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BEFORE THE
SURFACE TRANSPORTATION BOARD

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DOCKET NO. AB-33 (SUB-NO. 327X)

UNION PACIFIC RAILROAD COMPANY
--ABANDONMENT EXEMPTION--
IN CERRO GORDO COUNTY, IOWA

**UNION PACIFIC RAILROAD COMPANY'S REPLY
IN OPPOSITION TO M&STL GROUP, LLC'S APPEAL**

JEREMY M. BERMAN
Union Pacific Railroad Company
1400 Dodge Street, Stop 1580
Omaha, NE 68179
Phone: (402) 544-4735

Attorney for Union Pacific Railroad Company

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Union Pacific Railroad Company ("Union Pacific") submits this reply in opposition to the appeal ("Appeal") filed by M&StL Group, LLC ("MSL") in this proceeding on November 28, 2017. The Appeal should be denied because MSL did not provide any explanation for its failure to comply with the Board's regulations; thus MSL failed to meet its burden under 49 C.F.R. § 1011.6(b) to show that the Appeal must be granted to prevent manifest injustice.

The Appeal seeks to overturn the November 20, 2017 decision by the Acting Director of the Office of Proceedings (the "Decision") which rejected MSL's formal expression of intent to file an offer of financial assistance ("Expression of Intent"). Under 49 C.F.R. § 1011.6(b), "[a]ppeals are not favored and will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice."¹

MSL acknowledges that the Expression of Intent did not comply with the Board's regulations and that the Decision correctly rejected the Expression of Intent. Appeal at 3. MSL also admits that the Decision did not represent a clear error of judgment. *Id.* This leaves the

¹ Union Pacific agrees with MSL's assertion that the standard in § 1011.6(b) governs the Appeal.

“manifest injustice” prong as MSL’s only path to appeal. However, the Appeal fails to meet this standard.

MSL’s appeal merely submits the information that it should have submitted in the Expression of Intent (Appeal at 3-5) and argues that the Appeal should be granted because MSL has now complied with the regulations governing expressions of intent (Appeal at 5-6). MSL asserts that the Board should accept the Expression of Intent because such acceptance would further the national rail policy. Appeal at 5. However, as explained below, there is an equally strong policy of requiring strict compliance with the Board’s offer of financial assistance (“OFA”) procedures.

MSL is asking the Board to accept its supplemented Expression of Intent as sufficient even though it was filed with the Board nineteen days after the filing deadline. Accepting this late filing would contravene the Board’s long-standing policy of requiring strict compliance with the procedures governing OFAs. As the Board has recognized, 49 U.S.C. § 10904 balances the competing policy considerations to preserve rail lines for continued rail service and to allow railroads the ability to quickly abandon unprofitable rail lines.² It is these policy considerations that often lead the Board to require strict compliance with filing deadlines in the OFA process:

Allowing the late filing of an OFA over the owning rail carrier's objection would be contrary to Congress's direction to streamline the abandonment and OFA process. *See Aban. & Discontinuance of Rail Lines & Rail Transp. Under 49 U.S.C. § 10903*, 1 S.T.B. 894, 909-10 (1996) (in enacting the ICC Termination Act of 1995, Congress shortened the time for the Board to process OFAs); *R.R.*

² *1411 Corporation--Abandonment Exemption--In Lancaster County, PA, et al.*, Docket No. AB-581X, slip op. at 5 (STB served May 30, 2002) ("The underlying rationale of the OFA provision ... represents an accommodation of the conflicting interests of railroads that desire to unburden themselves quickly of unprofitable lines, and shippers that desire continued rail service") (*citing Hayfield Northern R. Co. v. Chicago & N.W. Tr. Co.*, 467 U.S. 622, 630 (1984)).

Ventures, Inc. v. STB, 299 F.3d 523, 531 (6th Cir. 2002) (same). Thus, the Board does not generally allow extensions of time for filing OFAs when the line owner objects. *See, e.g., Mid-Michigan R.R.--Aban. Exemption--in Kent, Ionia, and Montcalm Cntys., Mich.*, AB 364 (Sub-No. 14X), slip op. at 5 (STB served Sept. 26, 2008); *BNSF Ry.--Aban. Exemption--In Kootenai Cnty., Idaho*, AB 6 (Sub-No. 468X) (STB served Dec. 30, 2009).

Union Pacific Railroad Company--Abandonment Exemption--In Lafayette County, Mo., Docket No. AB-33 (Sub-No. 297X), slip op. at 5 (STB served July 22, 2011).

Following these principles, the Board rejected an expression of intent that was filed 10 days late by Topflight Grain Cooperative (“Topflight”) in *Illinois Central Railroad Company--Abandonment Exemption--In Champaign County, Ill.*, Docket No. AB-43 (Sub-No. 189X) (STB served May 11, 2015). In addition to citing the policy considerations mentioned above, the Board noted that Topflight did not provide any reason its notice of intent was late and could not have been filed by the deadline. *Id.* slip op. at 2. Similarly, MSL does not provide any reason the Expression of Intent was not compliant and not filed on time.

Like MSL, Topflight appealed the rejection of its notice of intent. Unlike MSL, Topflight explained in its appeal why it did not comply with the OFA rules. The Board granted Topflight’s appeal and accepted the late-filed notice of intent because: (i) Topflight’s notice of intent was handled by an employee who was not familiar with the Board’s procedures; and (2) the railroad seeking abandonment contributed to the problem by not revealing its pending abandonment filing in communications with Topflight. *Illinois Central Railroad Company--Abandonment Exemption--In Champaign County, Ill.*, Docket No. AB-43 (Sub-No. 189X), slip op. at 3 (STB served July 2, 2015). The Board’s decision to grant Topflight’s appeal is the exception to the Board’s long-standing practice of requiring strict compliance with OFA procedures. Union Pacific is not aware of any other instances where the Board granted an appeal like the one sought

by MSL and the facts that led the Board to grant Topflight's appeal are not present in this matter. MSL was represented by experienced STB counsel at all times in this proceeding and MSL does not allege that Union Pacific contributed to its non-compliance.

MSL did not provide any explanation for its failure to comply with the Board's regulations and submit a compliant and timely notice of intent. Thus, MSL failed to meet its burden of showing that manifest injustice will result if the Appeal is not granted. *See Union Pacific Railroad Company--Abandonment Exemption--In Lafayette County, Mo.*, Docket No. AB-33 (Sub-No. 297X) (STB served July 22, 2011) (finding no manifest injustice where potential OFA offeror failed to meet filing deadlines).

For the foregoing reasons, the Board should reject MSL Appeal.

Respectfully submitted,

s/ Jeremy Berman

JEREMY M. BERMAN
Union Pacific Railroad Company
1400 Dodge Street, Stop 1580
Omaha, NE 68179
Phone: (402) 544-4735

Attorney for Union Pacific Railroad Company

December 11, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of December, 2017, I caused a copy of the foregoing reply to be served by e-mail on the parties listed below.

Thomas F. McFarland
Thomas F. McFarland, P.C.
208 S. LaSalle St., #1666
Chicago, IL 60604-1228
tmcfarland@ameritech.net

Andrea Boulton
Iowa Natural Heritage Foundation
505 Fifth Avenue Insurance Exchange Building, Suite 444
Des Moines, IA 50309
aboulton@inhf.org

s/ Jeremy Berman

Jeremy M. Berman