

FILED

JAN 26 2011

PATRICK E. DUFFY, CLERK

By DEPUTY CLERK, MISSOULA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JOHN SCHMIDT,)	CV 06-193-M-DWM-JCL
)	
Plaintiff,)	
)	ORDER
v.)	
)	
BURLINGTON NORTHERN AND)	
SANTA FE RAILWAY COMPANY;)	
WESTERN FRUIT EXPRESS, INC.,)	
)	
Defendants.)	
_____)	

Defendants filed a renewed motion for summary judgment in this FELA case after it was remanded by the Ninth Circuit. United States Magistrate Judge Jeremiah Lynch entered Findings and Recommendation (dkt #108) in this case on January 7, 2011. Judge Lynch recommended the motion be denied, after determining the elements of judicial estoppel are not satisfied, and there is a

genuine issue of material fact as to whether Burlington Northern was Plaintiff John Schmidt's employer.

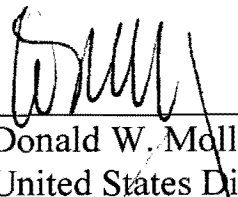
The parties did not timely object and so have waived the right to de novo review of the record. 28 U.S.C. § 636(b)(1). This Court reviews the Findings and Recommendation for clear error. McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981). Clear error exists if the Court is left with a "definite and firm conviction that a mistake has been committed." United States v. Syrax, 235 F.3d 422, 427 (9th Cir. 2000).

I find no clear error with Judge Lynch's Findings and Recommendation.

IT IS HEREBY ORDERED that the Findings and Recommendation (dkt #108) are adopted in full;

IT IS FURTHER ORDERED that Defendants' Renewed Motion for Summary Judgment (dkt #97) is DENIED.

Dated this 26th day of January, 2011.



Donald W. Molloy, District Judge
United States District Court