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September 29, 2008



Ms. Anne Quinlan, Acting Secretary  
Surface transportation board  
395 E Street S. W.  
Washington, DC 20423-0001

Re: STB Finance Docket No. 35161, Joseph R. Fox—Petition for Declaratory Order

Dear Acting Secretary:

Enclosed for filing in the above referenced docket is Petitioner's Motion for Judgment on the Pleadings and Motion to Proceed under Modified Procedures, pursuant to 49 CFR 1112.1 et seq., on the basis that there are no material issues of fact raised by the Respondent's Reply, filed August 18, 2008, and that if required, all factual matters may be resolved by written statement.

Your prompt attention to these motions is solicited.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph R. Fox".

Joseph R. Fox  
Petitioner  
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Email. [jf@irontonsuit.com](mailto:jf@irontonsuit.com)

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**BEFORE THE SURFACE TRANSPORTATION BOARD**

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**STB FINANCE DOCKET NO. 35161**

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

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**MOTION TO PROCEED UNDER MODIFIED PROCEDURES**

**AND**

**MOTION FOR JUDGMENT ON THE PLEADINGS**

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**JOSEPH R. FOX**  
**PETITIONER**  
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BEFORE THE SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35161



JOSEPH R. FOX—PETITION FOR DECLARATORY ORDER

MOTION TO PROCEED UNDER MODIFIED PROCEDURES

AND

MOTION FOR JUDGMENT ON THE PLEADINGS

The Petitioner hereby requests that this matter proceed under Modified Procedures as set forth in 49 CFR 1112.1 et seq. on the grounds that the pleadings on file herein do not raise any material issues of fact, and that any factual issues otherwise raised may be presented to the Board by written statement, and that efficient disposition of the proceedings can be accomplished without oral testimony.

The petitioner hereby petitions the Board for a Judgment on the Pleadings on the grounds that the Petition and Reply on file herein do not raise material issues of fact and that the Board may rule as a matter of law.

These motions are premised on the following memorandum and the Petition and Reply on file herein which are incorporated herein by this reference.

**Undisputed Facts**

1. In August 1977, the Union Pacific Railroad Company (UP) petitioned for and was eventually granted authority from the Interstate Commerce Commission (ICC) to abandon the entire Ironton Branch. Reply, pp. 3-4; Petition, pp. 3-4.

2. In December 1977, pursuant to the ICC's authorization, the UP filed notices with ICC, stating that a certain track segment of the branch was "retired and removed" and that the remaining track would be reclassified as "yard track". Reply, p. 4; Petition, p. 4.

3. From time to time, between 1977 and 2000, there was some unspecified use of the Ironton Branch as yard track. In the mid '90's, UP rehabilitated the branch, and, for about three years, the UP used the branch to repair rail cars. Since then, the UP has only used the branch for the storage of four cabooses, which were removed in 2007. Reply, pp 4-5

4. There has been no common carrier traffic over the Ironton Branch since 1969  
Petition, p. 3.

5. The UP has unsuccessfully, though actively, sought rail customers for the branch. Reply, pp 5-7

6. In 2006, the Ironton Branch was disconnected from the Interstate Rail Network Reply, p. 5; Petition, p. 4.

### **Issues**

The central issue to be decided by the Board is whether the Ironton Branch remains under the jurisdiction of the Board, in view of the UP's exercise of its abandonment authority in 1977.

The position of the UP is that it did not fully consummate its abandonment authority when it reclassified the remaining track as yard track, and that the Ironton Branch remains under the general jurisdiction of the Board pursuant to ICCTA, Section

10501, but is exempt from the Board's licensing authority under the provisions of ICCTA, Section 10906.

The Position of the Petitioner is that by reclassifying the remaining track as yard track, the UP fully consummated its abandonment authority in 1977, terminating the jurisdiction of the ICC over the remaining track. Therefore, the branch is not under the jurisdiction of the Board pursuant to the savings provisions of the ICCTA, Section 204. Since the yard track is not under the jurisdiction of the Board, Sections 10501 and 10906 of the ICCTA are inapplicable.

### Law

#### The only available method to reclassify track is through an abandonment proceeding

The only available method to convert a railroad line into yard track is through an abandonment proceeding. See City of Jersey City, Rails to Trails Conservancy, Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, et al., STB Docket No. 34818, STB served August 9, 2008.

A railroad may not "abandon" (i.e. permanently close or discontinue service over) a rail line without the advance authorization from the Board. In general, this licensing requirement applies to all carrier lines, including both "main" lines and "branch" lines, i.e. , those lightly-used lines over which carriers provide common carrier service to shippers in what are often rural communities. Honey Creek Railroad, Inc.—Petition for Declaratory Order—In Henry County, IN, STB Docket No. AB-865X, served June 4, 2008.

**Abandonment authority is consummated when  
the indicia of abandonment are manifest**

Whether a line has been fully abandoned (i.e. whether consummation has taken place) is a question of the carrier's intent. Indicia of intent to consummate that have been identified include whether a certificate of public convenience and necessity has been issued, whether operations have ceased, whether tariffs have been canceled, whether a letter has been filed with the ICC or the Board that the abandonment has been consummated, and whether the track and ties have been salvaged. The courts, the ICC, and this agency have also made it clear that a determination of consummation must be made on a case-by-case basis after a review of the facts, and that a particular finding on one or more of the elements is not necessarily dispositive of the issue. Burlington Northern Railroad Company—Abandonment—In Grays Harbor County, WA, STB Docket No. AB-6 (Sub No. 207), served July 25, 1997, citing *Brit v. Surface Transportation Board*, 90 F.3d 580 (D.C. Cir 1996); *Fritsch v. I.C.C.*, 59 F.3d 248, 253 (D.C. Cir. 1995), *Black v. I.C.C.*, 762 F.2d 106 113 (D.C. Cir. 1985); RLTD Railway Corporation—Abandonment Exemption—In Leelanau County, MI, Docket No. AB—457X (STB served Aug. 23, 1996).

Although salvage of track and ties has been treated as evidence of an intent to consummate, abandonment may be consummated notwithstanding that track has not been removed. Burlington Northern Railroad Company—Abandonment—In Grays Harbor County, WA, STB Docket No. AB-6 (Sub No. 207), served July 25, 1997, citing *Common Carrier Status of States, State Agencies, and Political Subdivisions*, 363 I.C.C. 132 (1980); *Consolidated Rail Corporation v. STB & USA*, 93 F.3d 793 (D.D. Cir. 1996).

The STB, however, is *not* free to depart from its predecessor's established precedent and thereby upset Conrail's reasonable expectations based on the preexisting practice without an adequate explanation for doing so. See *Hall v. McLaughlin*, 864 F.2d 868, 872 (D.C. Cir. 1989) *Consolidated Rail Corporation v. STB, et al.*, No. 95-1312, D.C. Cir. 1996.

Once abandonment is consummated  
ICC/STB jurisdiction is terminated

When rail abandonment authority is exercised, the Board loses jurisdiction over the property. *Hayfield Northern R.R. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622, 633 (1984) Whether or not abandonment authority has been exercised depends on a carrier's intent See *Fritch v ICC*, 59 F.3d 248, 253 (D.C. Cir 1995). Once a line is no longer part of the national rail network, the Board no longer has jurisdiction... See *RLTD Railway Corp. v. STB*, 166 F.3d 808, 814 (6<sup>th</sup> Cir. 1999.) As cited in *Burlington Northern and Santa Fe Railway Company—Abandonment Exemption—In Washington County, OR*, STB Docket No. AB-6 (Sub No. 383-X, served December 28, 2001.

In *Honey Creek*, *supra*, the Board characterized the *RLTD* decision, *supra*, saying: "In that case, the Board ruled that it lacked jurisdiction over a request for authority to abandon a line of railroad because the track at issue previously had been abandoned when a predecessor railroad consummated an authorized abandonment of the line some 14 years earlier, and because the line in question also had been severed from the interstate rail network when another carrier abandoned the only connecting line. See *RLTD Railway Corp. v. STB*, 166 F.3d 808 (6<sup>th</sup> Cir. 1999) "

Reclassification of the un-retired portions of the Ironton Branch track as “yard track” placed the remaining track outside the jurisdiction of the I.C.C. *Texas & Pacific Railway Company v Gulf, Colorado & Santa Fe Railway Company*, 270, U.S. 266, 278, (U.S Supreme Court 1926); see also *Jerry K. Nicholson v. ICC et al.*, 711 F.2d 364, 367 (D.C. Cir 1983)

When a track is abandoned, the ICC/STB jurisdiction ceases, and, in the usual case reversionary interests in the rail corridor become effective. See *RLTD Railway Corp v STB*, 166 F.3d 808, 814 (6<sup>th</sup> Cir. 1999.); *Preseault*, 494 U.S. 5, 5-7; *Brit v. STB*, 90 F.3d 580, 582-583 (D C. Cir 1996).

The ICCTA did not grant the STB jurisdiction  
over previously abandoned track

Section 204(b) of the ICCTA continues in full force all decisions of the ICC. ICCTA does not invalidate any prior decision of the ICC.

Railroad cannot withdraw its decision to abandon a line once consummation has occurred *Burlington Northern Railroad Company—Abandonment—In Grays Harbor County, WA*, STB Docket No. AB-6 (Sub No. 207), served July 25, 1997; see also *RLTD Railway Corp. v STB*, 166 F 3d 808, 814 (6<sup>th</sup> Cir. 1999).

The ICC/STB does not have jurisdiction over the Ironton Branch because it was the subject of a previous abandonment proceeding and was no longer recognized as a rail line by the ICC/STB for jurisdictional purposes. *Consolidated Rail Corp.—Petition for Declaratory Order*, 1 I.C.C. 2d 284, 286 (1984).

Abandoned track may be used for any purpose  
except to extend the railroad into  
new territory or access new customers

Rail service may continue over abandoned rail lines that are no longer subject to ICC/STB jurisdiction *Consolidated Rail Corp.—Petition for Declaratory Order*, 1 I.C.C. 2d 284 (1984). See also *Burlington Northern Railroad Company—Abandonment—In Grays Harbor County, WA*, STB Docket No. AB-6 (Sub No. 207), served July 25, 1997

The ICC has acknowledged that a line may be abandoned even if the track remains in place. In *Consolidated Rail Corp.\_Petition for Declaratory Order*, 1 I.C.C.2d 284 (1984), the ICC noted that the railroad had "agreed to forego dismantling" certain lines that had previously been abandoned and that these were "no longer railroad lines recognized by the ICC for jurisdictional purposes" even though Conrail had agreed to resume service over them on a "noncommon carrier" basis. *Id.* at 284 In a more recent decision, the ICC has specifically referred to salvage as "*post-abandonment ... work on the line.*" *Fox Valley & W. Ltd.\_Abandonment Exemption\_Kewaunee County, WI*, 1994 WL 487579 at \*1 (decision served Sept. 12, 1994) (emphasis added). Furthermore, in *Hayfield*, the United States (a respondent in this case) advised the Supreme Court that "[t]ypically, a carrier that abandons a rail line simply leaves in place the track and other permanent facilities that had been used in providing service " Brief for the United States as Amicus Curiae at 14 n.13, *Hayfield* (No. 82-1579) (Aug. 1, 1983). *Consolidated Rail Corporation v. STB, et al.*, D.C. Cir. 1996, No. 95-1312.

In determining whether a particular segment of track is excepted from the Board's jurisdiction, the ICC and the courts have focused on the intended use of the track and not on its designation. *Chicago Rail Link, L.L.C.—Lease and Operation*

Exemption—Union Pacific Railroad Company, STB Finance Docket No. 33323, served December 31, 1997; *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983), *Texas Pacific Railway Co. v. Gulf, Colorado & Santa Fe Railway Co.*, 270 U.S. 266 (926).

**Severance after abandonment  
works a de facto abandonment**

Once the UP consummated the abandonment authority and then disconnected the Ironton Branch from the national rail network, the UP effected a de facto abandonment of the Branch. See *RLTD Railway Corp v. STB*, 166 F.3d 808, 812-814 (6<sup>th</sup> Cir. 1999). See also *Honey Creek Railroad, Inc.—Petition for Declaratory Order—In Henry County, IN*, STB Docket No. AB-865X, served June 4, 2008.

**Argument**

The UP's position ignores the fact that the entire Ironton Branch was the subject of an abandonment proceeding initiated by the UP in 1977. In that proceeding, the UP was granted authorization to abandon the entire Branch. Pursuant to the ICC's authorization, UP ceased common carrier service along the branch, salvaged some track, and reclassified the remaining track as yard track, thereby terminating the jurisdiction of the ICC over the remaining track .

The UP argues that the reclassification of the remaining track did not constitute consummation of the abandonment authorization and that the ICC still had jurisdiction over the remaining track. This argument is illogical. The only way for a railroad to reclassify track as yard track, and take it out of the national rail network, is through an abandonment proceeding. Without having consummated the abandonment authority, the track could not have been reclassified. And once the abandonment authority was

consummated and the track reclassified, the jurisdiction of the ICC was terminated with respect to the track. The UP's argument that it was able to reclassify the track as yard track independent of the abandonment proceeding, without affecting the jurisdiction of the ICC, is not supported under the law and precedent of the ICC/STB. The provisions of the ICCTA, Sections 10501 and 10906 do not apply to the Ironton Branch because it was previously abandoned under the ICC's 1977 authorization.

Moreover, in the UP's notices to the ICC in December 1977, it failed to indicate that the UP was not exercising its full abandonment authority. If the UP's intention were otherwise, then there would have been no need to reclassify the remaining track. Since track is classified by its intended present or future use and not by its designation, the UP could have simply used the track as yard track, without reclassification. Such a procedure would not have restricted the UP's further use of the track. The only plausible purpose, then, for reclassification was to remove the remaining track from the national rail network and terminate the ICC's jurisdiction over the track.

The UP's subsequent use of the track since 1977 is not inconsistent with an intention to abandon the track. The UP could continue to use the track for storage or rail car repair or it could have contracted with a shipper for use the track even after it had consummated its abandonment authority. The only post-abandonment limitation on its use of the track is that it could not extend the track into new territory, or use it to access new territory, without the permission of the ICC/Board.

### Conclusion

Therefore, since there is no dispute concerning the material facts, and the recognized indicia for abandonment are present in this matter, including the

disconnection of the Branch from national rail network after abandonment, the Petitioner requests that the Board rule that the UP consummated the abandonment of the Ironton Branch in 1977, and that the Board lacks present jurisdiction over the Ironton Branch as a result thereof.

Dated: September 29, 2008

  
Joseph R. Fox  
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#### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motions has been served on the following persons by prepaid Express Mail this 29<sup>th</sup> day of September 2008.

Gabriel S Meyer  
Assistant General Attorney  
Union Pacific Railroad Company  
1400 Douglas Street  
Omaha, Nebraska 68179

  
Joseph R. Fox