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September 25, 2014

236766

ENTERED
Office of Proceedings
October 2, 2014
Part of
Public Record

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

RE: FD 35792, Thomas Tubbs, Trustee of the Thomas Tubbs Revocable Trust and Individually, and Dana Lynn Tubbs, Trustee of the Dana Lynn Tubbs Revocable Trust and Individually - Petition for Declaratory Order

Dear Ms. Brown:

This letter is in response to BNSF's unsolicited letter, dated September 9, 2014, regarding the above-referenced case. Perhaps a brief response would be appropriate.

On December 8, 2013, Judge Roger Prokes issued an Order that stayed the pending state court proceeding in *Tubbs* to facilitate the filing of a Petition for Declaratory Order with the Surface Transportation Board. It should be noted that BNSF was expressly given an opportunity by Judge Prokes to object to the imposition of a Stay, but BNSF did not object. The Order recognizes the authority and expertise of the Board to interpret the Interstate Commerce Commission Termination Act ("ICCTA"), 49 USC 10501 (b), and to determine whether Plaintiffs' state law claims are preempted by ICCTA. A copy of Judge Prokes' Order is attached.

The thrust of the recent BNSF letter is to suggest that Judge Prokes would no longer welcome or defer to a determination by the Board on the issue of ICCTA preemption. This assertion by BNSF is extremely presumptuous and patently false. Judge Prokes has never rescinded the Stay nor modified the language of the Order in any respect.



MURPHY, TAYLOR, SIEMENS & ELLIOTT P.C.

The Order signed by Judge Prokes states:

ON Plaintiffs' Motion to Stay this litigation pending the outcome of its Petition for Declaratory Order filed with the Surface Transportation Board ("STB") seeking a determination as to whether Plaintiffs' claims under Missouri law are preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. 10501(b), the Court finds that it would be in the best interest of the parties to seek the declaratory order.

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Stay is granted and that all pending motions, pre-trial filings, and the scheduled trial herein are stayed pending a ruling by the STB on Plaintiffs Petition for Declaratory Order.

If, in fact, Judge Prokes no longer held the opinion that the Board's determination would be relevant and of precedential value in this case, he could have terminated the Stay at any point in time over the past several months and could have ruled on BNSF's pending motions for summary relief based upon ICCTA preemption. Judge Prokes has not done so and obviously continues to find that "it would be in the best interest of the parties" for the Board to determine whether state law claims of the type alleged in *Tubbs* are preempted by ICCTA.

BNSF asserts that a ruling by Judge Prokes in a different case ("*Bullock*") indicates that the Court would no longer benefit from a determination by the Board on Plaintiff's pending Petition for Declaratory Order. This contention ignores two important points. First, as previously stated, Judge Prokes has never modified the Stay in *Tubbs*. Second, *Tubbs* and *Bullock* are two very different cases in many respects. BNSF has ignored the dissimilar issues of law and fact in the *Bullock* and *Tubbs* cases and has taken great liberty in suggesting that Judge Prokes intended to impact *Tubbs* with the cited ruling in *Bullock*.¹

For the reasons discussed herein, Petitioners request that the Board proceed on the Petition for Declaratory Order.

Sincerely,



R. EDWARD MURPHY

Enclosure

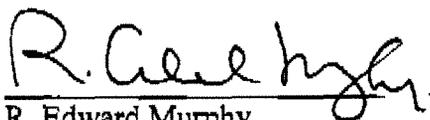
¹ State court claims for negligence, trespass, and inverse condemnation remain pending against BNSF in *Bullock*.

STATEMENT REGARDING SERVICE

The undersigned does hereby certify that on this 2nd day of October, 2014, I have served Defendants in this proceeding with this document by United States pre-paid mail, return receipt requested.

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Attorneys for BNSF Railway Company


R. Edward Murphy

IN THE CIRCUIT COURT OF HOLT COUNTY, MISSOURI
DIVISION NO. 1

THOMAS TUBBS, et al.)
)
 Plaintiffs,)
)
 vs.)
)
 BNSF RAILWAY COMPANY, INC.,)
 et al.)
)
 Defendants)

Case No. 12HO-CC00010

FILED

DEC 9 2013

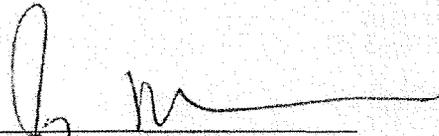
VICKI BOOK
CIRCUIT CLERK - DIV. I
HOLT COUNTY MISSOURI

ORDER GRANTING PLAINTIFFS' MOTION TO STAY

ON Plaintiffs' Motion to Stay this litigation pending the outcome of its Petition for Declaratory Order filed with the Surface Transportation Board ("STB") seeking a determination as to whether Plaintiffs' claims under Missouri law are preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. 10501(b), the Court finds that it would be in the best interest of the parties to seek the declaratory order.

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Stay is granted and that all pending motions, pre-trial filings, and the scheduled trial herein are stayed pending a ruling by the STB on Plaintiffs Petition for Declaratory Order.

SO ORDERED this 8~~th~~ day of December, 2013.



Roger M. Prokes, Judge