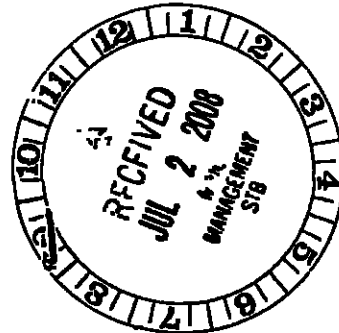


222712

July 1, 2008

Joseph R. Fox
Petitioner
1149 East 1630 South
Spanish Fork, Utah 84660
801-358-0846
Email: jf@irontonsuit.com

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

Re: STB Finance Docket No. FD-35161, Union Pacific Railroad Ironton Branch—Petition for Declaratory Order—Utah County, Utah

Dear Secretary Quinlan:

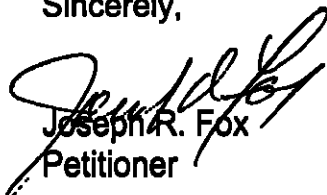
I have attached to this letter a true and complete copy of the Ruling and Order of Judge David N. Mortensen, issued in the Fourth Judicial District Court, Utah County, State of Utah, entitled Joseph R. Fox v. Union Pacific Railroad Company (UPRC), Case No. 070103208, concerning the subject matter of the Petitioner's request for a declaratory order in the above reference matter.

The district court ordered the parties to seek the ruling of the STB that the UPRC consummated its abandonment of the Ironton Branch in the prior action before the Interstate Commerce Commission (ICC), see ICC Docket No. AB-35 (Sub-No 3).

Expedited resolution of this controversy under the modified procedures set forth at CFR, Title 49 §1112.1, is requested so that the proceedings of the district court may go forward in a timely fashion.

Ten additional copies of this letter are attached for the Board's use.

Sincerely,


Joseph R. Fox
Petitioner

cc: Mr. Steven T. Densely
Attorney for UPRC
280 S 400 W Ste 250
Salt Lake City, UT 84101

JUN 25 2008

4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

**IN THE FOURTH JUDICIAL DISTRICT COURT,
UTAH COUNTY, STATE OF UTAH**

JOSEPH R. FOX.

Plaintiff,

vs.

**UNION PACIFIC RAILROAD
COMPANY,**

Defendant

RULING AND ORDER

Date June 25, 2008

Case No. 070103208

Division XI: Judge David N. Mortensen

This matter comes before the court on plaintiff's motion for partial summary judgment. Also before the court are defendant's motion for summary judgment, motion for a protective order, and motion to strike. For the reasons that follow, this matter is stayed and the parties are directed to take the determination of whether and to what extent an abandonment has occurred to the Surface Transportation Board (STB).

Factual Background

Plaintiff purchased a tract of real property in Utah County. On part of this property the Union Pacific Railroad Company has held, for many years, an easement. By virtue of this easement, Union has enjoyed free use of the railroad tracks, some of which run across plaintiff's property. Throughout the years, parts of the track appear to have fallen in disrepair, and several cabooses which were left on one of the tracks appear to have been used by vandals to engage in

criminal activity such as graffiti, etc.

Plaintiff filed this lawsuit requesting this court to rule that the tracks, and their accompanying easement, have been abandoned. Plaintiff further requests that this court award damages for the nuisance created by the abandoned tracks and cabooses. Defendant's defense is that the tracks have not been abandoned. Defendant also claims that this court lacks subject matter jurisdiction and has requested that this case be dismissed.

Analysis

The threshold issue in this case is whether Union Pacific has indeed abandoned or discontinued the use of the Ironton Branch. Only then can the issue of nuisance, and any damage award, be adjudicated upon. Before proceeding with a determination of whether the tracks have indeed been abandoned, this court must address defendant's argument that this court lacks subject matter jurisdiction.

In support of this argument, defendant cites 49 U.S.C.A. §10501, which reads, in relevant part:

(b) *The jurisdiction of the Board over - -*

...
(2) the construction, acquisition, operation, *abandonment*, or discontinuance of spur, industrial, team, switches, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part with respect to regulations of rail transportation are exclusive and preempt the remedies provided under federal or state law

Id (Emphasis added).

This statement of the law is clear and unequivocal, but its legal import is not so clear as

the precedent cited by defendant makes clear. While dismissal on summary judgment is the remedy being sought, it is not the remedy allowed by the precedent. Specifically, the precedent cited by defendant does *not* hold that the courts are without subject matter jurisdiction. While the term jurisdiction is used in the statute, the statute is addressing jurisdiction over issues, not over matters as a whole. In fact, Title 49 provides for concurrent jurisdiction in the state and federal court to enforce determinations of the STB. See 49 U.S.C.A. § 11704(d)(1) ("In addition to the district courts of the United States, a State court of general jurisdiction having jurisdiction of the parties has jurisdiction to enforce an order under this paragraph.") Thus, to say that the courts are without subject matter jurisdiction is simply not supported by the statute.

Pejepscot Indus. Park, Inc. v. Maine Cent. R. Co., 215 F.3d 195 (1st Cir. 2000) supports this conclusion. In *Pejepscot*, the U.S. District Court dismissed the case for lack of subject matter jurisdiction. This determination was vacated and the matter remanded. The *Pejepscot* court held:

The legislative history of § 10501 of the ICCTA also offers support for [plaintiff's] argument that in establishing the STB's jurisdiction under the ICCTA, Congress intended only to preempt state law and remedies, not to give the STB exclusive jurisdiction over ICCTA claims.

The thrust of the statute is to federalize these disputes, not to deprive the federal courts of jurisdiction.¹

¹By extension under 49 U.S.C.A. § 11704(d)(1) state court jurisdiction would remain as well.

Thus, subject matter jurisdiction does exist.² On this basis, defendants' motion for summary judgment is denied.

However, just as in *Pejepscot* the issue of primary jurisdiction remains. Although no formula exists for applying the doctrine of primary jurisdiction, courts have used a three-prong test to determine whether an issue should be referred to an agency under the primary jurisdiction doctrine: (1) whether the agency determination lies at the heart of the task assigned the agency by Congress, (2) whether agency expertise is required to unravel intricate, technical facts; and (3) whether, though perhaps not determinative, the agency determination would materially aid the court. *Pejepscot Indus. Park, Inc V Maine Cent. R Co.*, 215 F 3d 195, 205 (citing *Blackstone Valley Elec Co.*, 67 F 3d 981, 992 (1st Cir 1995)).

In making its decision to "refer" the case to the Surface Transportation Board, the *Pejepscot* court reasoned that "the STB's expertise is clearly involved in the question [at hand]." and that "the agency's determination would materially aid the district court. Furthermore, referral to the STB will promote uniformity in the standards governing [tracks]." *Id* This court relies on the court's reasoning in *Pejepscot* to reach the same result in this case. Applying the three-prong test set forth above to the facts at hand, this court finds that the Surface Transportation Board because of its very purpose, likely has more experience and expertise to resolve the technical

²The doctrine of primary jurisdiction "requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 353, 83 S Ct 1715, 10 L.Ed. 2d 915 (1963). "Court jurisdiction is not thereby ousted, but only postponed." *Id*

questions of this case than this court has. Referring this dispute to the STB would not only help preserve resources, since the STB is likely to resolve this in a more expeditious manner, but would also promote uniformity in decisions governing the abandonment of tracks. Once the STB has made its determination, including the assessment of damages, this court will be available to enforce said determination should the need arise.³ Accordingly, consistent with the precedent of *Pejepscot*, this matter is stayed.

Conclusion

Since the STB has primary jurisdiction, plaintiff's motion for partial summary judgment is denied. Defendant's motion for summary judgment is granted in part. This case is stayed pending a determination of the Surface Transportation Board on the issue of abandonment and any other claims which the STB determines it should adjudicate. Defendant's motion to dismiss for lack of subject matter jurisdiction is denied.

Dated this 25th day of June, 2008



Judge David N. Mortensen
Fourth Judicial District Court



A certificate of mailing is on the following page.

³ As this case is being stayed, this court will forego addressing the motion to strike and motion to compel.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 070103208 by the method and on the date specified

METHOD NAME

Mail JOSEPH R FOX
Plaintiff
1149 E 1630 S
SPANISH FORK, UT 84660
Mail STEVEN T DENSLEY
Attorney DEF
280 S 400 W STE 250
SALT LAKE CITY UT 84101

Dated this 25 day of June, 2018.

Melissa Strackley
Deputy Court Clerk