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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34914

DESERTXPRESS ENTERPRISES, LLC-
PETITION FOR DECLARATORY ORDER

ENTERED
Office of Proceedings

OCT 26 2009

Part of
Public Record

**NOTICE OF THE IBT RAIL CONFERENCE
OF ITS INTENT TO RELY ON SUPPLEMENTAL AUTHORITY**

The International Brotherhood of Teamsters Rail Conference and its affiliated organizations, the Brotherhood of Locomotive Engineers and Trainmen Division/IBT, and the Brotherhood of Maintenance of Way Employes Division/IBT, ("Rail Conference") hereby give notice of their reliance on a supplemental authority in support of their position in this case. In oral argument in this case the Rail Conference intends to rely in part on a Board decision served after the completion of briefing on the motion of putative interveners, California -Nevada Super Speed Train Commission ("CNSSTC") and American Magline Group ("Magline") for leave to intervene in this case, and for reopening and reversal of the Board's prior decision. The decision on which the Rail Conference intends to rely is: *Joseph R. Fox-Petition for Declaratory Order*, F.D. 35161 (served May 18, 2009); for convenient reference, a copy of that decision is attached to this filing.

Respectfully submitted,



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Dated: October 26, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing to be served this 26th day of October on the following by hand delivery and electronically:

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SERVICE DATE – MAY 18, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35161

JOSEPH R. FOX—PETITION FOR DECLARATORY ORDER

Decided: May 13, 2009

This decision denies the petition of Joseph R. Fox (Fox) for institution of a declaratory order proceeding. We find, based on the pleadings that have been submitted, that the rail line segment at issue, owned by Union Pacific Railroad Company (UP), has not been taken out of the national rail system and that it remains within the jurisdiction of the Surface Transportation Board (Board).

BACKGROUND

The petition, filed on June 20, 2008, arises out of a lawsuit filed by Fox in the District Court for the State of Utah, Fourth District (the Utah District Court) for a mandatory injunction requiring UP to remove a short rail line known as the Ironton Branch in Provo, UT, and for damages. In that case, Fox claims that UP has abandoned the entire Ironton Branch, and that a portion of the line has become a nuisance due to UP's neglect.¹ UP has denied the principal allegations of the complaint and has asserted various affirmative defenses, including that the lawsuit is preempted by 49 U.S.C. 10501(b).

On June 25, 2008, the Utah District Court stayed the lawsuit and directed the parties to obtain a ruling from the Board on whether and to what extent abandonment has occurred. Fox's petition seeks a determination that UP consummated the abandonment of the Ironton Branch; that the entire Ironton Branch no longer is subject to the Board's jurisdiction; and that therefore Fox's state-court lawsuit against UP may proceed. UP filed a reply on August 8, 2008, asking for denial of Mr. Fox's petition.

In a motion filed on September 30, 2008, which UP moved to strike, Fox sought a judgment on the pleadings, on the ground that material facts are not in dispute. In light of our conclusion that we can decide this matter on the written submissions, UP's request to strike the motion will be denied. We will rule on this matter on the basis of the pleadings submitted.

¹ Fox v. Union Pac. R.R. Co., Complaint at 5-6, Case No. 070103208 (Utah Fourth Dist. Ct.).

NATURE OF THE DISPUTE

The Ironton Branch is a 1.87-mile line located in Provo. It originates at UP's Sharp Subdivision (milepost 0.0), crosses UP's Provo Subdivision between mileposts 0.64 and 0.71, and stub-ends at milepost 1.87. Mr. Fox owns property that abuts the line for approximately 200 feet near milepost 1.25.

In July 1977, UP, the Los Angeles & Salt Lake Railroad Company, and the Denver & Rio Grande Western Railroad Company (collectively, the rail carriers) filed with our predecessor, the Interstate Commerce Commission (ICC), a "Notice of Intent to Physically Abandon and Discontinue Service over the Ironton Branch." In the 1977 Notice, the rail carriers stated that, if abandonment were authorized, the middle segment of the Ironton Branch between mileposts 0.64 and 0.71 would be physically removed and retired, that is, fully abandoned. The rail carriers stated that the remainder of the Ironton Branch—the northern segment between mileposts 0.00 and 0.64 and the southern segment between mileposts 0.71 and 1.87—would be left in place and reclassified as yard track. The rail carriers thus indicated at the outset their intention to retain use of the latter two segments to assist in rail operations.

On October 6, 1977, the ICC served a Certificate and Order authorizing UP to abandon the Ironton Branch and to discontinue common carrier operations over it.² By letter dated December 15, 1977, UP informed the ICC that the middle portion of the Ironton Branch had been abandoned and that the remaining segments would promptly be reclassified as yard track. Yard track, although still within the national rail network, falls into the category of "excepted" auxiliary spur or industrial track, which may be built, transferred, or abandoned without having to obtain authority.³

Fox states that a portion of the Ironton Branch borders on his property.⁴ He argues that UP's actions in 1977 amounted to abandonment of the southern segment of the Ironton Branch. Although Mr. Fox concedes that UP reclassified and used that segment as yard track, he states that the ICC did not have jurisdiction over yard track at the time of the reclassification in 1977.

² Los Angeles & Salt Lake Railroad Company, Union Pacific Railroad Company, and The Denver & Rio Grande Western Railroad Company—Abandonment Portion of the Ironton Branch in Utah County, UT, Docket No. AB-35 (Sub-No. 3) (ICC served Oct. 6, 1977).

³ See 49 U.S.C. 10906 (formerly 49 U.S.C. 10907(b)); Nicholson v. ICC, 711 F.2d 364 (D.C. Cir. 1983); MVC Transportation LLC—Acquisition Exemption—P&LE Properties, Inc., STB Docket No. FD 34462 (Sub-No. 1), slip op. at 5 (STB served Oct. 20, 2004).

⁴ According to a map provided by UP, Fox's property lies adjacent to the southern segment at approximately milepost 1.25. As Fox does not dispute that his property abuts only the southern segment, the remainder of this decision will focus on that segment.

Thus, Fox claims that, upon reclassification, the southern segment was irrevocably removed from the agency's jurisdiction and became subject solely to state law.⁵

In response, UP argues that the southern segment is still subject to Board jurisdiction because: the track has not been removed; the segment has regularly been used as yard track in aid of rail operations; UP is actively seeking new rail customers, several of whom have expressed interest in using the southern segment as a team track or transload facility; and removal of an easily replaced switch connection to UP's Provo Subdivision did not permanently sever the segment from the national rail system. UP claims that, as a consequence, the southern segment is subject to the Board's exclusive jurisdiction over transportation by rail carrier in accordance with 49 U.S.C. 10501(b), which expressly provides that the Board's jurisdiction extends to excepted auxiliary track such as yard track, even if located within a single state, and that the Board's jurisdiction preempts other remedies provided under state or Federal law.

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. 554(e) to issue a declaratory order to terminate a controversy or remove uncertainty. Here the operative facts are not disputed, and there is no need to institute a proceeding so that we can obtain further information. Rather, based on the pleadings already submitted, the Board can determine that it has jurisdiction over the southern segment that abuts Fox's property, thereby preempting Fox's state law claim. Therefore, the relief that Fox seeks in the Utah District Court is not available.

A railroad may not "abandon" (i.e., permanently close and discontinue service over) a rail line without advance authorization from the Board, or, prior to the enactment of the ICC Termination Act of 1995 (ICCTA), the ICC. 49 U.S.C. 10903, 10502. In general, this abandonment 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.⁶

Historically, to determine whether a railroad had exercised permissive abandonment authority by "consummating" an abandonment authorized by the Board or the ICC, the agency looked at whether a railroad manifested a clear intent, through its statements and actions, to

⁵ Additionally, Fox claims that the rail carriers sought abandonment authority for the entire Ironton Branch because there were no more rail customers on the line, no prospects of rail customers in the future, and no outstanding conditions on the abandonment authority that might have preserved ICC jurisdiction over any portion of the Ironton Branch. Fox also points to the removal in 2006 of the switch connecting the Ironton Branch to UP's Provo Subdivision, which Fox argues constituted severance of the branch from the national rail system.

⁶ See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) (Kalo Brick).

terminate permanently its common carrier service obligation with respect to the line rather than discontinue operations temporarily.⁷ Under current Board regulations in effect since 1997, the filing of a “notice of consummation” is deemed to be conclusive of whether a line has been abandoned.⁸

The line segment at issue here, however, after being authorized for abandonment in 1977, was promptly reclassified as yard track. Industrial yard track, while excepted under 49 U.S.C. 10906 from the need to obtain Board authority for construction, abandonment, or operation, is nevertheless subject to the Board’s jurisdiction and is not subject to state or local regulation. Indeed, although prior to the passage of ICCTA, state regulatory agencies had some authority over excepted track,⁹ ICCTA added a new provision that specifically establishes the exclusivity of the Board’s jurisdiction over “transportation by rail carriers.” This jurisdiction includes exclusive jurisdiction over “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.” 49 U.S.C. 10501(b)(1)(2). When sections 10501(b) and 10906 are read together, it is clear that Congress intended to occupy the field and preempt state jurisdiction over excepted track such as yard track, even though Congress allowed rail carriers to construct, operate, and remove such facilities without Board approval. See ICCTA Conf. Rpt., H.R. Rep. No. 311, 104th Cong., 1st Sess. at 95 (1995).¹⁰ Therefore, Federal courts have uniformly held that state law tort claims such as those brought by Mr. Fox – which would interfere with rail carrier operations, including operations involving spur, industrial, team, switching, or side tracks – are preempted.¹¹

⁷ See Birt v. STB, 90 F.3d 580, 585 (D.C. Cir. 1996) (Birt); ParkSierra Corporation (Successor-in-Interest to California Northern Railroad Company Limited Partnership)—Lease and Operation Exemption—Southern Pacific Transportation Company, STB Finance Docket No. 34126, slip op. at 5 (STB served December 26, 2001) (“Once the abandonment was consummated, [the line at issue] was no longer part of the interstate rail system . . .”) (ParkSierra).

⁸ 49 CFR 1152.29(e)(2); Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894, 904-06 (1996).

⁹ See, e.g., Illinois Commerce Comm. v. ICC, 879 F.2d 917 (D.C. Cir. 1989).

¹⁰ See also Auburn and Kent, WA—Pet. For Declar. Order—Stampede Pass Line, 2 S.T.B. 330 (1997), aff’d, Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998). Accord Port City Properties v. Union Pac. R.R. Co., 518 F.3d 1186, 1188 (10th Cir. 2008) (Port City); Green Mountain R.R. v. Vermont, 404 F.3d 638 (2d Cir. 2005);

¹¹ Port City, 518 F.3d at 1188-89 (ICCTA preempts state law claims for defamation and tortious interference with contract relations against rail carrier that ceased service to warehouse when rail carrier deemed excepted industrial track leading to warehouse to be unsafe). Cf. Kiser v. CSX Real Property, Inc., 2008 U.S. Dist. Lexis 90676 (M.D. Fla. 2008) (ICCTA preempts state law nuisance claim against railroad seeking to prevent development of a transloading

(continued . . .)

Fox argues that UP consummated the abandonment of the entire Ironton Branch in 1977 when it physically abandoned the segment between milepost 0.64 and 0.71 and reclassified the northern and southern segments as yard track, and that this action permanently deprived the agency of jurisdiction over any part of the line. That argument is incorrect. Track used in line-haul service may be more appropriately used for other purposes in support of rail operations.¹² Post-ICCTA, there is no question that yard track is subject to the Board's exclusive jurisdiction pursuant to section 10501(b) regardless of its prior use in line-haul service. Even if the 1977 reclassification action could be viewed as a consummation of abandonment, it is undisputed that beginning in 1977, UP used the southern segment as industrial yard track within the meaning of what is now section 10906. Thus, as long as the segment continues to be yard track, the Board has exclusive jurisdiction over the track segment under section 10501(b)(2).

Fox argues that he has shown that UP has in fact abandoned its use of the southern segment as excepted auxiliary track, but we disagree. It is undisputed that between 1977 and 2000, UP used the southern segment for staging and storing rail equipment for customers and, for 3 years in the mid-1990s, as a car repair site. UP also stored cabooses on the line until it removed them in 2007. And Fox acknowledges UP's efforts to market the southern segment for use as team track or as a transload facility to serve growing markets in Provo, UT.

These actions contradict any intent to take this track segment out of the national rail system. UP's action removing the switch connecting the Ironton Branch to its Provo Subdivision does not dictate a different conclusion; the switch can be easily replaced and therefore its removal did not sever the Ironton Branch from the national rail network. See Norfolk and Western Railway Company—Abandonment Exemption—Between Kokomo and Rochester in Howard, Miami, and Fulton Counties, IN, STB Docket No. AB-290 (Sub-No. 168X), slip op.

(. . . continued)

facility); Maynard v. CSX Transp. Inc., 360 F.Supp.2d 836 (E.D. Ky. 2004) (ICCTA preempts state common law claims against rail carrier for nuisance and denial of ingress and egress based on allegations that rail carrier's use of excepted side tracks blocked property owners' access to their properties); Gluckenber v. Wis. Cen. Ltd., 178 F.Supp.2d 954, 958 (E.D. Wis. 2001) (ICCTA preempts state law claims by landowners that rail carrier's construction of excepted switching tracks across the street from landowners' residence amounted to a common law nuisance).

¹² See ParkSierra, slip op. at 6; Burlington Northern Railroad Company—Abandonment—In Grays Harbor County, WA, Docket No. AB-6 Sub-No. 207), slip op. at 5-6 (STB served July 25, 1997) (Railroad's actions in providing contract rail service over an abandoned line of railroad "resulted in operations that are analogous to that of a common carrier providing service over a spur line . . ."). Cf. Union Pacific Railroad Company—Operation Exemption—in Yolo County, CA, STB Finance Docket No. 34252, slip op at 3-5 (STB served Dec. 5, 2002) (discussing cases involving changes in the use of excepted track).

at 6 (STB served May 4, 2005) (removal of some rails and other materials not dispositive in determining whether a rail-line segment had been abandoned). In short, because UP has continued to use the southern segment as part of the national rail network, and is seeking new customers to use it in the future, that segment remains within the Board's jurisdiction.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. UP's motion to strike Fox's motion to proceed under modified procedures and for judgment on the pleadings is denied.
2. Fox's motion to proceed under modified procedures and for judgment on the pleadings is granted.
3. Fox's request for a declaratory order proceeding is denied.
4. This decision is effective on its service date.

By the Board, Acting Chairman Mulvey, and Vice Chairman Nottingham.

Anne K. Quinlan
Acting Secretary