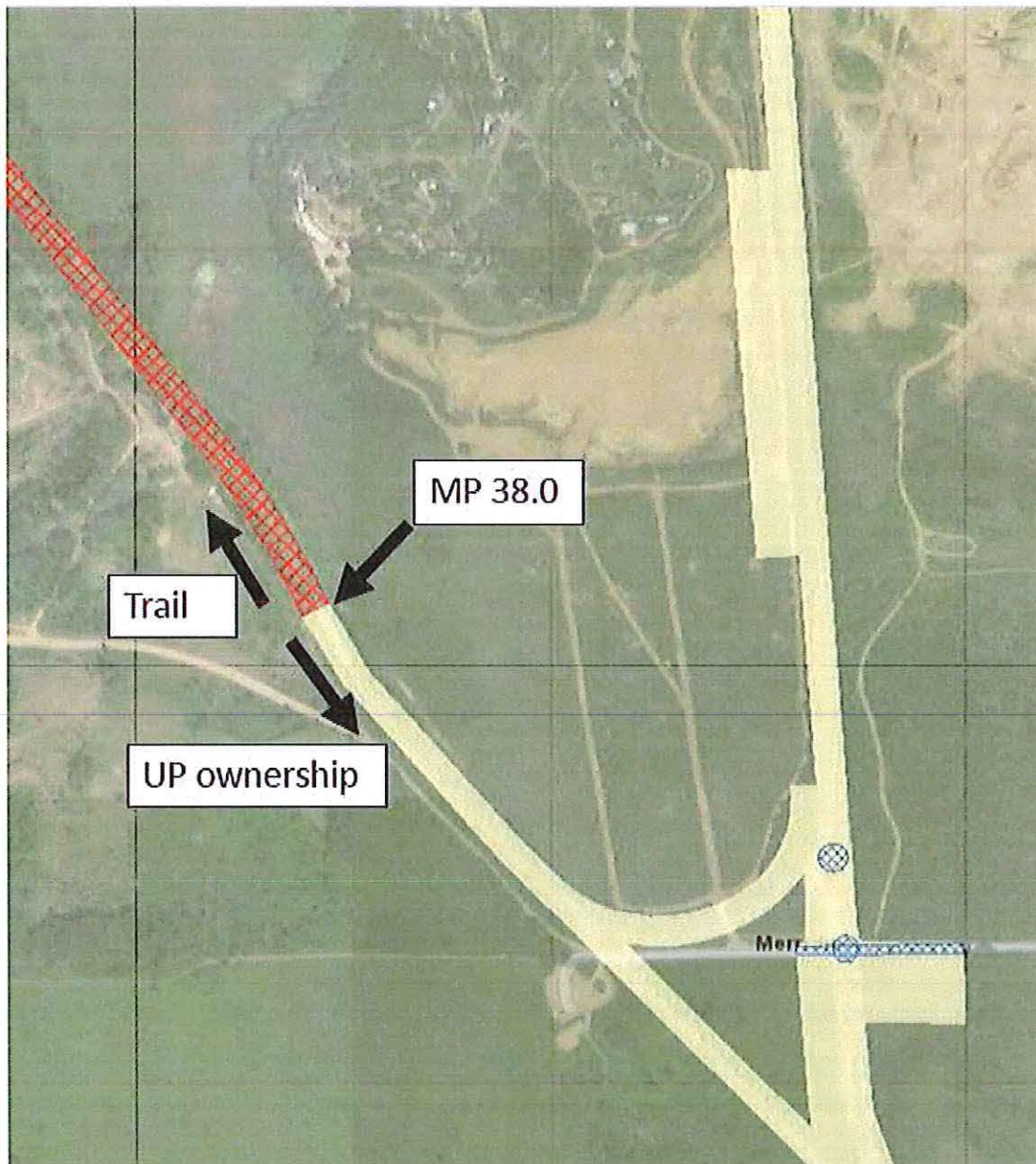
A handwritten signature in dark ink, appearing to read "Jeremy Berman", is written over a horizontal line.

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March 20, 2019

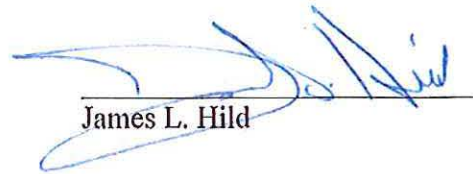
Exhibit 1



VERIFICATION

I, James L. Hild, Director Real Estate Operations for Union Pacific Railroad Company, declare under penalty of perjury that I have read the foregoing Reply of Union Pacific Railroad Company and that the facts and information set forth therein with respect to the trail use agreement and Union Pacific's property ownership on the line in question are true and correct. Further, I certify that I am qualified and authorized to file this Verification.

Executed on March 20, 2019



James L. Hild

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2019, I caused a copy of the foregoing reply to be served by first-class mail, postage prepaid on the parties listed below.

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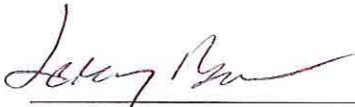
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