



Gabriel S. Meyer
Assistant General Attorney

October 17, 2008

Via Electronic Filing

The Honorable Anne Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

**Re: Petition of Joseph R. Fox for Declaratory Order, STB Docket No. 35161
(Ironton Branch, Provo, Utah)**

Dear Secretary Quinlan:

Enclosed for filing in the above-referenced matter is Union Pacific Railroad Company's reply, submitted in response to Joseph R. Fox's September 29, 2008 "Motion to Proceed Under Modified Procedures and Motion for Judgment on the Pleadings."

Thank you for your time and attention to this matter. Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Gabriel S. Meyer".

Gabriel S. Meyer

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35161

**JOSEPH R. FOX
PETITION FOR DECLARATORY ORDER**

**REPLY TO JOSEPH R. FOX'S
MOTION TO PROCEED UNDER MODIFIED PROCEDURES AND
MOTION FOR JUDGMENT ON THE PLEADINGS**

UNION PACIFIC RAILROAD COMPANY

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Dated and Filed: October 17, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35161

**JOSEPH R. FOX
PETITION FOR DECLARATORY ORDER**

**REPLY TO JOSEPH R. FOX'S
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MOTION FOR JUDGMENT ON THE PLEADINGS**

Union Pacific Railroad Company (“UP”) files this reply in response to Joseph R. Fox’s “Motion to Proceed Under Modified Procedures and Motion for Judgment on the Pleadings,” filed on September 29, 2008 in this matter. Mr. Fox’s motion sets forth a series of “Undisputed Facts” followed by a lengthy argument in which Mr. Fox reasserts his contention that UP has abandoned the Ironton Branch (the “Line”).¹ As explained in Section I below, the Board should strike the Mr. Fox’s motion as an impermissible reply to a reply. In the alternative, UP responds to Mr. Fox’s arguments in Section II. Finally, as explained in Section III, UP disagrees with many of the “Undisputed Facts” that Mr. Fox asserts in his motion.

¹ For the reasons UP explained in Footnote 1 of its August 18, 2008 Reply in this matter, the Board should limit its consideration to the portion of the Ironton Branch extending from Milepost 0.71 to Milepost 1.87, which is the only portion of the Line that abuts Mr. Fox’s property.

I. Mr. Fox's Motion is an Impermissible Reply to a Reply

Although Mr. Fox characterizes his filing as a "Motion to Proceed Under Modified Procedures and Motion for Judgment on the Pleadings," it is actually a reply to UP's Reply, filed on August 18, 2008 in this matter. Mr. Fox directly replies to and attempts at length to rebut UP's Reply arguments. Under Board regulations, "A reply to a reply is not permitted." 49 C.F.R. § 1104.13(c).

The Board adopted the rule prohibiting a reply to a reply to ensure the orderly development of a record in a fair manner. Mr. Fox's motion demonstrates the wisdom of this rule. In it, he not only seeks to rebut UP's Reply arguments, but he also seeks to further support his own arguments by citing additional cases as precedent. If Mr. Fox deemed them relevant, he should have introduced them in his June 20, 2008 Petition for Declaratory Order in order to allow UP to respond to them in its Reply.

For these reasons, UP respectfully requests that the Board strike Mr. Fox's motion from the record.

II. UP did not Abandon the Ironton Branch and It Remains Subject to Board Jurisdiction

As UP explained in detail in its Reply, it has continued to use the Ironton Branch and actively seeks to attract new business to the Line. Except for a 0.07-

mile segment of the Line,² which UP physically abandoned pursuant to ICC authority, the Line remains classified as yard (switching) track and is subject to STB jurisdiction.

In his motion, Mr. Fox restates most of the arguments he made in his Petition for Declaratory Order. UP responded to these arguments at length in its Reply, and briefly responds to them again here.

a. The indicia of abandonment are not manifest.

Mr. Fox contends that indicia of UP's intent to abandon the Ironton Branch exist. In Section II-a of its Reply (pages 6-8), however, UP explained that under the criteria established by the STB, it has not demonstrated an intent to abandon the Line. UP never sought ICC or Board authority to physically abandon the Line, has not filed a consummation notice indicating that it has abandoned it, has not ceased operations over it, has not permanently severed it from the national rail network, and has not salvaged it. As UP explained in Section II-c of its Reply (pages 9-10), removal of limited sections of rail lines, which can easily be restored, does not constitute severance necessary to show abandonment intent.

b. The STB retains jurisdiction over yard track.

Mr. Fox's assertions notwithstanding, the Board retains jurisdiction over yard tracks like the Ironton Branch, even if they are reclassified as yard tracks through abandonment proceedings. As UP explained on page 4 of its Reply, lines reclassified as yard tracks through abandonment proceedings remain

² The abandoned segment of the Line extends from Milepost 0.64 to Milepost 0.71.

subject to STB jurisdiction pursuant to 49 U.S.C. § 10906. State jurisdiction over such tracks is preempted.³

c. UP's reclassification of the Ironton Branch was not an abandonment.

Mr. Fox also argues that in December, 1977, UP notified the ICC that it was exercising "full abandonment authority" over the Ironton Branch. (*Fox Motion* at 9.) He is incorrect. In its December 30, 1977 notice, attached as Exhibit 3 to UP's Reply, UP stated that with the exception of the Milepost 0.64 to Milepost 0.71 segment, the Ironton Branch would "be retained and reclassified as yard trackage." Nothing in the notice suggests that UP intended to exercise full abandonment authority.

d. UP's continued use of the Ironton Branch is inconsistent with an intent to abandon.

Mr. Fox concedes that although UP continued to use the Ironton Branch following its reclassification as yard track, he argues that this "was not inconsistent with an intention to abandon the track." (*Fox Motion* at 9.) In support of his position, he again relies on the ICC's *Conrail* decision.⁴ As UP explained in Footnote 6 of its Reply, however, *Conrail* is inapposite. Unlike the Ironton Branch, the lines in the *Conrail* matter had not been reclassified as yard tracks through means of an abandonment proceeding. Rather, they were fully

³ See, e.g., *Port City Properties v. Union Pacific RR. Co.*, 518 F.3d 1186, 1188 (10th Cir. 2008).

⁴ *Consolidated Rail Corp.—Petition for Declaratory Order*, 1 I.C.C. 2d 284, 286 (1984).

abandoned and were therefore “no longer railroad lines recognized by the ICC for jurisdictional purposes.”⁵

III. Mr. Fox’s “Undisputed Facts” are False or Misleading

A number of Mr. Fox’s “Undisputed Facts” contain false or misleading assertions.

a. “Undisputed Fact” 1

Mr. Fox’s statement that UP “petitioned for and was eventually granted authority . . . to abandon the entire Ironton Branch” is misleading. As UP explained in its Reply (pages 3-4), it only sought permission to physically abandon the portion of the Ironton Branch extending from Milepost 0.64 to Milepost 0.71. As a result of the proceedings, UP reclassified the remainder of the Ironton Branch as yard track.

b. “Undisputed Fact” 3

Mr. Fox contends that between 1977 and 2000, UP made “unspecified use” of the Line. As UP explained in its Reply (page 4, and in footnote 1 of Steven McLaws’ attached verified statement), it used the Line to stage equipment moving to and from Geneva Steel. Additionally, UP used the Line as a car repair facility for a time during the mid 1990s, and most recently, to store a number of cabooses.

c. “Undisputed Fact” 4

⁵ *Id.*

Mr. Fox claims that no common carrier traffic has moved over the Line since 1969. In fact, UP used the Line in direct support of common carrier traffic moving to and from Geneva Steel well after this time.

d. "Undisputed Fact" 5

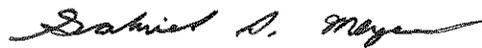
Mr. Fox inaccurately states that UP "unsuccessfully, though actively, sought rail customers for the branch." UP's discussions with potential customers who would use the Line remain active and ongoing. Moreover, Mr. Fox has no basis to know the status of UP's discussions with prospective customers.

IV. Conclusion

For the reasons explained above, UP respectfully requests that the Board strike Mr. Fox's September 29 motion as an impermissible reply to a reply. Additionally, for the reasons explained in UP's August 18, 2008 Reply and in this reply, UP respectfully requests that the Board dismiss this declaratory order proceeding.

Respectfully submitted,

UNION PACIFIC RAILROAD COMPANY

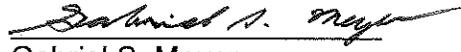


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CERTIFICATE OF SERVICE

I, Gabriel S. Meyer, hereby certify that on this 17th day of October, 2008, I caused a copy of the above Reply in STB Docket No. 35161 to be served, via electronic mail, upon the following party:

Mr. Joseph R. Fox
1149 East 1630 South
Spanish Fork, UT 84660


Gabriel S. Meyer