

1993

Williams v. Hoopiiana : Brief of Appellee

Utah Court of Appeals

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FILED
MAR 17 1994
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930758 CA

IN THE UTAH COURT OF APPEALS

STEVEN WILLIAMS and KYLE
WILLIAMS,

Plaintiffs-Appellants,

vs.

MALUALANI B. HOOPIANA,
Trustee of the MALUALANI B.
HOOPIANA TRUST,

Defendant-Appellee.

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Case No. 930758-CA

Priority No. 15

BRIEF OF DEFENDANT-APPELLEE

Appeal from the Judgment of the Third District Court,
Salt Lake County, State of Utah.
Honorable Homer F. Wilkinson, Judge

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Utah Court of Appeals

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Mary T. Noonan
Clerk of the Court

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BRIEF OF DEFENDANT-APPELLEE

JURISDICTION OF THE COURT

The Court of Appeals has appellate jurisdiction in this matter pursuant to § 78-2-2(4) Utah Code Annotated.

STATEMENT OF THE ISSUES FOR REVIEW

1. Were the findings of the trial court clearly erroneous?
2. Were the conclusions of the trial court correct?
3. What constitutes abandonment of an easement acquired by written grant of record?

STANDARD OF REVIEW

1. To successfully challenge the trial court's findings, the appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the

trial court's findings are so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous. Ohline Corp. v. Granite Mill, 849 P.2d 602, 604 (Utah App. 1993)

2. The appellate court reviews a trial court's conclusions of law for correction of error. Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

DETERMINATIVE STATUTES AND RULES

(a) Utah Code Annotated § 54-4-11 and § 54-3-20, require a railroad corporation to make connections and to provide services by switches and spurs upon application of any person who is a shipper or receiver of freight.

STATEMENT OF THE CASE

A. Nature of the Case.

Plaintiffs-appellants, Steven and Kyle Williams ("Williams") commenced this action by a Complaint to Quiet Title to commercial and industrial property at 737 South 300 West, Salt Lake City, Utah, claiming that a written easement appurtenant to the tract of the defendant-appellee, Malualani B. Hoopiiana ("Hoopiiana") had been abandoned. (R 2-5).

B. Course of Proceedings and Disposition in Trial Court.

After a full bench trial and review of briefs filed by both parties, the trial court by telephone conference recited its decision (R 100) and subsequently made and entered Findings of

Fact, Conclusions of Law, and Judgment and Decree dismissing the Williams' complaint with prejudice and decreeing that Hoopiiana owns a perpetual easement for a spur track over Williams' property pursuant to an agreement of February 8, 1947 creating a right-of-way, which has not been abandoned and continues in full force and effect. (R 101-108).

C. Statement of Facts.

Hoopiiana submits the following excerpt from the trial court's Findings of Fact as being the facts of the case:

1. The [Williams] are residents of Salt Lake County and are owners of certain real property located at 737 South 300 West, Salt Lake City, Utah 84101, and more particularly described as follows:

Lot 5, Block 23, Plat "A", Salt Lake City Survey, as is recorded in the Salt Lake County Recorder's Office.

2. The Defendant, [Hoopiiana], is the owner of the following described tract which adjoins the [Williams'] property on the east thereof:

West one-half of Lot 6, Block 12, Plat "A", Salt Lake City Survey, Salt Lake County, Utah.

3. On or about April 6, 1917, the then owner of Lot 5, referred to above, Theodore T. Burton and Florence Burton, his wife, granted to the Oregon Shortline Railroad Company a railroad easement for a right-of-way for the construction, operation and maintenance of a railroad spur that traversed through all of Lot 5, as per Exhibit "A" offered and received in evidence.

4. A condition of the said Easement of April 6, 1917,

granted by the previous owner of Lot 5 was that:

If at any time the said spur track or any portion thereof shall be removed from the above-described land, then and in that event this conveyance shall become null and void and have no effect between the parties hereto or their successors, or assigns, as to such trackage so removed.

5. Subsequently, on or about February 8, 1947, the then owner of Lot 5, Florence M. Burton, granted to the then owner of the following real property:

The West 1/2 of Lot 6, Block 12, Plat "A" Salt Lake City Survey.

a right-of-way for a spur track in perpetuity. The right-of-way was granted for the exclusive use of the real property as a "spur track" and could not be extended to any other property adjacent to the west half of Lot 6, Block 12, Plat "A", Salt Lake City Survey. Said Easement of February 8, 1947 was received into evidence as Exhibit B.

6. The successor-in-interest to Edward L. Burton, the Grantee of the right-of-way for a railroad spur over the [Williams] tract is [Hoopiiana] who is the current owner and in possession of certain real property at about 349 West 700 South, Salt Lake City, Salt Lake County, State of Utah and is the West 1/2 of Lot 6, Block 12, Plat "A", Salt Lake City Survey.

7. On or about July 6, 1983, the Union Pacific Railroad Company, the Lessee of the railroad spur across Lot 5 notified the [Williams], who are now the owners of Lot 5, of their Notice of Intent to Terminate the Easement of April 6, 1917, that was originally granted to the railroad company for the creation of

the railroad spur track.

Then, on December 17, 1987, the Union Pacific Railroad for and in behalf of the Oregon Shortline Railroad Company, recorded a Disclaimer releasing all of their rights, title and interest to the Easement of April 6, 1917. Said Disclaimer of December 17, 1987, was granted based upon the original terms of the railroad spur Easement of April 6, 1917, which stated:

If at any time the said spur tracks, or any portion thereof shall be removed from the above-described land, then in the event this conveyance shall become null and void and if no effect between the parties thereto or their successors or assigns as to such trackage so removed.

No such termination provision was contained in [Hoopiiana's] easement of February 18, 1947, which by its terms was stated to be a perpetual right-of-way of a spur track crossing the property now owned by the [Williams], with the right of the servient owner to change the location on its tract so long as the right-of-way as changed will continue to permit the spur track to continue to serve [Hoopiiana's] property entering at the same place as the existing spur then entered the dominant tract.

8. [Hoopiiana] last used the spur track in 1983. Subsequently in 1983, [Williams] erected a gate at the entrance of the spur at 700 South Street, placed a lock on the gate and provided a key to the gate to [Hoopiiana].

9. In 1988 the Union Pacific Railroad removed that portion of the spur in 700 South Street which attached to the trunk line on 400 West Street thereby disconnecting the spur at the vicinity of [Williams'] tract. The railroad company continues to operate

the trunk line on 400 West Street (formerly 300 West Street) and to serve spur tracks to properties adjoining 400 West Street including a spur exiting on 700 South to serve properties east of 400 West.

10. Someone removed a portion of the spur track from [Hoopiiana's] property without his knowledge or consent and also removed a small portion of the track which was situated on [Williams'] property in the vicinity of [Hoopiiana's] property. The remaining portion of the spur track on the [Williams'] property extending to 700 South Street is still in place.

Williams' Statement of Facts includes some of the evidence presented and some of the facts set forth in the Findings of Fact of the trial court. However, Williams have not undertaken the burden of marshalling all of the evidence to render the findings of the trial court clearly erroneous.

SUMMARY OF ARGUMENT

The findings of the trial court must stand in absence of a marshalling of evidence which would show the findings to be clearly erroneous.

There were two written easements over Williams' track. The first, in 1917 was a grant to a railroad for a divided spur, one of which served Hoopiiana's tract on the east, and the other extended southerly to other properties and the easement was stated to become "null and void" upon removal of the spur track. The second written easement in 1947 was a right-of-way

appurtenant to the owner of Lot 6 in perpetuity with no provision for termination. Hoopiiana was a contract purchaser of his tract and required his seller to obtain the second easement, the separate, perpetual right-of-way for his tract, to prevent termination by act of a railroad. Utah Supreme Court decisions recognize that a right-of-way gained by conveyance may not be lost by non-use alone and that an intent to abandon must be evidenced by clear and convincing actions releasing the ownership and right of use and an intentional abandonment. Western Gateway Storage Co. v. Treseder, 567 P.2d 181, 182 (Utah 1977); Riter v. Cayias, 431 P.2d 788, 789 (Utah 1967). The trial court specifically stated that there has been no abandonment of the easement by Hoopiiana.

ARGUMENT

POINT I. WILLIAMS HAVE FAILED TO MARSHAL THE EVIDENCE TO ADEQUATELY CHALLENGE THE DISTRICT COURT'S FINDINGS.

Williams have failed to marshal all the evidence in support of the district court's findings and to demonstrate that viewing the evidence in light most favorable to the district court, the evidence is insufficient to support the findings. Utah appellate courts have consistently held that to challenge a trial court's findings, "an appellant must marshal all the evidence in support of the trial court's findings and then demonstrate that even viewing it in light most favorable to the court below, the evidence is insufficient to support the findings. K. J. Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985). While Williams

claim to accept the district court's findings of fact, Williams' arguments are inconsistent with the court's findings. Williams cannot argue inconsistently with the district court's findings without first engaging in the marshalling process. See Ohline Corp. v. Granite Mill, 849 P.2d 602, 604 (Utah App. 1993).

Therefore, this court should assume that the record supports the district court's findings entirely. See id.

POINT II. HOOPIIANA'S EASEMENT WAS ACQUIRED INDEPENDENTLY FROM A PREVIOUS EASEMENT AND WAS NOT CONDITIONAL IN ANY WAY TO THE 1917 EASEMENT OF THE RAILROAD.

This case involves two distinctly different easements. The April 6, 1917 easement, Exhibit 1 (R 119), was to a railroad for a divided spur, one of which served Hoopiiana's tract in Lot 6 to the east and the other continued to serve other properties to the south. Exhibit 1, is the same as Exhibit A appended to Williams' brief. The 1917 easement provided for termination upon removal of any portion of the track and in fact the railroad filed a disclaimer in 1988 terminating the 1917 easement. The 1947 Agreement Creating Right of Way to Lot 6 was appurtenant to the owner of Lot 6 and runs with the land and made no provision for termination but provided the owner of Lot 5 with the "right and privilege of changing the right-of-way for said spur track or other spur tracks to meet her convenience" provided that the changed right-of-way "continue to serve" Lot 6 and "to permit said [changed] spur track to enter the property of the party of

the second part at the same place as said spur track now enters the property of said party of the second part." [Emphasis added]. The last paragraph of the 1947 easement makes the right-of-way an appurtenance by stating that it is for the exclusive use of the "real property of said party of the second part." The 1947 easement is Exhibit 2 in the record (R 0121) and is designated Exhibit B in Williams' brief.

Hoopiiiana testified that he acquired the property in 1946 (R 149) and required his seller to provide him a separate easement and that he received the 1947 Easement, Exhibit 2. (R 0159).

The 1947 easement differs from the 1917 easement in several respects, the most notable ones being:

(a) The 1947 easement recites that it "grants and conveys to said party of the second part a right-of-way over the real property above described of said parties of the first part [Lot 5] for a perpetual right-of-way of a spur track crossing said property of the said party of the first part to serve and for the use and benefit of the above described real property of the party of the second part" [West 1/2 Lot 6].

Whereas the 1917 easement was granted to the Oregon Short Line Railroad Company ("OSLR") solely for its two spur tracks over a definitely described center line of a right-of-way 8.5 feet on either side of the center line. It was not given for use and benefit of any designated property and was to become null and void in the event any portion of the spur tracks were removed from the right-of-way described.

(b) The 1947 easement contained no provision for termination: While the recital in the 1947 document refers to a Union Pacific Railroad Company spur track, the granting provisions refer to "a perpetual right of way of a spur track" and allows the servient owner to change the location so long as the changed spur enters the dominant property at the same place as the existing spur enters the dominant property. Accordingly, if the servient owner elected to change the location, such change would appear to be the right and obligation of the servient owner, and not that of the dominant owner or the railroad. Also, if the railroad removed its spur track, the dominant owner is given a perpetual right to maintain "a spur track" which it could own or have anyone else own for its service.

The 1947 easement was in no way conditional upon the 1917 termination provision and to the contrary was given to avoid such kind of termination.

POINT III. WHILE THE 1917 EASEMENT MAY BE CLASSIFIED AS A "SPECIFIC PURPOSE EASEMENT" SUBJECT TO TERMINATION, THE 1947 EASEMENT WAS FOR THE GENERAL PURPOSE OF A PERPETUAL SPUR TRACK.

Hoopiiiana's easement for a perpetual spur track should be regarded as continuing for so long as the property could have some possible use of the spur track. In its findings of fact, the district court found that the 1947 easement is a perpetual right of way and not a specific purpose easement (R 104). Williams attempt to classify the 1947 right-of-way as a specific purpose easement dependent upon the 1917 easement in direct

contradiction to the district court's findings. The district court's determination that the 1947 right-of-way is perpetual indicates that the district court found no such condition. Specifically, the court found that "no such termination provision was contained in [Hoopiiana's] easement of February 8, 1947, which by its terms was stated to be a perpetual right-of-way of a spur track crossing the property now owned by the [Williams]" (R 103-04). As established in POINT I above, Williams may not challenge the district court's findings of fact without first marshalling the evidence. Therefore, this court should reject the following arguments offered by Williams that contradict the trial court's findings: 1) Hoopiiana's easement is conditional upon Williams' easement; 2) Hoopiiana's easement is a specific purpose easement; 3) the disclaimer of the easement by the railroad company terminated Hoopiiana's easement; and 4) the easement of April 6, 1917, and the right-of-way of February 8, 1947, are sequential and are linked.

Apparently, Williams are relying upon proof of abandonment in the arguments under their Points II through VI.

POINT IV. THE COMPLAINT DID NOT ALLEGE ABANDONMENT.

Williams' complaint alleged a termination of the 1917 easement by the railroad which Williams also claim terminated the 1947 easement. There has never been a termination or disclaimer by Hoopiiana, the owner of the 1947 easement.

Williams filed a motion for summary judgment (R 22), to

which Hoopiiana filed a memorandum in opposition thereto (R 43). In Williams' reply to Hoopiiana's memorandum, Williams denied that they were claiming "non-use" and repeated that the 1917 termination provision applied to the 1947 agreement. Specifically, Williams replied:

The Plaintiffs, by and through their attorney, Hollis S. Hunt, Reply to the Defendant's Memorandum in Opposition to the Plaintiff's Motion for Summary Judgment as follows:

1. **THE ISSUE IS NOT ONE OF "NON-USE", BUT RATHER THE CONTINUED EXISTENCE OF "SPECIFIC PURPOSE"**. The Defendant cites the case of Western Gateway Storage Company v. Treseder, 567 P.2d 181 (Utah 1977), in which the Court talks about abandonment and non-use of the right-of-way. However, the case before the Court here is not a question of "non-use" of a right of way by the owner of Lot 6. It is a question of the continued existence of the "subject matter" of the right of way, that is, the continued existence of the spur track.

Williams' Reply Memorandum.

At trial, Williams proffered evidence of abandonment but called no witnesses on such issue. Hoopiiana challenged the proffer and indicated that the complaint did not allege nonuse or abandonment (Tr 31 R 146). During the proffer, Williams' counsel was asked by the court what he would say was the abandoned date, to which counsel replied: "Oh, the date it was abandoned would be after the disclaimer by Union Pacific Railroad in 1988, shortly after the tracks were removed" (R 144). Hoopiiana called two witnesses to testify, beginning with Malualani Hoopiiana (R 149), and the plaintiff Richard Williams (R 168). Malualani Hoopiiana

testified that: 1) the spur track serving his property connected to the main line of 700 South just east of Fourth West (formerly 300 West) (R 153); 2) the main tracks are still in the street and presently serve the newspaper agency every day; 3) Hoopiiana had service over the spur track in 1983 when he brought in a crane and used to ship hundreds of carloads of material on that track a year (Tr 40 R 155); 4) in 1984, Williams erected a gate at the 700 South entrance and Hoopiiana demanded and received a key to the gate from Mr. Williams (Tr 40 R 155) (Williams acknowledged that he gave Hoopiiana the key (Tr 56 R 171)); 5) while he was absent from the state for a few months, someone had stolen part of his spur track without his consent or knowledge and a portion of the spur remains on his land (Tr 41 R156); 6) he has previous experience with both the Union Pacific and D & RG railroads on four occasions where he arranged for spur track connection with them (Tr 45 R 160); and 7) Hoopiiana's tenant, Gene Pugmire expressed an interest in bringing in new steel in maintaining the railroad easement (Tr 49 R 0164).

Mr. Richard Williams was called to testify by Hoopiiana, and he stated: 1) he acquired the property in Lot 5 in the early 1970's (Tr 54 R 169); 2) he knew of the two easements of 1917 and 1947 as shown in his title policy (Tr 55 R 170); 3) in 1984, he was asked to remove the gate he had placed at the 700 South entrance to the easement, and as a result provided Hoopiiana with a key to the gate (Tr 56 R 171); and 4) that he had negotiated to purchase the right-of-way from Hoopiiana in 1986.

In short, Williams failed to allege abandonment of the right-of-way in their pleadings and offered no testimony regarding abandonment at trial. Hoopiiana's objection to Williams' proffered testimony regarding abandonment supports the trial court's determination that there was no abandonment of the 1947 spur track easement. Therefore, this court should uphold the trial court's conclusion that there was no abandonment.

POINT V. TEMPORARY NONUSE IS NOT ABANDONMENT.

Temporary nonuse of the right-of-way is no more evidence of abandonment than is temporary nonuse of a vacant lot or building.

The cases holding railroad easements to be abandoned by nonuse, deal with easements in gross. An easement in gross is a mere personal interest in or right to use the land of another which is not attached to a dominant estate. 25 Am. Jur. 2d Easements and Licenses Section 12. Earnst v. Allen, 55 Utah 272, 277, 184 P. 821, 830 (1919).

The 1947 Agreement created an easement appurtenant wherein Hoopiiana's land is the dominant estate and the Williams' land is the servient estate.

Utah follows the general rule stated in 25 Am. Jur. 2d Easements and Licenses Sec. 105: "As a general rule, an easement acquired by grant or reservation cannot be lost by mere nonuse for any length of time, no matter how great." See Riter v. Cayias, 431 P.2d 788, 789 (Utah 1969).

In Western Gateway Storage Co. v. Treseder, 567 P2d 181

(Utah 1977) the Utah Supreme Court held that Treseder had a right of way by grant, which was initially used for delivery of coal. After natural gas replaced coal, the way was used to remove waste, delivery of building materials and movement of tenants. Even though the way had for some time become littered with rubbish, power poles, mounds of earth and growing trees, it was held that there was no evidence of any intention to abandon the way. The following excerpts from the decision are pertinent:

It is well recognized that an easement or right of way may be abandoned. However, to determine the issue of abandonment several factors need be considered among which are whether or not the right was acquired by prescription or grant, the extent of its use, and the actual intent of the owner.

This court has previously recognized that a right gained by conveyance may not be lost by non-use alone and that an actual intent to abandon be evident. The same principle was reaffirmed in Tuttle v. Sowadzki, 126 P. 959, 964-65 and in Riter v. Cayias, 431 P.2d 788, 789.

In regard to the quantum of proof required on the issue of abandonment, the court was confronted with the question in connection with a prescriptive easement in Harmon v. Rasmussen, 375 P.2d 762 and it was therein determined that the degree of proof required was that of clear and convincing actions releasing the ownership and right of use and an intentional abandonment, not a mere preponderance of the evidence.

The facts of the case at hand reveal that the right of way is of long standing, is supported by a grant, and the evidence presented of actual intent to abandon was insufficient. While the evidence does reflect the right of way is somewhat obstructed by debris, undergrowth and items of personal property, there is clear evidence that it was used, is presently in a condition as will allow continued use, and that defendants have access thereto through a portion of removable fence utilized as a gate. In fact, the trial court made a specific finding of occasional use.

The trial court further found that defendants would

suffer only slight inconvenience should the right of way be closed while on the other hand plaintiff would suffer substantial monetary loss if the same remained open.

In light of the specific findings of the court, which are contrary to a determination of abandonment, and in derogation of the previously announced principles of law pertaining to abandonment of granted rights of way, we reverse and rule as a matter of law that the right of way was not abandoned and remand for the entry of judgment in favor of defendants. No cost awarded.

Western Gateway Storage Co. v. Treseder, 567 P.2d 181, 182 (Utah 1977) (emphasis added).

Although Williams did not allege in their complaint that the Hoopiiana had abandoned the right-of-way granted in 1947, and in Williams' Reply to Hoopiiana's Objection to Motion for Summary Judgment stated "However, the case before the Court here is not a question of 'non-use' of a right-of-way by the owner of Lot 6," at trial, Williams endeavored to rely primarily upon an issue of abandonment. Williams rely upon the Texas case of Kearney & Son v. Fancher, 401 S.W.2d 897 (1966). The Kearney case was one in which the continuation of the easement was an "impossibility". The "impossibility" in that case was the result of the Blue Diamond Company's acquisition of property north of the subject tracts, and the notification of Blue Diamond that it was closing off such connecting switch track crossing their property and that it would no longer allow railroad cars to cross its property. Id. at 902. The court stated that the action of Blue Diamond effectively cut off all railroad car access to the switch track in question. Id. at 902-03.

No such impossibility exists in the case before this Court.

There is a main railroad track along the center of 400 West (formerly 300 West) and a spur track exiting the main line at the intersection of 400 West and 700 South which presently runs to the northeast serving the Newspaper Agency. Hoopiiana has his own right-of-way over the Williams' property which extends to the south line of 700 south street and is less than 100 feet from where the spurs joined in the intersection of 400 West and 700 South. Utah statutes requiring the railroad corporation to make connections and provide services by switches and spurs are appended to this brief and cited as Utah Code Annotated §§ 54-3-20 and 54-4-11. Accordingly, upon application of Hoopiiana, his successors or assigns the spur track service is provided by law.

Williams also cite the Kansas case of Gauges v. State of Kansas, 815 P.2d 501 (1991) wherein the easement was granted to the railroad, not the abutting owner and the railroad abandoned its right-of-way by disclaimer. In Gauges, there was no dispute on the issue of abandonment by the railroad. See id at 503. The trial court cited a prior Kansas abandonment decision, Miller v. St. Louis, Southwestern Ry. Co., 718 P.2d 610 (1986) which held:

Whether a right-of-way has been abandoned by a railroad company is largely a question of intent, and it is generally held that in order to constitute an abandonment there must be an intent to relinquish, together with external acts by which the intent is carried into effect.

Id. at 613 (quoting Pratt v. Griesse, 409 P.2d 777, 780-781 (Utah 1966)).

The Miller court found no abandonment by the railroad which

had previously used a tract within its operating right-of-way to service its livestock pens, but phased this out in 1967, allowing debris from demolished buildings and fences to litter the tract and tall weeds to take over. Miller, 718 P.2d at 613. In 1969, Miller cleared the debris, placed permanent steel bolts on the boundary lines, and planted alfalfa, trees, a garden and stored equipment on the operating right-of-way tract. Id. Although Miller claimed that the railroad had not used the tract between 1968 and 1984, the court found no abandonment where an official of the railroad testified unequivocally that the railroad never had intent to abandon the property. Id. In addition to the above quotation, the Kansas court cited 25 Am. Jur. 2d, Easements and Licenses Section 103 specifying that the intent must be neither to use nor to retake the property and the act must be clear and unmistakable manifesting a purpose to repudiate and indicating a lack of interest in the property. Id.

By contrast, Hoopiiana testified that he had no intention of abandoning his right-of-way even though the railroad disclaimed its 1917 easement. He further testified that he used the spur in 1983 and that in 1984 he demanded and received a key from Williams to the gate erected by Williams. Williams acknowledged giving the key to Hoopiiana, and that in 1986 he negotiated unsuccessfully to buy Hoopiiana's right-of-way. Hoopiiana further testified that the trackage on part of his land was taken up without his consent or knowledge when he was in Hawaii and that he and his present tenant are contemplating reactivating the

line.

In short, Hoopiiana did not abandon his easement. Under Utah law, temporary nonuse alone is not abandonment. Treseder, 567 P.2d at 182; Riter, 431 P.2d at 789; Tuttle, 126 P. 959. To show abandonment, Williams must prove that Hoopiiana's clear and convincing actions releasing ownership and right of use manifest an intentional abandonment. See Harmon v. Rasmussen, 375 P.2d 762, 766 (Utah 1962). Williams failed to carry this burden at trial. In fact, the evidence Hoopiiana presented at trial clearly indicates that Hoopiiana did not abandon his easement. Therefore, this court should affirm the district court's conclusion that Hoopiiana did not abandon his easement.

POINT VI. THE 1917 EASEMENT WAS TERMINABLE AT THE ELECTION OF THE RAILROAD, WHEREAS THE 1947 EASEMENT COULD BE TERMINATED ONLY BY THE DOMINANT OWNER.

The 1917 easement was not granted to the owner of any property served by the easement, but was an easement in gross to the railroad to render service at the election of the railroad. The land owners under the 1917 easement were given no right to have the divided spur removed or continued. By contrast, the 1947 Agreement Creating Right of Way was a grant and conveyance to the landowner in perpetuity for the exclusive use of the owner of the West one-half of Lot 6.


Accordingly, any act by the railroad company in terminating its own easement or terminating service does not constitute a termination of the perpetual right-of-way of Hoopiiana and his

statutory right to require service over the spur.

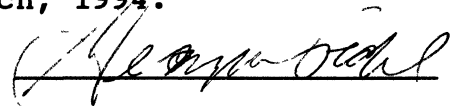
CONCLUSION

Hoopiiana is the owner of a right-of-way appurtenant to his dominant estate which was acquired by grant stated to be of perpetual duration without mention of termination or abandonment. Hoopiiana's right to construct, maintain, operate and use the right-of-way for a spur track or equivalent use continues irrespective of temporary nonuse. The specific written abandonment by the railroad of its easement in gross under the 1917 Easement in no way applies to the continued easement appurtenant of Hoopiiana under the 1947 agreement. Therefore, the judgment of the District Court should be affirmed.

Dated this 17 day of March, 1994.


George K Fadel
Attorney for Defendant-
Appellee

I certify I mailed two copies hereof to Mr. Hollis S. Hunt, Attorney for Plaintiffs, 243 East 400 South, Suite 200, Salt Lake City, Utah 84111 this 17 day of March, 1994.



History: L. 1917, ch. 47, art. 4, § 8; C.L. 1917, § 4805; R.S. 1933 & C. 1943, 76-4-9.

COLLATERAL REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d Railroads § 335 et seq.	§ 10903(a), of Interstate Commerce Commission's decision permitting railroad to abandon line or discontinue service, 77 A.L.R. Fed. 231.
C.J.S. — 74 C.J.S. Railroads § 418.	
A.L.R. — Propriety, under 49 USCS	Key Numbers. — Railroads ⇨ 227.

54-4-10. Connections between tracks — Adjustment of expense.

Whenever the commission shall find that public convenience and necessity would be subserved by having connections made between the tracks of any two or more railroad or street railroad corporations so that cars may readily be transferred from one to the other at any of the points hereinafter in this section specified, the commission may order any two or more such corporations owning, controlling, operating or managing tracks of the same gauge to make physical connections at any and all crossings, and at all points where a railroad or street railroad shall begin or terminate or run near to any other railroad or street railroad. After the necessary franchise or permit has been secured from the county, city or town the commission may likewise order such physical connection within such county, city or town between two or more railroads which enter the limits of the same. The commission shall by order direct whether the expense of the connections referred to in this section shall be borne jointly or otherwise.

History: L. 1917, ch. 47, art. 4, § 9; C.L. 1917, § 4806; R.S. 1933 & C. 1943, 76-4-10.

NOTES TO DECISIONS

Power of municipalities.

—Franchises.

This section recognizes the power of municipalities to grant franchises, because it appears therefrom that before the adoption of this title,

a railroad could not occupy any of the streets of a city without the consent of its governing body. *Union Pac. R.R. v. Public Serv. Comm'n*, 103 Utah 186, 134 P.2d 469 (1943).

COLLATERAL REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d Railroads § 258.	C.J.S. — 74 C.J.S. Railroads § 56.
	Key Numbers. — Railroads ⇨ 214 et seq.

54-4-11. Spurs and switching service.

(1) Whenever the commission shall find that application has been made by any person to a railroad corporation for a connection or spur as provided in Section 54-3-20, and that the railroad corporation has refused to provide such connection or spur and that the applicant is entitled to have the same provided for him under said Section 54-3-20, the commission shall make an order requiring the providing of such connection or spur and the maintenance and use of the same upon reasonable terms which the commission shall have power to prescribe. Whenever such connection or spur has been so provided

any person shall be entitled to connect with the private track, tracks or railroad thereby connected with the railroad of the railroad corporation, and to use the same or to use the spur so provided upon payment to the person incurring the primary expense of such private track, tracks or railroad, or the connection therewith or of such spur, of a reasonable proportion of the cost thereof, to be determined by the commission after notice to the interested parties and a hearing thereon; provided, that such connection and use can be made without unreasonable interference with the rights of the person incurring such primary expense.

(2) The commission shall likewise have the power to require any railroad corporation to switch to private spurs and industrial tracks upon its own railroad the cars of a connecting railroad corporation, and to prescribe the terms and compensation for such service.

History: L. 1917, ch. 47, art. 4, § 10; C.L. 1917, § 4807; R.S. 1933 & C. 1943, 76-4-11. **Cross-References.** — Interchange of service required, Utah Const., Art. XII, Sec. 12.

COLLATERAL REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d Railroads §§ 205 to 218. **C.J.S.** — 74 C.J.S. Railroads § 412. **Key Numbers.** — Railroads ☞ 216.

54-4-12. Telegraph and telephone — Connections — Joint rates — Division of costs.

Whenever the commission shall find, after a hearing, that a physical connection can reasonably be made between the lines of two or more telephone corporations, or two or more telegraph corporations, whose lines can be made to form a continuous line of communication by the construction and maintenance of suitable connections for the transfer of messages or conversations, and that public convenience and necessity will be subserved thereby, or shall find that two or more telegraph or telephone corporations have failed to establish joint rates, tolls or charges for service by or over their said lines and that joint rates, tolls or charges ought to be established, the commission may, by its order, require that such connection be made, except where the purpose of such connection is primarily to secure the transmission of local messages or conversations between points within the same city or town, and that conversations be transmitted and messages transferred over such connections under such rules and regulations as the commission may establish and prescribe, and that through lines and joint rates, tolls and charges be made and be used, observed and be in force in the future. If such telephone or telegraph corporations do not agree upon the division between themselves of the cost of such physical connection or connections, or upon the division of the joint rates, tolls or charges established by the commission over such through lines, the commission shall have authority, after a further hearing, to establish such division by supplemental order.

History: L. 1917, ch. 47, art. 4, § 11; C.L. 1917, § 4808; R.S. 1933 & C. 1943, 76-4-12.

by the commission to charge less for a longer than for a shorter distance service for the transportation of passengers or property or for the transmission of messages or conversations, and the commission may from time to time prescribe the extent to which such common carrier, telegraph or telephone corporation may be relieved from the operation and requirements of this section.

History: L. 1917, ch. 47, art. 3, § 11; C.L. 1917, § 4793; L. 1919 (S.S.), ch. 13, § 1; R.S. 1933 & C. 1943, 76-3-19.

NOTES TO DECISIONS

Effect of federal Transportation Act.	provisions of federal Transportation Act of
Long and short haul provision of this section	1920 Wasatch Coal Co. v. Baldwin, 60 Utah
was suspended and rendered inoperative by	397, 208 P. 1109 (1922).

COLLATERAL REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d Carriers § 119	Key Numbers. -- Carriers ⇌ 12(2), 12(3); Telecommunications ⇌ 323.
C.J.S. — 13 C.J.S. Carriers § 295, 582	

54-3-20. Railroad connections by switches and spurs.

(1) Every railroad corporation, upon the application of any corporation or person being a shipper or receiver or contemplated shipper or receiver of freight for a connection between the railroad of such railroad corporation and any existing or contemplated private track, tracks or railroad of such corporation or person, shall make such connection and provide such switches and tracks as may be necessary for that purpose, and deliver and receive cars thereover; provided, that such connection is reasonably practicable and can be installed and used without materially increasing the hazard of the operation of the railroad with which such connection is sought, and that business which may reasonably be expected to be received by such railroad corporation over such connection is sufficient to justify the expense of such connection to such railroad corporation.

(2) Under the conditions specified in the proviso in Subsection (1) hereof, every railroad corporation, upon the application of any person being a shipper or receiver or contemplated shipper or receiver of freight, shall construct upon its right of way a spur or spurs for the purpose of receiving and delivering freight thereby, and shall receive and deliver freight thereby.

History: L. 1917, ch. 47, art. 3, § 12; C.L. 1917, § 4794; R.S. 1933 & C. 1943, 76-3-20.

COLLATERAL REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d Railroads § 205 et seq.	C.J.S. — 74 C.J.S. Railroads § 413.
	Key Numbers. — Railroads ⇌ 216, 225.

JUL 06 1993

GEORGE K. FADEL #1027
ATTORNEY FOR Defendant
170 WEST FOURTH SOUTH
BOUNTIFUL, UTAH 84010
TELEPHONE: 295-2421

SALT LAKE COUNTY
[Signature]
CLERK

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

STEVEN WILLIAMS, and KYLE)	
ANN WILLIAMS,)	FINDINGS OF FACT
)	AND
Plaintiffs,)	CONCLUSIONS OF LAW
)	
vs.)	
)	
MALUALANI B. HOOPIIANA,)	Civil No. 920906000 PR
Trustee of the MALUALANI B.)	
HOOPIIANA TRUST,)	Judge Homer F. Wilkinson
)	
Defendants.)	

This cause came on regularly for trial before the above entitled Court on May 27, 1993, the Honorable Homer F. Wilkinson, District Judge, presiding. Plaintiff, Steven Williams, appeared in person and by his attorney Hollis S. Hunt. Defendant appeared in person and by his attorney, George K. Fadel. Plaintiffs' attorney proffered the testimony and evidence of the plaintiffs; Defendant testified and called the plaintiff Steven Williams as a witness; the Court took the matter under advisement, reviewed the briefs presented by the parties, and being fully advised in the matter now makes the following:

FINDINGS OF FACT

1. The plaintiffs are residents of Salt Lake County and are

owners of certain real property located at 737 South 300 West, Salt Lake City, Utah 84101, and more particularly described as follows:

Lot 5, Block 23, Plat "A", Salt Lake City Survey, as is recorded in the Salt Lake County Recorder's Office.

2. The defendant is the owner of the following described tract which adjoins the plaintiffs' property on the east thereof:

West one-half of Lot 6, Block 12, Plat "A", Salt Lake City Survey, Salt Lake County, Utah.

3. On or about April 6, 1917, the then owner of Lot 5, referred to above, Theodore T. Burton and Florence Burton, his wife, granted to the Oregon Shortline Railroad Company a railroad easement for a right-of-way for the construction, operation and maintenance of a railroad spur that traversed through all of Lot 5, as per Exhibit "A" offered and received in evidence.

4. A condition of the said Easement of April 6, 1917, granted by the previous owner of Lot 5 was that:

If at any time the said spur track or any portion thereof shall be removed from the above-described land, then and in that event this conveyance shall become null and void and have no affect between the parties hereto or their successors, or assigns, as to such trackage so removed.

5. Subsequently, on or about February 8, 1947, the then owner of Lot 5, Florence M. Burton, granted to the then owner of the following real property;

The West 1/2 of Lot 6, Block 12, Plat "A" Salt Lake City Survey.

a right-of-way for a spur track in perpetuity. The right-of-way was granted for the exclusive use of the real property as a "spur

track" and could not be extended to any other property adjacent to the west half of Lot 6, Block 12, Plat "A", Salt Lake City Survey. Said Easement of February 8, 1947 was received into evidence as Exhibit B.

6. The successor-in-interest to Edward L. Burton, the Grantee of the right-of-way for a railroad spur over the plaintiff's tract is the defendant who is the current owner and in possession of certain real property at about 349 West 700 South, Salt Lake City, Salt Lake County, State of Utah and is the West 1/2 of Lot 6, Block 12, Plat "A", Salt Lake City Survey.

7. On or about July 6, 1983, the Union Pacific Railroad Company, the Lessee of the railroad spur across Lot 5 notified the plaintiffs, who are now the owners of Lot 5, of their Notice of Intent to Terminate the Easement of April 6, 1917, that was originally granted to the railroad company for the creation of the railroad spur track.

Then, on December 17, 1987, the Union Pacific Railroad for and in behalf of the Oregon Shortline Railroad Company, recorded a Disclaimer releasing all of their rights, title and interest to the Easement of April 6, 1917. Said Disclaimer of December 17, 1987, was granted based upon the original terms of the railroad spur Easement of April 6, 1917, which stated:

If at any time the said spur tracks, or any portion thereof shall be removed from the above-described land, then in the event this conveyance shall become null and void and if no effect between the parties thereto or their successors or assigns as to such trackage so removed.

No such termination provision was contained in the defendant's

easement of February 18, 1947, which by its terms was stated to be a perpetual right-of-way of a spur track crossing the property now owned by the plaintiffs, with the right of the servient owner to change the location on its tract so long as the right-of-way as changed will continue to permit the spur track to continue to serve the defendant's property entering at the same place as the existing spur then entered the dominant tract.

8. The defendant last used the spur track in 1983. Subsequently in 1983, plaintiffs erected a gate at the entrance of the spur at 700 South Street, placed a lock on the gate and provided a key to the gate to the defendant.

9. In 1988 the Union Pacific Railroad removed that portion of the spur in 700 South Street which attached to the trunk line on 400 West street thereby disconnecting the spur at the vicinity of plaintiffs' tract. The railroad company continues to operate the trunk line on 400 West street (formerly 300 West Street) and to serve spur tracks to properties adjoining 400 West street including a spur exiting on 700 South to serve properties east of 400 West.

10. Someone removed a portion of the spur track from the defendant's property without his knowledge or consent and also removed a small portion of the track which was situated on plaintiffs' property in the vicinity of the defendant's property. The remaining portion of the spur track on the plaintiff's property extending to 700 South Street is still in place.

From the foregoing Findings of Fact the Court makes the

follows:

CONCLUSIONS OF LAW

1. The defendant is the owner of a perpetual easement for the spur track over the property of the plaintiffs which was obtained by written, recorded grant and which was not conditioned upon any specific purpose associated with the spur track easement of 1917 granted to the railroad company.

2. There has been no abandonment of the spur track easement of 1947 which was granted to the defendants and the same continues as an easement appurtenant to defendant's property over and across the property of the plaintiffs.

3. Defendant is entitled to a judgment dismissing the plaintiff's complaint with prejudice and decreeing that the defendant's easement of February 8, 1947, continues in full force and effect.

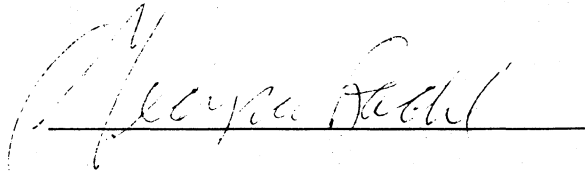
DATED this 6 day of July, 1993.

BY THE COURT


DISTRICT JUDGE

CERTIFICATE OF MAILING

I certify that on the 22nd day of June, 1993, I mailed copies of the proposed Findings of Fact, Conclusions of Law and Judgment and Decree to Mr. Hollis S. Hunt, attorney for plaintiffs, 243 East 400 South, Suite 200, Salt Lake City, Utah 84111.



FILED DISTRICT COURT
Third Judicial District

GEORGE K. FADEL #1027
ATTORNEY FOR Defendant
170 WEST FOURTH SOUTH
BOUNTIFUL, UTAH 84010
TELEPHONE: 295-2421

Ex D. J. Curran Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

STEVEN WILLIAMS, and KYLE
ANN WILLIAMS,

Plaintiffs,

VS.

MALUALANI B. HOOPIIANA,
Trustee of the MALUALANI B.
HOOPIIANA TRUST,

Defendants.

**JUDGMENT
AND
DECREE**

2184565

7-9-93-813am

Civil No. 920906000PR

Judge Homer F. Wilkinson

This cause came on regularly for trial before the above entitled Court on May 27, 1993, the Honorable Homer F. Wilkinson, District Judge, presiding. Plaintiff, Steven Williams, appeared in person and by his attorney Hollis S. Hunt. Defendant appeared in person and by his attorney, George K. Fadel. Plaintiffs' attorney proffered the testimony and evidence of the plaintiffs; Defendant testified and called the plaintiff Steven Williams as a witness; the Court took the matter under advisement, reviewed the briefs presented by the parties, and being fully advised in the matter and the Court having heretofore made and entered Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the plaintiffs' complaint be, and the same is hereby dismissed with prejudice.

2. That the defendant is the owner of a perpetual easement for a spur track appurtenant to the West one-half of Lot 6, Block 12, Plat "A", Salt Lake City Survey in Salt Lake County, Utah over and across the property of the plaintiffs described as Lot 5, Block 12, Plat "A", Salt Lake City Survey, Salt Lake County, Utah, by Agreement Creating Right Of Way dated February 8, 1947, and recorded June 16, 1947, in Book 543 at Page 436, in the office of the Recorder of Salt Lake County, Utah, which has not been abandoned and which continues in full force and effect.

DATED this 6 day of July, 1993.

BY THE COURT

DISTRICT JUDGE