

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**INDIANA SOUTHWESTERN RAILWAY CO.-ABANDONMENT EXEMPTION-IN
POSEY AND VANDERBURGH COUNTIES, IN**

**LANDOWNERS' MOTION FOR DECLARATORY AND INJUNCTIVE
RELIEF AND REQUEST TO ISSUE SHOW CAUSE ORDER STATING
WHY ABANDONMENT HAS NOT BEEN CONSUMMATED PURSUANT
TO 49 C.F.R. § 1152.29(e)(2) AND WHY AN ORDER OF ABANDONMENT
SHOULD NOT BE ENTERED**

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I. INTRODUCTION

The Notice of Exemption was filed by the Indiana Southwestern Railway Co. (“ISW”) on October 25, 2010. ISW sought permission to abandon 17.2 miles of interconnecting rail lines extending (1) from milepost 227.5 at Poseyville, IN, to milepost 240.2, near German Township, IN (approximately 12.7 miles) and (2) from milepost 277.5 at Cynthiana, IN, to milepost 282.0, at Poseyville, IN (approximately 4.5 miles). The Board issued its Decision regarding ISW’s abandonment exemption on November 12, 2010, approving the abandonment, and then subsequently issued a Notice of Interim Trail Use (“NITU”) that became effective on May 23, 2011.

The Landowners are all Plaintiffs in two lawsuits pending before the Court of Federal Claims who all own land adjacent to ISW’s right-of-way. The first case, *Memmer v. United States*, Case No. 14-135L, involves 9 Landowners,¹ and the case went to trial before the Honorable Chief Judge Margaret Sweeney from April 29, 2019 through May 2, 2019 in Evansville, Indiana and on May 7, 2019 in Peoria, IL.² The second lawsuit is *Butler v. United States*, Case No. 17-667L, which is also pending before the Honorable Chief Judge Margaret Sweeney, and the case has basically been stayed during the pre-trial stages pending an outcome in *Memmer*.³

¹ The Landowners in *Memmer v. United States* are: Jeffrey Memmer, Gilbert Effinger, Larry and Susan Goebel, Owen Halpeny, Joseph Jenkins, Michael and Rita Martin, McDonald Family Farms of Evansville, Inc., Reibel Farms, Inc., and James and Robin Schmidt.

² The parties are in the process of filing all of their post-trial briefs, which is currently scheduled to conclude on October 25, 2019, and the Court will then schedule closing arguments before issuing an Opinion and Order.

³ There are 36 Landowners in *Butler* who collectively own 52 parcels of land adjacent to the right-of-way at issue. The Landowners in *Butler* are: Robert D. Bender, William Bender, Christopher Bender, Estate of Jean Bender, Donald R. and Jody M. Blankenberger, William R. and Norma Sue Butler, Suzanne J. Curry, Wayne T. and John R. Wiggins, F&M Damm Trust, Barry Dean Gaslin & Stacey Gaslin, Alvin J. Gries and Rita A. Gries Revocable Trust of 1995, Ivan Bender Farm, Inc., William D. & Mary Jane Kight Revocable trust of 2008, Rita Kissel and Adam Leo Kissel Revocable Trust Agreement, Eugene W. and Charlotte A. Kuehn, Leonard B. and Mary Jeanette Will Joint Life Estate, David M. and Judith E. Lipking, Lockwood Farms, LLC, William L. and Dorothy Jean Luigs, Bruce K. and Kathy L. Martin, Sylvester J. Elpers Revocable Trust of 2000 and Patricia A. Elpers Revocable Trust of 2000, Poseyville Development, LLC, Robert W. and Gladys I. Reuter, Kenneth R. Rexing, Allen C. Rexing, Rita Ann Griffith and Michael J. Rexing, Kenneth R. Rexing, Rita C. Rexing, Daniel J. Rexing, Kristina Hickson, f/k/a

Most of the underlying facts in these cases, particularly related to the extensive procedural and factual history, are not in dispute. Prior to the trial in *Memmer*, the parties, the Plaintiffs and the Department of Justice, entered into an extensive list of factual stipulations and Chief Judge Sweeney has already conclusively ruled that all of the Landowners own land adjacent to the right-of-way and that ISW acquired a mere easement in the right-of-way adjacent to all of their properties.⁴

Although ISW sought and received permission to abandon the right-of-way in both 2010 and 2011, ISW never consummated abandonment pursuant to 49 C.F.R. § 1152.29(e)(2) after several extensions to negotiate a potential trail use agreement were received. In fact, the NITU expired 30 months after it was issued in November of 2013. But, during the pendency of the NITU, ISW removed all of the rails and ties and salvaged the rails and then reiterated during the *Memmer* trial that there has been no train traffic since 2004, there have been no customers since 2004, there are no current customers who could potentially use the rail line, and ISW has no intention of ever utilizing the right-of-way again.

Even though the NITU expired in November of 2018, ISW has intentionally failed to consummate abandonment under 49 C.F.R. § 1152.29(e)(2) in an attempt to extract payment from some source in order to do so. Under these facts, since all of these Landowners really want federal jurisdiction over the rail line to end so that they can get their land back and put it to some productive use, a declaratory order from the Board is required concerning abandonment and a show cause

Kristina L. Rexing, Scott L. and Kendra M. Straub, Janet M. Schapker, Francis J. and Martha H. Scheller, Stephen L. Schenk & Richard A. Schenk, Dorothy M. Schmitt, John O and Debra M. Schmitt, Family Trust created under the Last Will and Testament of Francis E. Schmitt, Frank D. and Carolyn S. Riley, The Irene G. Seibert Trust and The Joseph E. Seibert Trust, Glen A. Seibert & Brandon Seibert, Harold & Edna Mae Straub, Tenbarga Oil Co., Inc., Voegel Farm, LLC, Watzlavik Properties, LLC, and Wayne T. and Jacklyn J. Wiggins.

⁴ See *Memmer v. United States*, 122 Fed. Cl. 350 (Fed. Cl. 2015).

order should also be issued to force ISW to state why abandonment has not been consummated pursuant to 49 C.F.R. § 1152.29(e)(2).

II. THE APPLICABLE PROCEDURAL HISTORY AND UNDERLYING FACTS ARE NOT REALLY IN DISPUTE

The procedural facts leading up to the issuance of the NITU in both *Memmer* and *Butler* are not in dispute. In addition, after the NITU expired, and because two representatives of ISW testified at the *Memmer* trial, there should also be no current disputes concerning any aspect of ISW's abandonment. The following stipulated facts in both *Memmer* and *Butler* pertain to the history of the railroad and the Board's docket and the current status of ISW's abandonment:

1. The "Railroad Line" at issue in this case was originally constructed by the Evansville and Peoria Railroad, which thereafter became the Peoria, Decatur & Evansville Railway ("PD&E").

2. The PD&E, including the Railroad Line that is the subject of this case, became part of the Illinois Central Railroad ("IC") in 1900.

3. The Railroad Line went through a series of operators, including Evansville Terminal Company, Inc., ("EVTC"), and finally the ISW.

4. In March of 2000, ISW, then a non-carrier subsidiary of Pioneer Railcorp, acquired the Railroad Line from EVTC and AB Rail Investments, Inc. ISW is among 17 Class III railroads controlled by Pioneer Railcorp.

5. The Abandonment Notice of Exemption was filed by ISW on October 25, 2010, to abandon 17.2 miles of interconnecting rail lines extending (1) from milepost 227.5 at Poseyville, IN, to milepost 240.2, near German Township, IN (approximately 12.7 miles) and (2) from milepost 277.5 at Cynthiana, IN, to milepost 282.0, at Poseyville, IN (approximately 4.5 miles).

6. The Board issued its decision regarding abandonment exemption on November 12, 2010. In its decision, the Board stated:

ISW has certified that: (1) no local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic on the line to be rerouted; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 C.F.R. § 1105.7(c) (environmental report), 49 C.F.R. § 1105.11 (transmittal letter), 49 C.F.R. § 1105.12 (newspaper publication), and 49 C.F.R. § 1152.50(d)(1) (notice to governmental agencies) have been met.

Id. at 1-2. The Board's decision also states that "Pursuant to the provisions of 49 C.F.R. § 1152.29(e)(2), ISW shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by ISW's filing of a notice of consummation by November 12, 2011, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire."

Id. at 3.

7. On November 17, 2010, the Indiana Trails Fund formally requested a public use condition, interim trail use condition, and statement of willingness to assume financial responsibility rather than an outright abandonment authorization of the approximately 17.2 miles of interconnecting rail lines. STB Dkt. No. AB-1065-0-X, ID No. 228256.

8. On November 18, 2010, the Town of Poseyville filed a formal notice of intent to file an Offer of Financial Assistance to purchase the entire 17.2 mile rail line proposed for abandonment. STB Dkt. No. AB-1065-0-X, ID No. 228265.

9. On November 23, 2010, ISW filed a reply stating that it was willing to negotiate interim trail use / railbanking with Indiana Trails Fund, Inc. STB Dkt. No. AB-1065-0-X, ID No. 228306.

10. The Board issued a decision and NITU effective on May 23, 2011. STB Dkt. No. AB-1065-0-X, ID No. 41362.

11. On November 22, 2011, the Indiana Trails Fund, Inc., filed a letter with the Board asking for an extension of time to continue to negotiate a trail use agreement for an additional 180 days. STB Dkt. No. AB-1065-0-X, ID No. 231330.

12. On December 16, 2011, the Board issued a decision granting Indiana Trails Fund, Inc.'s request to continue to negotiate a trail use agreement with ISW through May 17, 2012. STB Dkt. No. AB-1065-0-X, ID No. 42050.

13. On May 17, 2012, the Indiana Trails Fund, Inc., filed a letter with the Board asking for an extension of time to continue to negotiation a trail use agreement with ISW for 180 days. STB Dkt. No. AB-1065-0-X, ID No. 232323

14. On May 24, 2012, the Board issued a decision granting Indiana Trails Fund, Inc.'s request to continue to negotiate a trail use agreement with ISW through November 13, 2012. STB Dkt. No. AB-1065-0-X, ID No. 42415.

15. On November 14, 2012, the Indiana Trails Fund, Inc., filed a letter with the Board asking for an extension of time to continue to negotiate a trial use agreement with ISW for an additional 180 days. STB Dkt. No. AB-1065-0-X, ID No. 233341.

16. On November 21, 2012, the Board issued a decision and granted Indiana Trails Fund, Inc.'s request to continue to negotiate a trail use agreement with ISW through May 12, 2013. STB Dkt. No. AB-1065-0-X, ID No. 42776.

17. On May 13, 2013, the Indiana Trails Fund, Inc., filed a letter with the Board asking for an extension of time to continue to negotiate a trail use agreement with ISW for an additional 180 days. STB Dkt. No. AB-1065-0-X, ID No. 234217.

18. On May 23, 2013, the Board issued a decision granting Indiana Trails Fund, Inc.'s request to continue to negotiate a trail use agreement with ISW through November 8, 2013. STB Dkt. No. AB-1065-0-X, ID No. 43110.

19. Because ISW and the trail operator neither executed a trail use agreement nor sought another extension of time by the November 8, 2013 deadline, the NITU expired on its own terms as of November 8, 2013.

20. While the trail use agreement was being negotiated, after the NITU was issued on May 23, 2011 and before it expired on November 8, 2013, ISW removed both the rails and ties and salvaged the rails.⁵

21. The removal of the rails and ties and the salvage of the rails was completed in early 2012.⁶

22. After the rails and ties were removed and after the NITU expired on November 8, 2013, the railroad never formally consummated abandonment pursuant to 49 C.F.R. § 1152.29(e)(2).

23. There has been no train traffic on the rail line since 2004, there have been no shippers that wanted to use the rail line since 2004, and there are no shippers currently who want to use the rail line.

24. Even though the NITU expired on November 8, 2013, and even though ISW failed to consummate abandonment under federal law, the railroad has attempted to sell their interest in the corridor before they actually consummate federal abandonment under 49 C.F.R. §

⁵ Both Shane Cullen and Dan LaKemper, from ISW, testified at length during the *Memmer* trial concerning the removal of the rails and ties. See discussion in Section IV *infra*.

⁶ See discussion of Cullen's testimony and LaKemper's testimony in Section IV *infra*.

1152.29(e)(2), and it is still ISW's intention to consummate the abandonment because they have pulled up the rails and ties and because there have been no shippers for almost 16 years.⁷

III. THE BOARD HAS THE AUTHORITY TO ISSUE A DECLARATORY ORDER TO FORCE ISW TO CONSUMMATE ABANDONMENT PURSUANT TO 49 U.S.C. § 1321(b)(4) AND ALSO SHOULD ISSUE A SHOW CAUSE ORDER STATING WHY ABANDONMENT HAS NOT BEEN CONSUMMATED PURSUANT TO 49 C.F.R. § 1152.29(e)(2)

Under 49 U.S.C. § 1321(b)(4), the Board has authority to issue an appropriate Order to prevent irreparable harm. In this case, after the NITU expired on November 8, 2013, even though the rails and ties had already been removed, and even though there had been no train traffic on the right-of-way since 2004, ISW has intentionally failed to consummate abandonment pursuant to 49 C.F.R. § 1152.29(e)(2) simply and solely because they want to extract some compensation from some source before they actually consummate abandonment. The end result is that the permissive abandonment requirement set forth in 49 C.F.R. § 1152.29(e)(2) is continuing to needlessly block these Landowners' reversionary interests and the Board should issue a show cause order to ISW as to why abandonment has not been consummated and why the Board should not declare the corridor abandoned.

The underlying facts of this case demonstrate the irreparable harm that is being imposed on all of these Landowners, including their loss of farm production for over 8 years. Under the Board's regulatory process, ISW sought and received permission to abandon the corridor when their Petition for Exemption was filed in 2010. In other words, all of the conditions for abandonment were properly established at that time and the Board clearly and unmistakably had to apply the standard that there was no public convenience and necessity for continued rail traffic.

⁷ See testimony from Dan LaKemper, ISW's General Counsel, discussed in Section IV *infra*.

Once the NITU was issued, the Board once again gave its permission to ISW to abandon the corridor and the permissive component of 49 C.F.R. § 1152.29(e)(2) was triggered. Then, during the pendency of the NITU, ISW removed the rails and ties and salvaged the rails and declared to the world that the right-of-way had actually been abandoned even though ISW failed to consummate their permissive authority to abandon pursuant to 49 C.F.R. § 1152.29(e)(2).⁸ As a result, these facts do not advance any form of a discontinuance, as opposed to an abandonment, and the Landowners are entitled to a declaratory order from the Board directing ISW to consummate the abandonment under 49 C.F.R. § 1152.29(e)(2).

Under these facts, it is clear that a *de facto* abandonment of the right-of-way has already taken place. In *Modern Handcraft, Inc.—Abandonment in Jackson County, Missouri*, 363 I.C.C. 969, 1981 WL 22670 (1981), the Board dealt with the public convenience and necessity issue when a non-carrier pursued an adverse abandonment proceeding. The ICC considered the facts that there had been no rail service or recognizable maintenance on the right-of-way for 12 years and that the only revenues generated by the line were produced by billboard rentals and parking lot licenses and concluded that a *de facto* abandonment of the line had taken place:

The record leaves no doubt that a *de facto* abandonment of the Freight Operation line has taken place. No rail service or recognizable rail track maintenance has taken place since September of 1968. Nor has there been any serious effort on the part of Freight Operation to solicit traffic or reinstate rail service. Indeed, the current use of the rail line for parking lot and billboard purposes is totally unrelated to the carrier's obligation to perform rail service. **The only objection to abandonment comes from the carrier itself, whose principal interest appears to be the price and terms for the sale of the right-of-way.**

See *Modern Handcraft*, 1981 WL 22670 at *2 (emphasis added).

⁸ All 9 Landowners in *Memmer* testified that the rails and ties were removed in 2011 and 2012. Even though the rails were salvaged, ISW merely left over 40,000 ties on the right-of-way, a complete mess, because they were not functional and had no value. Photographs confirming the removal of the rails and ties, and showing the current condition of the corridor with ties still stacked, are collectively attached hereto as Exhibit A.

The ICC went even further in *Modern Handcraft* and discussed the standard for obtaining permission to abandon a rail line and the relationship between federal jurisdiction and state jurisdiction. The ICC specifically concluded that the railroad was misusing the federal jurisdiction over the property to improperly interfere with other legitimate uses of the right-of-way:

The function of our exclusive and plenary jurisdiction over abandonments is to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. We will not allow our jurisdiction to be used to shield a carrier from the legitimate processes of State law where there is no overriding Federal interest in interstate commerce. Where as here there have been no rail operations for over 12 years and no attempt to provide rail service, we can find no public benefit in preventing a State condemnation proceeding.

We find that the rail service which Freight Operation is authorized to perform is not required and that elimination of this line will not burden interstate commerce and will benefit the public. Although it is true that the grant of abandonment application is permissive and the railroad can choose not to surrender its common carrier status and obligations, a certificate of abandonment is evidence in any court proceeding that the line is not required by the public for rail operations.

See Modern Handcraft, 1981 WL 22670 at *3 (emphasis added).

There are two obvious and fundamental principles of law set forth in *Modern Handcraft*. First, there is no need for the Board to continue to exercise its exclusive and plenary jurisdiction over abandonments when there is no overriding federal interest in continued rail operations. Second, the railroad should not be allowed to use continuing federal jurisdiction over a rail line as a shield against abandonment when there is no overriding federal interest in continuing rail operations. These basic principles have been reaffirmed by the Board and the Courts on numerous occasions. *See Chelsea Property Owners—Abandonment*, 8 I.C.C.2d 773, 1992 WL 233599, at *1-*4 (1992) (“we grant the appeals and find that the public convenience and necessity permit abandonment of the line” and “our jurisdiction may not be used to shield a carrier from the legitimate process of state law”) (citing *Modern Handcraft*); *Consolidated Rail Corp. v. Interstate*

Commerce Comm’n., 29 F.3d 706, 708 (D.C. Cir. 1954) (“more to the point, it is clear that the aim of § 10905 is not simply the maintenance of rail *lines* but the continuation of rail *service*”) (emphasis in original); *CSX Corp. & CXT Transp. Inc.—Adverse Abandonment Application*, 2002 WL 127074, at *4 (2002) (“where no overriding federal interest exists, we will not allow our jurisdiction to be used to shield a carrier from the legitimate processes of state law” and “here, we conclude that the public is best served by granting the adverse abandonment application”).

The guiding principle that ISW should not be allowed to use continuing federal jurisdiction over a rail line as a shield when there is no overriding federal interest in continuing rail operations is demonstrated in *Birt v. Surface Transp. Bd.*, 90 F.3d 580 (D.C. Cir. 1996). After interpreting the Board’s regulatory process and the Supreme Court’s Opinion in *Preseault I*, the D.C. Circuit stated that “before it can cease service on an established line, however, a railroad must obtain a certificate of abandonment from the ICC” and “once in possession of an effective abandonment certificate, the railroad may at any time thereafter exercise its option to fully abandon the line by clearly exhibiting its intent to do so.” See *Birt*, 90 F.3d at 582-583. These facts present a situation where ISW sought and received the Board’s permission to abandon the right-of-way and clearly exhibited their intent to finalize that abandonment by removing the rails and ties even though they never exercised their permissive authority to consummate the abandonment under 49 C.F.R. § 1152.29(e)(2).

The D.C. Circuit in *Birt* also discussed the relevant facts to be examined to determine if the railroad actually intended to abandon the line under state law and the inherent problems associated with extensions to consummate abandonment under federal law when the right-of-way has already been abandoned under state law. The Plaintiff in *Birt* attempted to argue that the Board lost jurisdiction over the corridor at issue because it was already abandoned under state law even

though they were negotiating for a possible trail use agreement under the CITU. The D.C. Circuit ruled that the Board did not lose its jurisdiction over the corridor at issue even though state law abandonment had occurred but identified the inherent problem with the Board's continuing jurisdiction when state law abandonment has occurred and the consummation of abandonment has not occurred:

Nor does the Commission's policy of granting extensions when presented with evidence of good-faith negotiations between the railroad and potential trail sponsor compromise the goal that a CITU is intended to advance—providing a defined window of opportunity for reaching agreement on a trails conversion. **Although extensions *ad infinitum* might frustrate that purpose by allowing the railroad to stop service without either relinquishing its rights to the easement or putting the right-of-way to productive use**, an extension of 30 or 60 days does not threaten such a result.

See Birt, 90 F.3d at 589 (emphasis added).

ISW in this case, unfortunately, through a combination of extensions to negotiate a trail use agreement and their failure to consummate abandonment under federal law, has done exactly what the D.C. Circuit referred to in *Birt*. In this case, ISW abandoned the corridor as a matter of fact when they received the effective certificate of abandonment on two different occasions in 2010 and 2011 and, because they failed to consummate abandonment under federal law, the Board is specifically allowing ISW to stop service without either relinquishing its rights to the easement under federal law, thereby giving the land back to the Landowners, or putting the right-of-way to productive use.

Although one of the primary issues during the *Memmer* trial was the duration of the taking under prong 3 of *Preseault II*, which is abandonment under state law, the reason the taking is continuing in *Memmer*, and *Butler* too, is because the Landowners' reversionary interests are still being blocked by the federal regulation that requires consummation of abandonment even though ISW consummated abandonment under state law in 2012. As a result, ever since the rails and ties

were removed in 2011 and 2012, and even though ISW never consummated abandonment under federal law, it is clear that the Landowners' reversionary rights are still being blocked.⁹

In these two cases, the governmental action that creates the continuing blockage of the Landowners' reversionary rights are the issuance of the NITU in combination with the Board's regulation requiring formal consummation of abandonment under federal law. As a result, since 2012 at the latest, ISW has not put the right-of-way to any productive use, the Landowners have not been able to put the right-of-way to any productive use, and the Landowners simply want and need a ruling that the line has been abandoned under federal law so they can get their land back and put it to productive use.

IV. THE TRIAL TESTIMONY FROM *MEMMER* ESTABLISHES THAT THE LANDOWNERS ARE ENTITLED TO A DECLARATORY ORDER OF ABANDONMENT BECAUSE THERE HAS BEEN NO TRAIN TRAFFIC SINCE 2004, ISW HAD THE INTENT TO ABANDON WHEN THEY SOUGHT THE BOARD'S PERMISSION TO ABANDON IN 2010, ISW RECEIVED THE BOARD'S PERMISSION TO ABANDON IN BOTH 2010 AND 2011, AND ISW REMOVED THE RAILS AND TIES IN 2012

The abandonment of this rail line was established both by ISW's Notice of Exemption and the fact that ISW pulled up the rails and ties in 2012. In fact, when the Board granted permission to abandon in both 2010 and again in 2011, the Board previously determined that the "public convenience and necessity require or permit the abandonment." In addition, since two key fact witnesses from ISW testified during the *Memmer* trial, it is clear that there has been no train traffic since 2004, ISW had the intent to abandon in 2010, followed through with their request for abandonment in 2010, received the Board's approval to abandon on two separate occasions in 2010 and 2011, removed the rails and ties in early 2012, which evidences their continued intent to abandon, and it has now been confirmed that, even though ISW has not formally consummated

⁹ All 9 of the Plaintiffs in *Memmer* testified that they want their land back so that they can put it to productive use.

abandonment, that it is still their intention to do so.

The testimony from Shane Cullen¹⁰ from the *Memmer* trial is attached hereto as Exhibit B. Although Mr. Cullen's testimony dealt primarily with the removal of the rails and ties and the salvage of the rails, Mr. Cullen's testimony also clearly revealed that there has been no train traffic since 2004, that the rails and ties were in no condition to even support continued rail traffic, and that ISW did not have any customers and did not foresee the need for continued rail service in the future either:

Mr. Cullen's Testimony: Tr. 900:10-901:5; 905:5-907:12

Q. Good morning, Mr. Cullen.

Let me first go back and discuss the discontinuance of train traffic. And did you, as part of this case, perform some research concerning the discontinuance of train traffic along this line?

A. Yes, we did.

Q. And in order to obtain that information, and I'm -- and I'm focusing on the last revenue load movement, you requested a report from the director of operations center, did you not?

A. Yes.

Q. All right.

And after you requested that information, you actually received the information. And based on the information you received in your research you made a conclusion as to when the last loaded revenue train traffic took place, did you not?

A. That's correct.

Q. And in fact, based on that research, you concluded that the last loaded revenue train you used on the applicable rail line ceased in 2004, correct?

A. Yes.

* * *

¹⁰ Mr. Cullen has been employed by Pioneer RailCorp. since 2001 and currently serves as the Vice President of Mechanical Operations and, as such, oversees ISW.

Q. Okay. Now, as part of the salvage of the rails, you indicated that the rails were separated from the crossties and the crossties were merely left on the right-of-way, right?

A. Yes.

Q. All right.

And in fact, I think you described the process whereby the rails are removed from the crossties and that actually either damages or can destroy them, right?

A. Depending on method, yes.

Q. All right.

And although the crossties were left on the right-of-way, none of them were actually functional as crossties, were they?

MR. WEIGERT: Objection. Mischaracterizes testimony.

THE COURT: If the witness knows, if the witness can answer, he can answer.

THE WITNESS: Our position was they were not functional. It was not economically viable to go back and pick them up.

BY MR. STEWART:

Q. All right.

Now, when you say that, essentially, none of the crossties were functional, that means that they were not economically viable to recover the ties and reuse them for the transportation of trains, right?

A. Economically viable for me to recover the ties.

Q. Right.

And then they would not be economically viable to recover the ties and reuse them, because the cost of labor to pick out the ties that would be salvageable is not economically viable, right?

A. That's correct.

Q. All right.

Now, rail lines are typically abandoned due to the

overall condition of the roadbed, and that includes the crossties, right?

A. Yes.

Q. And also includes the traffic conditions on the rail line?

A. Yes.

Q. All right.

And you concluded that the tie condition on this particular rail bed was extremely deficient for operating trains, didn't you?

A. Yes.

Q. All right.

Now, since the crossties were not functional in the future as crossties, the only reason that the railroad left them was because they were not part of the salvage contract with A & K, right?

A. Yes.

Q. All right.

And that's the only reason they were left there, isn't it?

A. They were left there, because we didn't have a need to pick them up at that time.

See Tr. 900:10-901:5; 905:5-907:12 (Exhibit B) (emphasis added).

In addition to Mr. Cullen's testimony, Dan LaKemper, the General Counsel of ISW, also testified at length and his testimony is attached hereto as Exhibit C. Mr. LaKemper explained the fact that ISW intended to abandon the right-of-way at the time the Notice of Exemption was prepared and filed in 2010 and, even though the NITU expired, it was and still is ISW's intent to consummate the abandonment. In fact, there has been no train traffic since 2004, the rails and ties were removed in 2012, and there is no prospect or plan for future rail service on the line and ISW is waiting to consummate abandonment simply and solely to see if someone will pay them something in order for them to consummate abandonment:

Mr. LaKemper's Testimony: Tr. 967:16-968:6; 970:1-971:10

Q. Okay. At that time November 8, 2013, did the trail group drop the ball in their failure to file a further request for a negotiating period extension?

A. They did not file for an extension.

Q. Okay.

A. That is correct.

Q. And ISW failed to remind them, right?

A. Apparently.

Q. Okay. It was still actually your intent at that point to negotiate with the trail group, wasn't it?

A. Yes.

Q. All right.

And it's -- and it is still your intent to follow through and finalize the abandonment or a trail use agreement, isn't it?

A. Yes.

Q. All right.

In fact, I think you -- you're even looking for or were looking for a possible financing arrangement of some kind, were you not?

A. We were discussing financing arrangements with the trail group, yes.

Q. In addition to the potential trail operator, you have had contacts with other parties who have shown an interest, haven't you?

A. Yes.

Q. Okay. But nothing has been signed to date?

A. Correct.

Q. All right.

So we're clear on this, the railroad has no current intention to reinstall the rails and ties, do you?

A. No.

Q. All right.

And despite the fact that the NITU expired on November 8, 2013, you have had ongoing discussions and negotiations to negotiate a deal and those negotiations and discussions have actually taken place within a month of this trial, right?

A. Correct.

Q. All right.

You actually foresee continuing your negotiations with the trail people, don't you?

A. Well, at the moment they're kind of on hold too, because of our potential buyout, but that is something that will likely be resumed by somebody.

Q. Okay. And you'd like that to happen, wouldn't you?

A. It's – it's – it's one option that the railroad has that allows it to fully divest the property in one transaction.

Q. And hopefully, you want this issue resolved one way or the other in the not too distant future, don't you?

A. Yes.

See Tr. 967:16-968:6; 970:1-971:10 (Exhibit C) (emphasis added).

Even though the corridor has been abandoned under state law,¹¹ and even though ISW has not consummated abandonment under federal law, it is clear that the Plaintiffs' reversionary rights are still being blocked simply and solely because ISW has intentionally failed to consummate abandonment under federal law even though they have been given permission to do so twice. In this case, the governmental action that creates the continuing blockage of the Plaintiffs' reversionary rights are the issuance of the NITU in combination with the Board's regulation that permissively requires formal consummation of abandonment under federal law.

¹¹ Indiana's abandonment statute, § 32-23-6, requires a finding that the public convenience and necessity permit the abandonment, which occurred in 2010 and 2011, and that the rails and ties are removed, which occurred in late 2011 and early 2012.

The record has already been established that there has been no train traffic on this corridor since 2004, there are no current shippers to protect, shippers have not needed any protection for over 16 years, and there is no need to protect shippers in the future either. ISW cannot reasonably or properly object to a decision of adverse abandonment either because they obviously have no shippers to protect and have had no shippers to protect for 16 years. In fact, ISW sought and received permission from the Board to abandon this rail line over 8 years ago, removed the rails and ties, received \$1.2 Million in salvage value for the rails, and has basically repeatedly admitted that there are no current shippers and no prospects for shippers in the future.

In the end, Mr. LaKemper ultimately confirmed that there was no alternative to abandonment because they did not want to keep the line in place without having any customers:

Q. And if you go back to page 21, it goes on to say that the only alternative to abandonment, which is the start of this next paragraph, would be for ISW not to abandon the line and to incur losses associated with the ownership of unused rail assets.

Do you see that?

A. Yes.

Q. So, you didn't want to keep the line in place and have the costs associated with that course of action without having any customers on the line, right?

A. Correct.

Q. All right.

And given these two alternatives, one was to go ahead and abandon the line, which you started with this abandonment exemption procedure, and the other one was to not abandon the line, right?

A. That's the -- that's the two alternatives that are presented there, yes.

Q. And ISW, basically, concluded that to not abandon the line was an untenable alternative, correct?

A. We did not want to maintain the line in place.

See Tr. 957:23-958:18 (Exhibit C) (emphasis added).

This record actually leaves no doubt, just like the result in *Modern Handcraft*, that a *de facto* abandonment has already taken place. As the Board pointed out in *Modern Handcraft*, the Board's exclusive and plenary jurisdiction over abandonments is to provide the public with a degree of protection concerning continuing rail service and the Board should not stand by and allow that jurisdiction to be used to shield ISW when there is no overriding federal interest in interstate commerce. Under these egregious facts, the Board should conclude that these Landowners are entitled to a declaratory order of abandonment and the Board should also issue a show cause order to ISW for ISW to attempt to explain why abandonment has not already been consummated.

V. CONCLUSION

ISW effectively abandoned this rail line many years ago and, they did so, because there had been no shippers to protect and no prospects of shippers in the future either. Under these facts, whether ISW opposes the abandonment decision or responds to the show cause order or not, the Board should issue a declaratory order of abandonment, thus allowing the Landowners to get their land back.

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CERTIFICATE OF SERVICE

I certify that I have this day served copies of this document upon all parties of record in this proceeding, this 11th day of September, 2019.

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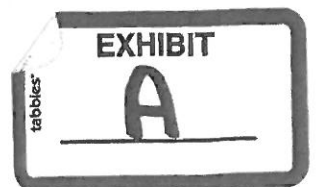
Pioneer Railcorp
Attn: Dan LaKemper
1318 S Johanson Rd
Peoria, IL 61607

/s/ Thomas S. Stewart

Exhibit A

Photographs of former railroad corridor

Posey & Vanderburgh Counties, IN



Claim No. 2
Robert Bender



C# 2 parcel north part view north.JPG
04/18/2018



C# 2 parcel south part view southwest.JPG
04/18/2018

A.000002



C# 2 RTT easement center & rail bed view east from west end.JPG
04/18/2018



C# 2 RTT easement center & rail bed view west from east end.JPG
04/18/2018

A.000003

Robert Bender #2
near Road looking North



A.000004

Robert Boudier #2



A.000005

Claim No. 39
Wayne Wiggins

Claim No. 5
Suzanne Curry



C# 39 RTT easement view northwest from east end.JPG
04/16/2018



C# 39 RTT easement, heavy woods view northwest.JPG
04/16/2018

A.000007

Wiggin - Curry



A.000008

Curry-Wiggies



A.000009

Claim No. 21
Kenneth Rexing

Kenneth Rexing #21



A.000011

Claim No. 22.A-B
Kenneth & Rita Rexing



C# 22A&B RTT easement north side view northwest.JPG
04/18/2018



C# 22A&B RTT easement south side view northwest.JPG
04/18/2018



C# 22A&B RTT easement south side W of road view northwest.JPG
04/18/2018

Henneth and Rita Rexing # 22 A+B



Kenneth and Rita Rexing # 22 Nov 13



Claim No. 26
Martha Scheller



C# 26 parcel north part view northeast.JPG
04/18/2018



C# 26 parcel south part view southwest.JPG
04/18/2018

A.000017

Schellar #26



A.000018

In the Matter of:

Jeffrey Memmer, et al. v. USA

May 7, 2019

Trial

Vol. 5

Condensed Transcript with Word Index



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832

834

1 IN THE UNITED STATES COURT OF FEDERAL CLAIMS

2

3

4 JEFFREY MEMMER, et al.,)

5 Plaintiffs,)

6 v.) Case No. 14-135L

7 THE UNITED STATES,)

8 Defendant.)

9

10

11

12 Courtroom B

13 U.S. District Court for the Central District of Illinois

14 100 N.E. Monroe Street

15 Peoria, Indiana

16 Tuesday, May 7, 2019

17 9:30 a.m.

18 Trial Volume 5

19

20

21 BEFORE: THE HONORABLE MARGARET M. SWEENEY, CHIEF JUDGE

22

23

24

25 Reported by: Bobbi L. Hamlin, CCR, CSR, RMR

1 TESTIMONY INDEX

2 Shane Cullen

3 Direct-Examination by Mr. Weigert Page 836

4 Cross-Examination by Mr. Stewart Page 900

5 Redirect-Examination by Mr. Weigert Page 928

6 Daniel LaKemper

7 Direct-Examination by Mr. Weigert Page 935

8 Cross-Examination by Mr. Stewart Page 951

9 Redirect-Examination by Mr. Weigert Page 975

10 Direct-Examination by Mr. Stewart Page 981

11

12 EXHIBIT INDEX

13 NUMBER	14 MARKED	15 ADMITTED
16 DEFENDANT:		
17 108.0531		933
18 108.0558		933
19 108.0607		886
20 108-0619		899
21 108-0620		899
22 108-0621		899
23 108.0623		933
24 108.0718		933
25 108.0721		933
		934
		934

833

835

1 A P P E A R A N C E S

2

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25

1 EXHIBIT INDEX (Continued)

2 NUMBER	3 MARKED	4 ADMITTED
5 DEFENDANT:		
6 113		884
7 114		885
8 117		951
9 118		979
10		
11		
12		
13		
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836

PROCEEDINGS

- - - - -

(Proceeding called to order, 9:38 A.M.)

THE COURT: This is not our usual set up, but I can see all of you. This is great.

Well, welcome to Peoria. Good morning.

MR. WEIGERT: The United States calls Mr. Shane Cullen.

(Witness was duly sworn.)

DIRECT EXAMINATION

BY MR. WEIGERT:

Q. Good morning.

A. Morning.

Q. Please, State your name for the record?

A. Shane Cullen.

Q. And that's spelled how?

A. S-H-A-N-E C-U-L-L-E-N.

Q. My name is David Weigert. I'm an attorney with the U.S. Department of Justice representing the United States in this case.

We last spoke at your deposition on April 2, 2019, here in Peoria. Do you recall that?

A. Yes.

Q. Where do you live, Mr. Cullen?

A. Peoria.

838

Q. Any others subsidiaries?

A. Sixteen to twenty of them, yes.

Q. And generally, what are those subsidiaries?

A. (No response.)

Q. What kind of businesses?

A. Most of them are operating railroad entities. There are some in management functions and other miscellaneous companies.

Q. Other miscellaneous companies?

A. Yes.

Q. Do you also have the same position, vice president of mechanical operations, with Pioneer Railcorp and Indiana Southwestern Railway, Inc.?

A. Pioneer Rail Incorporated I do and I oversee ISW.

Q. Okay. So, we're going to call Indiana Southwestern Railway ISW?

A. Yes.

Q. Okay. So, you perform similar functions for ISW; is that right?

A. Yes.

Q. How long have you been vice president of mechanical operations?

A. About seven years.

Q. That would be since about 2012?

A. Yes.

837

Q. Could you tell us something about your education?

A. I'm sorry?

Q. Could you tell us something about your education?

A. Graduated from Bradley in 2001.

Q. And what degree did you receive then?

A. Bachelor's in Business Administration.

Q. And are you currently employed?

A. Yes.

Q. Where?

A. Pioneer Railroad Services Incorporated.

Q. What is your position?

A. Vice president of mechanical operations.

Q. What are your duties, Mr. Cullen, in that position?

A. Oversee mechanical maintenance of way, car storage, insurance claims, other duties as assigned.

Q. Is Pioneer Railroad Services, Inc. affiliated with any other companies as parent companies or subsidiaries?

A. It's subsidiary, Pioneer Railroad Corporation.

Q. With Pioneer Railroad Corporation?

A. Yes.

Q. And is Pioneer Railroad Corporation a parent company of other subsidiaries?

A. Yes.

Q. Including Indiana Southwestern Railway, Inc.?

A. Yes.

839

Q. What was your previous position?

A. Vice president of transportation.

Q. And that was also with ISW?

A. Pioneer Railroad Corporation.

Q. How long had you been vice president of transportation?

A. About eight years.

Q. Going back to 2004?

A. Roughly, yes.

Q. What positions did you hold before that, if any?

A. Trainmaster.

Q. And how long did you hold that position?

A. About three years.

Q. Back to about 2001?

A. Roughly.

Q. When did you start with Pioneer?

A. 2001.

Q. Have you worked continuously with the company since that time?

A. Yes.

Q. Were you employed prior to 2001 at all?

A. Yes.

Q. With which organization?

A. Peoria Journal Star, local newspaper.

Q. How long were you with Peoria -- is it -- Journal

840

1 Star?
 2 A. Journal Star.
 3 Fifteen years.
 4 Q. And what was your position there?
 5 A. When I left I was the supervisor, afternoon
 6 supervisor, night processor.
 7 Q. So, that was going back to about 1989?
 8 A. Roughly.
 9 Q. And before that you were in school?
 10 A. Yeah.
 11 Q. No further employment going back from there?
 12 A. I started with the Journal Star when I was about 12 --
 13 Q. Okay.
 14 A. -- twelve or fifteen, give or take.
 15 Q. Thank you.
 16 I'd like to show you a document it's identified as
 17 Joint Exhibit 6.
 18 Mr. Cullen, please take a moment to look at this
 19 document.
 20 A. Okay.
 21 Q. Do you recognize it?
 22 A. It's a familiar documentation, but...
 23 Q. Do you know what it is?
 24 A. STB filing or decision.
 25 Q. Does it -- is it identified as Notice of Interim Trail

841

1 Use Or Abandonment at the top?
 2 A. Yes.
 3 Q. Is it okay if we refer to that as an to NITU?
 4 A. Okay.
 5 Q. Have you heard of that before?
 6 A. Yes.
 7 Q. I just want to turn your attention to page two,
 8 paragraph two, it starts: ISW filed a verified notice of
 9 exemption under 49 C.F.R. pt. 1152, subpart F: Exempt
 10 Abandonments to abandon 17.2 miles of interconnecting rail lines
 11 extending between one milepost 227.5 at Poseyville, Indiana and
 12 milepost 240.2 near German Township Indiana, 12.7 miles; and to
 13 milepost 277.5 at Cynthiana, Indiana and milepost 282.0 at
 14 Poseyville, Indiana, approximately 4.5 miles.
 15 Do you recognize that as the intersecting rail lines
 16 at issue in this case?
 17 A. You're referring to rail line -- are we talking about
 18 the piece removed?
 19 Q. I'm referring to the 17.2 miles they just described
 20 there of interconnecting rail lines?
 21 A. There's a difference in the mileage in the filings
 22 versus the operating set.
 23 Q. Okay. Can you explain that?
 24 A. About 228 is what we used from an operating
 25 perspective and 227.5 is what we used from a leave perspective.

842

1 Q. And do you know why there's that difference?
 2 A. No.
 3 Q. Okay. Thank you.
 4 Well, for our purposes here I'm going to refer, if
 5 it's okay with you, I'm going to refer to that 17.2 miles
 6 described right there.
 7 You are familiar with those segments; is that right?
 8 A. Yes.
 9 Q. I'll refer to them as the rail line or the corridor or
 10 the right-of-way, okay, unless -- unless explained otherwise?
 11 A. Okay.
 12 Q. Thank you.
 13 I'm going to show you another document now, it's got
 14 Bates number D-X108.0639-52 to 06392.0652.
 15 Please, take a moment to review that document
 16 Mr. Cullen. Again, it's pages .0639 to .0652.
 17 A. Okay.
 18 Q. Do you recognize this document?
 19 A. Appears to be the agreement that was returned to us
 20 from A & K with an A & K signature on it.
 21 Q. Now, when you say agreement, are you referring -- what
 22 are you referring to?
 23 A. Scrap rails sales agreement.
 24 Q. And is there a fully executed version of that in this
 25 document?

843

1 A. There's a fully executed copy.
 2 Q. Okay. Well, let's focus on that. Is that Bates
 3 number D-X108.0641 to .0646?
 4 A. Yes.
 5 Q. What is that document?
 6 A. It's a scrap rails sales agreement that's fully
 7 executed.
 8 Q. And let's see, it's signed, it looks like on page
 9 00646 by two people. Who are those people?
 10 A. Beth Wyatt with A & K. J. Michael Carr with Indiana
 11 Southwestern Railway.
 12 Q. And Ms. Wyatt is the vice president of the Central
 13 Region for A & K Railroad Materials Inc.; is that correct?
 14 A. Yes.
 15 Q. And there's indication here that she signed on
 16 August 1, 2011; is that right?
 17 A. Yes.
 18 Q. And J. Michael Carr is the president of Indiana
 19 Southwestern Railway Company; is that correct?
 20 A. Yes.
 21 Q. And the date by his signature is August 2, 2011; is
 22 that right?
 23 A. Yes.
 24 Q. Okay. Are you familiar with this document?
 25 A. Yes.

844

- 1 Q. Have you seen it before?
- 2 A. Yes.
- 3 Q. In what context have you seen that?
- 4 A. When I contributed drafting it. Communicated with A &
- 5 K on getting it signed. And I saw it in deposition again.
- 6 Q. Let me turn your attention to the first page of this
- 7 Scrap Rail Sales Agreement. In the very first paragraph it
- 8 says -- actually, I'm referring to the numbered section one. Do
- 9 you see that?
- 10 A. Yes.
- 11 Q. On the first page it says: Seller will sell and buyer
- 12 will purchase from seller the switches, rail and other metallic
- 13 track materials and remove same from sellers railway.
- 14 Do you see that?
- 15 A. Yes.
- 16 Q. And who is the seller there?
- 17 A. I'm sorry?
- 18 Q. Who is the seller that's referred to there?
- 19 A. ISW.
- 20 Q. ISW.
- 21 Who is the buyer?
- 22 A. A & K.
- 23 Q. Are you familiar with that term "materials" as it's
- 24 used in this agreement?
- 25 A. Yes.

845

- 1 Q. What did -- what was included within that term?
- 2 A. All the steel rail track material, which is the rails,
- 3 joint bars, plates, spikes and bolts and nuts.
- 4 Q. So, that included switches, rail and other metallic
- 5 track materials; is that fair to say?
- 6 A. Steel portion of the switches, yes.
- 7 Q. What did the term "materials" not include; if you
- 8 know?
- 9 A. Generally speaking, it wasn't including any ties,
- 10 bridges, signals, anything on or along the right-of-way
- 11 underneath.
- 12 Q. Did it -- did that term "materials" include other
- 13 nonmetallic property?
- 14 A. There was a reference to a railcar, but I don't recall
- 15 the outcome of that.
- 16 Q. You see at the end of section in the last sentence
- 17 there it says: It is agreed by the parties that materials do
- 18 not include bridges, culverts or similar structures.
- 19 A. Yes.
- 20 Q. Is that in accordance with your understanding?
- 21 A. Yes.
- 22 Q. What does the agreement say A & K will do with the
- 23 materials?
- 24 A. Go in and remove the material.
- 25 Q. And -- and -- okay. And what stretch of rail line is,

846

- 1 under this agreement, is A & K supposed to remove those
- 2 materials?
- 3 A. Sixteen point seven miles from 240.2 to 228 in the
- 4 Cynthia branch.
- 5 Q. So, is that 16.7 miles described in that section one
- 6 there?
- 7 A. Yes.
- 8 Q. And it's described, as it says, removal of materials,
- 9 I'm quoting, shall extend for approximately 16.7 miles on the
- 10 ISW from ICR milepost 228.0, at Poseyville switch, C&IE MP
- 11 282.0, at Poseyville, Indiana, to ICR milepost 240.2 near German
- 12 Township, approximately 12.2 miles, and from C&EI milepost 277.5
- 13 at Cynthia, Indiana to C&EI milepost 282.0 at Poseyville,
- 14 Indiana, approximately 4.5 miles, within Posey and Vanderburg
- 15 counties in Indiana.
- 16 And it defines that as location. Do you see that?
- 17 A. Yes.
- 18 Q. What -- what does C&EI mean there?
- 19 A. That's another railroad, but I don't know what it
- 20 stands for.
- 21 Q. Okay. Might it stand for Chicago and Eastern Illinois
- 22 Railroad?
- 23 A. It might.
- 24 Q. But you're not sure?
- 25 A. I don't know.

847

- 1 Q. Okay. Do you know what ICR stands for?
- 2 A. I assume Illinois Central Railroad.
- 3 Q. And what are the relationship between those railroads
- 4 and ISW? Do you know?
- 5 A. The best I can tell it was former owner/operators of
- 6 the line.
- 7 Q. Those are the former owners?
- 8 A. Former railroad that ran on that line prior to being a
- 9 short line.
- 10 Q. Okay. Now, is that the 16.7 miles you referred to
- 11 before when we were reviewing the need to --
- 12 A. Yes.
- 13 Q. And again, it's different from the 17.2-mile rail line
- 14 how?
- 15 A. Yes.
- 16 Q. Is it included -- is that 16.7 miles included wholly
- 17 within the 17.2-mile rail line?
- 18 A. That would be my understanding.
- 19 Q. Is it your understanding also from looking at this
- 20 agreement and how the description reads that that's the case?
- 21 A. My understanding would be 16.7 is the complete line to
- 22 be pulled up.
- 23 Q. And it completely lies completely within the
- 24 17.2 miles?
- 25 A. To me that's one and the same.

848

1 Q. Okay. And you're not sure what accounts for that 0.5
2 mile difference?

3 A. I do not.

4 Q. Okay. Let me turn your attention to paragraph 17 of
5 this agreement, section 17, it's comprised of four paragraphs.

6 Do you see that?

7 A. Yes.

8 Q. Let me focus you in on paragraph three of that section
9 17, if I could, it starts with: Buyer shall leave all bridges,
10 culverts, signal systems, road crossings and other structures,
11 fixtures and facilities intact and undamaged.

12 Do you see that?

13 A. Yes.

14 Q. Why was that there?

15 A. Because they were not responsible to remove any
16 bridges, culverts or signal systems or road crossings.

17 Q. What is a signal system?

18 A. Flashers that you see on the highway when a train is
19 going through. It could also be track control signals that --
20 we don't have that as ISW.

21 Q. Is that used for -- are signal systems used at
22 railroad intersections?

23 A. Highway railroad intersections and at intersections
24 between railroads and also to govern train movements on the
25 railroad itself, there are structures as used here.

849

1 Structures will be anything from a short shanty depot
2 to culvert or anything, anything that's got a manufacturer --

3 Q. Anything that's manufactured?

4 A. -- manufactured.

5 Q. That might include bridges?

6 A. Yes.

7 Q. What are fixtures as it's used here?

8 A. I'm not a hundred percent sure what he was referring
9 to as fixtures.

10 Q. But do you know what facilities mean -- means in this
11 context?

12 A. Facilities is normally office buildings, crew
13 locations.

14 Q. So, those items that we just described are to be left
15 intact and undamaged under this agreement; is that correct?

16 A. Yes.

17 Q. Okay. Under this provision A & K was also to leave
18 rails on road crossings; is that correct?

19 A. Yes.

20 Q. A & K also left rails and ties on bridges; is that
21 correct?

22 A. No, I believe they pulled them off the bridges.

23 Q. Did they leave rails -- rails on any other part of the
24 16.7-mile -- these 16.7-mile intersecting lines?

25 A. They shouldn't have, other than the road crossings.

850

1 Q. Let me now turn your attention to the next sentence in
2 that paragraph three of section 17, that says: Crossties, and
3 I'm quoting, may be moved away from the center of the
4 right-of-way, but shall not be removed from the right-of-way.

5 Do you see that?

6 A. Yes.

7 Q. Are crossties also known as just ties?

8 A. Yes.

9 Q. To your knowledge did A & K comply with that
10 provision?

11 A. Yes.

12 Q. Why was that included there?

13 A. Because they did not want the tie materials left just
14 recklessly discarded along the right-of-way.

15 Q. Let me turn your attention to the third sentence in
16 that same paragraph that says -- I'm sorry, this is the second
17 clause of that second sentence. Okay? And it says: Neither
18 the crossties, nor any other materials shall be allowed to
19 obstruct, block or alter the drainage of right-of-way or any
20 surrounding property.

21 What does that mean?

22 A. The ties shouldn't be recklessly discarded into
23 drainage ways and ditches.

24 Q. Are there drainage ditches within the right-of-way?

25 A. Yes.

851

1 Q. To your knowledge, did A & K comply with that
2 provision?

3 A. Yes, with one exception.

4 Q. Yes.

5 What was that exception?

6 A. We had a gentleman complain the ties were slipping
7 down a road bank. And I asked A & K to address it, which they
8 did.

9 Q. That was the only incidence of that nature that you
10 know of?

11 A. That I'm aware of.

12 Q. Let me turn your attention to section six entitled
13 time that reads, and that's on page .0642, see that?

14 A. Yes.

15 Q. That reads: Buyer shall have all work of removal and
16 restoration completed and shall vacate the property on or before
17 April 1, 2012.

18 Do you see that?

19 A. Yes. Yes.

20 Q. To your knowledge, did A & K, as the buyer, comply
21 with that provision?

22 A. I believe they did.

23 Q. Let me turn your attention to section two of this
24 agreement entitled purchase price.

25 That provision states: The purchase price payable

852

1 from buyer to seller for the materials is \$1,200,000 US dollars.
 2 Do you see that?
 3 A. Yes.
 4 Q. And was that the purchase price actually paid by A & K
 5 to ISW on this agreement?
 6 A. Yes.
 7 Q. Let me show you another document, it's Bates
 8 D-X108.0653 to 0654. Have you found that?
 9 A. Yes.
 10 Q. What is that document?
 11 A. Looks like the copy of the check and cover letter for
 12 the payment.
 13 Q. Have you seen this before?
 14 A. Yes.
 15 Q. So, that's a check. Who – who was that check from?
 16 A. A & K.
 17 Q. And who is it to?
 18 A. ISW.
 19 Q. And the amount on that ISW?
 20 A. One point two million.
 21 Q. Okay. So, that's – your understanding is that that's
 22 the same 1.2 million as is required under this Scrap Rail Sales
 23 Agreement; is that correct? Is that right?
 24 A. Yes.
 25 Q. And that's – also, there's a reference in there to

853

1 the Evansville Project.
 2 Do you see that?
 3 A. Yes.
 4 Q. Is this project that's described in this agreement
 5 sometimes known as the Evansville Project?
 6 A. Yes, it's based out of Evansville, Indiana.
 7 Q. I note that the letter there, the cover letter for the
 8 check, is addressed to Pioneer Railroad Corporation, while the
 9 check is made out to ISW. Why is that?
 10 A. I don't know.
 11 Q. Okay. To your knowledge, did A & K timely perform all
 12 of its other obligations under this agreement?
 13 A. Yes.
 14 Q. They timely removed rails and other metallic materials
 15 from the rail line by the April 1, 2012 deadline?
 16 A. To the best of my knowledge, yes.
 17 Q. You're not aware of any extensions of that deadline?
 18 A. No.
 19 Q. Did – and I think you said A & K complied with their
 20 requirement in Section 17 to leave all ties in the right-of-way;
 21 is that correct?
 22 A. Yes.
 23 Q. And to your knowledge, with one exception that you
 24 mentioned about ties in the drainage ditch, A & K did not allow
 25 crossties or other materials to obstruct, block or alter the

854

1 drainage of right-of-way; is that your understanding – or of
 2 the property?
 3 A. That's my understanding.
 4 Q. And all road crossings were left intact with the rails
 5 in place; is that correct?
 6 A. Yes.
 7 Q. And all bridges, culverts signal systems or other
 8 structures, fixtures and facilities were left intact and not
 9 damaged; is that right?
 10 MR. STEWART: I object. A, it's repetitive. B,
 11 it's asked and answered. C, it's irrelevant.
 12 THE COURT: I'm going to let the Government
 13 continue.
 14 BY MR. WEIGERT:
 15 Q. You can answer.
 16 Do you want me to repeat the question?
 17 A. Please.
 18 Q. Is it true that A & K left, quote, intact and
 19 undamaged all bridges, culverts, signal systems and other
 20 structures, fixtures and facilities?
 21 A. Yes.
 22 Q. Let me turn your attention to Section 4 of this
 23 agreement.
 24 That's entitled Seller's Representations and
 25 Warranties.

855

1 Do you see that?
 2 A. Yes.
 3 Q. That section is comprised of two paragraphs. And
 4 focusing on the second one it says: Seller indemnifies and
 5 saves Buyer harmless from and against any and all damages,
 6 losses, liabilities and claims, including reasonable costs of
 7 attorney and litigation costs, as well as losses awarded against
 8 or incurred by Buyer in regard to Seller's breach of its
 9 representations and warrants in the Section 4.
 10 To your knowledge, was that indemnification ever
 11 exercised?
 12 A. No.
 13 Q. No, it was not?
 14 A. No, it was not.
 15 Q. And similar question on Section 5, that's Buyer's
 16 Representations – I'm sorry – that's – yes, Buyer's
 17 Representations and Warranties.
 18 There's a – you'll see that's a three-paragraph
 19 section. The final one is a similar one: Buyer indemnifies and
 20 saves Seller harmless from and against all losses awarded
 21 against or incurred by Seller in regard to Buyer's breach of
 22 its representations and warrants in this Section 5.
 23 To your knowledge, was that indemnification provision
 24 ever exercised?
 25 A. No, it was not.

856

1 Q. Let me turn your attention to Section 7, that's
2 entitled Indemnifies.
3 Can you review that for a moment?
4 Have any of those indemnities described in that
5 section been exercised?
6 A. Not to my knowledge, no.
7 Q. Okay. I want to turn your attention to Section 10,
8 that's entitled Default/Termination.
9 Do you see that?
10 A. Yes.
11 Q. And it refers to a notice of default.
12 Do you see that?
13 A. Yes, I see it.
14 Q. Do you know what that is?
15 A. I know what default is.
16 Q. To your knowledge, did either party in this -- to this
17 agreement ever issue a notice of default to the other?
18 A. No, not to my knowledge.
19 Q. Let me turn your attention to Section 12 entitled
20 Force Majeure.
21 Do you have an understanding of what force majeure?
22 A. Yes, I do.
23 Q. To your knowledge, was there a force majeure in this
24 case?
25 A. No, there was not.

857

1 Q. That provision was never exercised?
2 A. No, it was not.
3 Q. Let me turn to section 14 time of contractors. What
4 does that provide generally.
5 A. The right to subcontract work out if they chose to.
6 Q. To your knowledge, did A & K subcontract any of this
7 work out?
8 A. Not to my knowledge.
9 Q. And let me -- we're almost done here. Let me turn
10 your attention to Section 18, it's entitled Entire
11 Understanding. And I believe in there, there is reference to
12 modification.
13 To your understanding, was this agreement ever
14 modified from this point forward?
15 A. Not to -- not to my knowledge, no.
16 Q. Thank you.
17 I'm going to switch topic now. Let me ask this
18 question: Before -- before the rails, was there a time when A &
19 K pulled up the rails from the 16.7-mile line reference in this
20 agreement?
21 A. I'm sorry. I don't understand.
22 Q. So, we just discussed that A & K did pull up the rails
23 under that agreement; is that correct?
24 A. Correct.
25 Q. Okay. Before they did that, did you have an occasion

858

1 to determine the value of the rails and ties on, I'll call it,
2 the 17.2-mile corridor?
3 A. I did do some calculations of the value of it.
4 Q. And for what purpose did you prepare those
5 calculations?
6 A. Well, part of it was for reference material. Part of
7 it was for receipt of scrap material. Part of it was for the
8 legal department for -- I believe they were doing the OFA for
9 Poseyville.
10 Q. When you say the OFA for Poseyville, are you referring
11 to the Town of Poseyville's offer of financial assistance?
12 A. Yes.
13 Q. And do you recall what date, approximately, you did
14 that calculation?
15 A. I don't.
16 Q. Do you recall, approximately, what date the Town of
17 Poseyville filed its offer of financial assistance?
18 A. No, I wasn't actually involved in the OFA legal or
19 real estate.
20 Q. Okay. But you were involved in preparing ISW's
21 response to the town's OFA; is that correct?
22 A. I would have been responsible for the cost
23 calculations.
24 Q. The cost calculations?
25 A. I would have done no legal responses for anything of

859

1 that nature.
2 Q. How many ties are there per mile or were there per
3 mile on 17.2-mile corridor?
4 A. Well, rough calculation, I used 2800 ties per mile for
5 any typical railroad calculation. I never actually counted the
6 ties at ISW per mile.
7 Q. But your understanding is these 17.2 miles were pretty
8 standard in that regard?
9 A. They should have been standard, yes.
10 Q. So, you estimate there were, approximately, 2800 ties
11 per mile; is that right?
12 A. That's an approximation you can use in general terms.
13 Q. And from that number and from knowing 17.2 miles, did
14 you make a calculation of how many ties there were,
15 approximately, in 17.2 mile corridor?
16 A. It was based on 16.7, it was -- seems like it was
17 43,000 something.
18 Q. Let me turn your attention to a document D-X -- it's
19 -- it's Bates number D-X108.0608 to .0609. Should be in your
20 collection of documents there.
21 A. 0608.
22 Q. Correct.
23 To .0609.
24 Do you find that?
25 A. Yes.

860

1 Q. Okay. What do you recognize this document as?

2 A. Not sure I have the right document here.

3 Q. Is that a letter with a Baker & Miller --

4 A. Yes.

5 Q. -- letterhead?

6 A. I've got it. I'm sorry.

7 Q. December 8, 2010; is that correct?

8 A. December 8, 2010, yes.

9 Q. It's a two-page document?

10 A. (No response.)

11 Q. Have you seen this document before?

12 A. I believe I saw it at the deposition.

13 Q. And what -- what -- what is the significance of this document; if you know?

14 MR. STEWART: Your Honor, objection. There's no
15 foundation for this document. He may have seen it. He
16 didn't write it. He didn't author it. He's already said he
17 didn't know what it was no until he identified it as letter
18 from a lawyer in Washington D.C.

19 THE COURT: I'm going to sustain the objection,
20 unless you can give me a reason why it shouldn't be
21 sustained.

22 BY MR. WEIGERT:

23 Q. Let me focus you, Mr. Cullen, on the last paragraph of
24 that letter this may help make it the clear what your
25

861

1 relationship was to this letter.

2 There's some calculations there. Do you see those
3 reflected in that paragraph of -- final paragraph of the letter?

4 A. Yes.

5 Q. Did you have a role in -- in developing those
6 calculations?

7 A. Yes.

8 Q. And what were those calculations?

9 A. Like, net liquidation value of the rail line?

10 Q. Okay. When you say rail line, do you mean the
11 17.2-mile rail line?

12 A. Yes. Yes.

13 Q. Okay. And what were your calculations here as
14 reflected here?

15 MR. STEWART: Your Honor, I object. Lack of
16 foundation in any relevance whatsoever for this calculation.

17 THE COURT: I have to agree. The witness said he
18 didn't recognize the letter or didn't participate in
19 preparing the letter.

20 He recognizes some of the figures that appear in
21 the letter it -- it -- it seems, but can you do a little --
22 if you could connect the dots a little more, if you could,
23 because you may be able to lay a foundation for it, but so
24 far, that hasn't occurred. Thank you.

25 MR. WEIGERT: Sure.

862

1 BY MR. WEIGERT:

2 Q. So, the author of this letter is William Mullens.
3 Do you see that?

4 A. Yes.

5 Q. Do you know who that is?

6 A. Yes.

7 Q. Who is that?

8 A. Our D.C. attorney that handles these type of issues.

9 Q. Okay. And you mentioned that you did recognize the
10 calculations in that final paragraph, right?

11 A. Yes.

12 Q. And you recognize them as your own, correct?

13 A. Yes.

14 Q. Are those calculations that Mr. Mullens requested from
15 ISW?

16 A. Mr. Mullens probably requested them through our legal
17 counsel who requested them from me.

18 Q. Thank you.

19 Just focusing -- let me -- let me -- just focusing on
20 that paragraph there, it says: According -- let's see, based
21 upon these documents as of the -- let me start from the
22 beginning. As of this time ISW has no documents that
23 specifically analyze the northwest procedures. The net
24 liquidation value of the lines. ISW has received some
25 confidential offers to purchase the rails, switches, diamonds,

863

1 ties, plates, signals and other track material for OTM.
2 Does that accord with your recollection.

3 MR. STEWART: Well, your Honor, first of all, the
4 document speaks for itself.

5 Second of all, the net liquidation value of this
6 line for purposes of an OFA to the Town of Poseyville is
7 completely irrelevant.

8 MR. WEIGERT: Your Honor, it's very relevant
9 actually to the -- to showing that --

10 THE COURT: I'm sorry. I can't hear you. Could
11 you --

12 MR. WEIGERT: So the -- the value of this line is
13 very relevant to the question of whether -- whether it's
14 been abandoned and what the value of the property remaining
15 on the line is, which we're going to get to.

16 THE COURT: I will -- I will let the Government
17 continue, but it will -- it will go to the weight.

18 I certainly understood the testimony with respect
19 to the cost of pulling -- well, the agreement with regard to
20 pulling up all the salvage value that existed on the
21 railroad line and that there was no damage to the
22 property -- to the adjoining properties' owners, that no
23 nuisance was created, but in terms of the other relevance, I
24 I'm not quite following the Government's argument or -- but
25 I'll let you proceed.

864

1 MR. WEIGERT: Thank you, Your Honor.

2 BY MR. WEIGERT:

3 **Q. Let me -- let me turn your attention to a second**
4 **document.**

5 THE COURT: Could I just, counsel, I apologize.
6 Are you trying to establish a value for the property with
7 this line of testimony?

8 MR. WEIGERT: We're trying to establish that the
9 railroad assigned a value, a positive value, to the ties, in
10 particular, that were left, the 48160 ties, as the witness
11 counted.

12 THE COURT: And how does that relate to the taking?

13 MR. WEIGERT: It has to do with the -- the state --
14 it has to do with the abandonment under the state law and
15 the state law provision, which the state law provision
16 provides that in order to abandon under state law the ties
17 have to be removed from the right-of-way.

18 And so, this testimony goes, in part, to showing
19 that the ties were not, in fact, removed.

20 And it also goes to show that they -- there wasn't
21 abandonment in the sense of discarding the ties, rather the
22 ties have some positive value from the railroad perspective
23 and also from potential bidder perspective, which we'll get
24 to. And so therefore, that's a railroad purpose, just like,
25 you know, a railroad can retain use of a right-of-way for

865

1 railroad purposes other than train traffic.

2 And so, in this case --

3 THE COURT: What would -- could you give me --

4 MR. WEIGERT: -- storage of valuable ties.

5 THE COURT: Could you give me an example?

6 MR. WEIGERT: Well, being the ties in this case, and
7 I think we've heard testimony on this were, stacked neatly
8 in many cases within the right-of-way. Okay.

9 THE COURT: I've heard disparate testimony on that.
10 I don't think many of the landowners would agree that the
11 ties were stacked neatly.

12 MR. WEIGERT: Okay. They were left -- through
13 this witness we will learn, I believe, that all ties were
14 left under this -- under this agreement they were all
15 required to be left in the right-of-way under the Scrap Rail
16 Sales Agreement --

17 THE COURT: Well, that --

18 MR. WEIGERT: -- all 48160 ties were required to be
19 left.

20 THE COURT: That doesn't mean that they were left
21 that way or that they -- given people that were going up and
22 down the track that they were -- that they were left
23 undisturbed.

24 MR. WEIGERT: Over time there may have been change.
25 I'm trying to establish that initially what the --

866

1 what the starting point here was in this story, okay, we
2 never have heard that -- we've never heard that at the time
3 that the rails were pulled up and the ties were -- the rails
4 were and the metallic objects removed, but the ties and
5 other nonmetallic property was left within the right-of-way
6 and that was under a requirement of this agreement. And --
7 and many of those items that were left in the right-of-way
8 were assigned a positive value by the railroad and also by
9 companies that bid to remove them.

10 THE COURT: Presumably, because they could -- they
11 could use them?

12 MR. WEIGERT: Exactly.

13 THE COURT: They could repurpose them.

14 MR. WEIGERT: Correct.

15 MR. STEWART: Your Honor, that's the whole point of
16 this dialogue.

17 THE COURT: Would you mind? I apologize. The
18 other reason I'm asking you to sit is because I can't hear
19 you as well. It's okay if you just to speak in the
20 microphone. Thank you.

21 MR. STEWART: That's the whole problem with this
22 exercise is that there is no testimony that they had value.

23 And in fact, it's contrary to this witness's
24 testimony and the next witness's testimony that they were
25 not functional and did not have any value.

867

1 And so, he's -- and it's also a false and
2 misleading issue for the Court to even say that they had
3 value or that they were -- we will stipulate that they were
4 left in some way on the railroad right-of-way, but that's a
5 far cry from what he's actually trying to establish that
6 they served any railroad purpose.

7 MR. WEIGERT: Your Honor, counsel has just
8 illustrated precisely why we need this testimony, because
9 he's made an assertion that we believe to be false. And we
10 would plan to show it through documents and this witness.

11 THE COURT: Okay. Well, I'm going to allow you to
12 proceed. And Mr. Stewart will have the opportunity to
13 cross-examine if they think it's even necessary.

14 Thank you very much.

15 MR. STEWART: Thank you, Your Honor.

16 BY MR. WEIGERT:

17 **Q. Mr. Cullen, I'd like to show you another document,**
18 **this one is Bates numbered, it comes right of the one you just**
19 **looked at, one you just looked at fully, executed letter. I'm**
20 **going to show you one just prior to that. And that is Bates**
21 **numbered D-X108.0605 to D-X108.0607.**

22 **Do you see that, Mr. Cullen?**

23 A. Yes, I see it.

24 **Q. What is that, if you know?**

25 A. A letter to the Town of Poseyville discussing the NLV

868

1 by the railroad.

2 Q. And — and by NLV what do you mean?

3 A. Net liquidated value, what the railroad would be, in
4 theory, worth.

5 Q. Okay. Are you referring to the chart on or table on
6 page D-X108.0607?

7 A. Yes.

8 Q. Do you know who prepared that table?

9 A. Yes.

10 Q. Who?

11 A. I did.

12 Q. And is that a table of your calculations of the values
13 of both rail and ties?

14 A. Yes.

15 Q. And ballast as well, correct?

16 A. Yes.

17 Q. Let's focus in on the third section of that chart
18 entitled Tie Disposal.

19 Do you see that?

20 A. Yes.

21 Q. And can you tell me what that — what your
22 calculations were in that section?

23 A. Well, on the rail line I made some assumptions on what
24 the ties that would be junked in the landfill, as I said ground,
25 would be and the cost to dispose of those. And made assumptions

869

1 that there would be some ties, potentially, still on the ground
2 that would have relay value to them. There's number one or
3 number two-grade type tie.

4 Q. Okay. Let's start with a total number of ties. How
5 many total — how many ties in total did you calculate here?

6 A. Roughly 48,000.

7 MR. STEWART: Your Honor —

8 BY MR. WEIGERT:

9 Q. And that was calculated as 2800 ties per mile times
10 17.2 miles; is that correct?

11 A. Seventeen point two or sixteen point seven.

12 MR. STEWART: May I interpose an objection that this
13 is already admitted to be an assumption on his part as to
14 the ties that were either functional or nonfunctional for
15 purposes of preparing this quotation; and other than the
16 assumption that he's already admitted, there's no other
17 foundation for this whatsoever.

18 MR. WEIGERT: Your Honor, I'm happy to probe the
19 foundation for that assumption.

20 THE COURT: Thank you.

21 BY MR. WEIGERT:

22 Q. Mr. Cullen, you said you made an assumption regarding
23 the percentages of ties here that were either junk/landfill or
24 that were relay number one or relay number two; is that correct?

25 A. Yes, that's correct.

870

1 Q. And just so we got your terms straight: What does
2 relay mean?

3 A. Relay means the used material can be reused.

4 Q. Okay. And what's the difference between relay number
5 one and relay number two?

6 A. Well, relay number one and number two are gradings of
7 ties, they're subjective in nature. Some people would only use
8 number one, classify it as a tie to be put back on tracks and
9 classify it as usable only in landscape, not usable in track.
10 So, depending on who's grading it, it would have the decision
11 making on it.

12 Q. Okay. And — and in this case, you gave three grades
13 to the 48,160 ties. I'm just adding those numbers. And you
14 gave them three different grades yourself; is that correct?

15 MR. STEWART: Your Honor, I object to the from of
16 the question as referring to them as three grades. They may
17 be three different assumptions, but he did not go out and
18 look at the ties and make any determination as to their
19 functionality.

20 MR. WEIGERT: Your Honor, I'm attempting — I'm in
21 the middle of attempting to create a foundation here, if he
22 would let me finish, I would really appreciate it.

23 THE COURT: Yes. The objection is sustained. You
24 can continue.

25 MR. WEIGERT: Thank you.

871

1 BY MR. WEIGERT:

2 Q. So, just trying to work through here how you, you
3 know, how you developed these numbers, Mr. Cullen.

4 So, you know, just to be clear, what we got here,
5 you — you have broken up these 48,160 ties into three
6 categories; is that fair to say?

7 A. Yes.

8 Q. Okay. Now, the first category is junk/landfill. What
9 does that mean?

10 A. That means that in all likelihood as they sat on the
11 track they were junk, not supporting the rail.

12 Q. Okay. What's the basis for your determination that
13 half of these ties, working with these numbers here, half of
14 these ties were in that category?

15 A. Because over the years that rail line, the traffic
16 didn't sustain the rail line. So, therefore, maintenance of
17 ties and such were not replaced and upgraded over time.

18 Q. And the basis for your determination there is your
19 position as vice president of mechanical and operations and your
20 direct experience with ties in this railroad line, correct?

21 A. Yes.

22 Q. And how did you make the determination that another
23 — that a quarter or 12,040 of these ties fit into the category
24 of relay number one?

25 MR. STEWART: Your Honor, objection to the form of

10 (Pages 868 to 871)

872

1 the question. He did not make that conclusion. He made an
2 assumption.

3 And to ask this witness whether he made a
4 conclusion that a quarter of these ties were relay one or
5 relay two is totally improper and lacks foundation.

6 MR. WEIGERT: Your Honor, I'm in the middle of
7 laying a foundation. I think this goes to weight.

8 Frankly, I'm going to establish this witness is in
9 the best position of any witness we've seen and I think any
10 witness we could see to make this determination. This falls
11 squarely within his responsibilities on a daily basis for
12 this railroad. And so, he's really the -- that's the reason
13 that the railroad asked this witness to prepare these
14 calculations. He's the person in the best position to do
15 so.

16 MR. STEWART: Your Honor, if I might add, I
17 apologize, but the proof is ultimately in the pudding here,
18 because they did not ever divide these ties into relay one
19 or relay two and they were all left and discarded after they
20 were pulled up.

21 And so this exercise of going and trying to
22 establish whether this assumption was ultimately correct, we
23 ultimately know the assumption was wrong and so, as a
24 result, this foundation is -- is totally irrelevant.

25 THE COURT: Well, you'll have the opportunity to

873

1 ask those questions on cross-examination. So, I will permit
2 it.

3 You may continue.

4 MR. WEIGERT: Thank you, Your Honor.

5 BY MR. WEIGERT:

6 Q. So, let's focus in, Mr. Cullen, on that second
7 category relay number one, if we could. You have assigned that
8 category to 12,040 ties; is that correct?

9 A. Yes.

10 Q. And what value did you assign to each tie in that
11 category?

12 A. Relay number \$14.50.

13 Q. Why did you choose that number?

14 A. That was most likely market price at the time.

15 Q. The market price at the time?

16 A. (No response.)

17 Q. And how did you determine that?

18 A. Because I buy ties from various vendors. So I would
19 have been paying for them at that time.

20 Q. Thank you.

21 And so, did you do the calculation to figure out the
22 total value of those 1240 ties here?

23 A. No, my Excel did.

24 Q. And how did -- and you operated the Excel?

25 A. Yes.

874

1 Q. How did your operation of Excel result in this --
2 what -- what number resulted?

3 A. One hundred seventy-four thousand five hundred eighty
4 dollars.

5 Q. And is that the result of a simple multiplication of
6 12,040 times \$14.50?

7 A. Yes, that's supposed to be.

8 Q. And for the record, that number of the -- the
9 resulting number, \$174,580, right?

10 A. Yes.

11 Q. Let's focus on the category relay number two. How
12 many ties did you place in that category?

13 A. Twelve thousand.

14 Q. And 40?

15 A. Yes.

16 Q. And what value did you assign to each item in that
17 category?

18 A. Ten dollars.

19 Q. And did you similarly use Excel to calculate the
20 result from multiplying those two numbers 12,040 times \$10?

21 A. Yes.

22 Q. And what was the result?

23 A. One hundred twenty thousand four hundred.

24 Q. One hundred twenty thousand four hundred dollars?

25 A. Yes.

875

1 Q. And so, is it fair to say that for relay number one
2 and relay number two, if you add those values together, they
3 equal close to \$300,000?

4 A. Yes.

5 Q. Now, let's just to be -- to be -- for the record,
6 let's focus back on the junks/landfill category; how many ties
7 did you put in that category?

8 A. Twenty four thousand eighty.

9 Q. Okay. And what value did you assign to each of those
10 ties?

11 A. Five dollars 5 to the negative.

12 Q. Okay. And did you use Excel to multiply 24,080 times
13 negative \$5?

14 A. Yes.

15 Q. And what resulted?

16 A. One hundred twenty thousand four hundred dollars.

17 Q. And what did you do next in your calculation?

18 A. Summed those totals up accounting for the negatives,
19 of course.

20 Q. And what was result of that summation?

21 A. One hundred seventy-four thousand five hundred eighty
22 dollars.

23 Q. And was that \$174,580 the net liquidation values you
24 calculated of all 48,160 ties?

25 A. Yes.

876

1 Q. And that's a positive value, correct?
 2 A. Yes.
 3 Q. Let me focus your attention on ballast value. What
 4 value did assign the ballast?
 5 A. One hundred fifty thousand dollars.
 6 Q. What was your basis of your assigning that value?
 7 A. Just put a value to it from reclaiming ballast in the
 8 past.
 9 Q. Based on your experience in buying and selling
 10 ballast?
 11 A. Yes.
 12 Q. And was your best estimation based on that experience
 13 of what the market value was at that time; is that correct?
 14 A. Yes.
 15 Q. And that's to -- that's a positive value, right?
 16 A. Yes.
 17 Q. And under the A & K Scrap Rail Sales Agreement, was
 18 the ballast left within the 16.7-mile line?
 19 A. Yes, it was.
 20 Q. Yes, it was?
 21 A. Yes.
 22 Q. Thank you.
 23 THE COURT: May I ask a question? The ballast is
 24 rock, correct, here?
 25 THE WITNESS: That's correct.

877

1 THE COURT: Does that -- I would -- and that
 2 would be very heavy to remove and costly, too. Does
 3 anyone -- have you seen instances in which a railroad or
 4 some other entity, organization, will come and pay for
 5 ballast or is it a matter of if someone wants to use the
 6 land it just has to be destroyed? What -- what --
 7 THE WITNESS: I have purchased ballast from a
 8 railroad that's been taken up. So, I buy it as reclaimed
 9 ballast.
 10 THE COURT: Oh, you buy it.
 11 THE WITNESS: Railroad short lines will buy it. It
 12 will not be meet class one specs. So, class one would be
 13 like Norfolk Southern, Burlington Northern. Short lines, we
 14 use it.
 15 THE COURT: Right.
 16 THE WITNESS: People along the line have requested
 17 to purchase some for their driveways, whatever purposes they
 18 want to use it for. So, yes, as reused.
 19 THE COURT: Okay.
 20 THE WITNESS: And you have to take into account
 21 freight to move it to where you want to, because it,
 22 obviously, diminishes the value of it. If it costs you more
 23 to move it and pick it up than it does where you can buy it
 24 out of quarry.
 25 THE COURT: And the other question I have for you

878

1 was: Did you, when you performed your calculations, did you
 2 ever go out and actually look at the condition of the ties
 3 and crossties or did you simply do calculations sitting at
 4 your desk, knowing that there were -- you assumed that there
 5 were X number of ties and crossties and maybe half of them
 6 would be unusual -- unusable and then the other half
 7 would -- you would divide into two categories, relay number
 8 one and the other would be relay number two?
 9 THE WITNESS: The assumption would be that there
 10 would be some relays in it and I calculated from the desk.
 11 I have seen the line in the past prior to the time I
 12 calculated this.
 13 THE COURT: You didn't go out --
 14 THE WITNESS: I did not go out and look at it, but
 15 in order to have the rail line intact and be able to operate
 16 empty I traffic on it, there's got to be the assumption that
 17 there's some decent ties in there to hold the rails
 18 together.
 19 THE COURT: Okay. And --
 20 THE WITNESS: Now --
 21 THE COURT: It's okay.
 22 THE WITNESS: When we do take the rail up in the
 23 process of taking rail up they do tear the tie up, so to
 24 speak, or destroy the tie, depending on how strong the tie
 25 is, much like you take a nail out of a piece of wood. If

879

1 that piece of wood is rotted or ruined, it's going to
 2 destroy that piece of wood. If it's a good, strong piece of
 3 wood, then the nail can be taken out and that wood reused.
 4 THE COURT: Okay. So, in the entire universe the
 5 total number of ties was 48,160 and you just assumed that
 6 half of them would end up in a landfill and then the other
 7 half would be evenly split between relay number one and
 8 relay number two?
 9 THE WITNESS: Correct.
 10 THE COURT: Okay. Thank you.
 11 BY MR. WEIGERT:
 12 Q. And -- and again, would -- the bases of your
 13 assumptions were what?
 14 A. (No response.)
 15 Q. Your experience?
 16 A. Based on experience and knowing that we have operated
 17 empty storage traffic on that line.
 18 Generally, class one track means you can operate a
 19 certain parameter. You have to have at least five ties attached
 20 to a rail out of roughly 13 ties per rail, roughly 50 percent.
 21 Roughly 50 percent of those ties had to be useable as leg in the
 22 track prior to taking it out. So, that's the reason I used a 50
 23 percent calculation knowing that, unfortunately, once they're
 24 taken out, those ties will simply be destroyed.
 25 THE COURT: Is there literature that instructs

880

1 estimators to value railroad ties this way that -- that half
2 will be salvageable and the other half will have to go to,
3 as you have said, junk or landfill or is it just -- I'm not
4 trying to minimize your experience, I don't mean it that
5 way, or is it -- is this a formula that you've come up with?

6 THE WITNESS: Some vendors have a documented
7 classifier for relay ties, number of splits, whether they
8 have all four corners on each end, how many plates in them,
9 how many spike holes have been in them, how many times have
10 they been turned. So, they do have internal documentation
11 that they classify them.

12 Therefore, the number of ties per rail, there is
13 clear documentation that the FRA requires a certain number
14 of ties for that rail, the 213 track standards, you can
15 refer to that. And they will tell you five good ties per
16 rail length in order to meet class one.

17 You can go with less than five, it would be what
18 they call excepted track. There's limitations on it. You
19 cannot perform certain type of service.

20 So in theory, yes, there would be some
21 documentation out there. I did not use that.

22 THE COURT: Right.

23 THE WITNESS: Based on my knowledge, based on
24 calculations, which would be quick, simple calculations. So
25 I, basically, just using logic, knowing that half the ties

881

1 were probably going to be junk, the other ties I split
2 between one and two, assuming that there's going to be some
3 use for them.

4 THE COURT: And do you sort of know just based on
5 your experience that half will be junk, is it because ties
6 versus rail ties is it that specific types of ties along a
7 track get greater wear or have some spikes driven through
8 them or is it just happenstance?

9 THE WITNESS: Well, the tie that is -- were in this
10 track, some of this was probably original tie they were put
11 in to when they were replaced.

12 THE COURT: Oh, okay.

13 THE WITNESS: Not with the original rail line,
14 would have been too old. Depending on the quality of the
15 tie it could be anywhere up to 35 years, depending on the
16 environment. A relay tie you buy would be about half of
17 that.

18 So, if you buy a relay tie number one I would
19 expect to get 10 or 15 years of life out of that tie, but if
20 it's been spiked once and it's been turned once, probably
21 been tamped a few times.

22 Tamping mechanically raises a tie and pulls it up
23 and tamps the rock beneath it, to solidify that tie, to
24 straighten the rail, to give you good alignment, elevation
25 and such. So those ties, depending on their condition, they

882

1 could have various states of repair and quality. So, I
2 don't know that there's really a good answer to your
3 question.

4 There's only one type of railroad tie that goes
5 underneath the rail, depending on the rail size, depending
6 on how many ties are required to support that rail size,
7 generally speaking, the heavier the rail in terms of weight
8 the less number of ties that you can get away with operating
9 on that track. The lighter the weight of the rail the more
10 ties you have to have under that track that are in good
11 shape.

12 So the ISW, unfortunately, was to the point where
13 it was no longer an operating railroad. It wasn't
14 justifying its existence in terms of revenue to put ties
15 back into it. So, those ties were just, basically, decaying
16 underneath the rail. So, we were at a point where we felt
17 we couldn't operate it anymore.

18 THE COURT: Very good. Thank you.

19 MR. WEIGERT: Your Honor, based on the discussions
20 we have been having, I would like to move into evidence the
21 Scrap Rail Sales Agreement, DX-108.0641 to DX-108.0646.
22 That's the final version.

23 MR. STEWART: Your Honor, I actually have no
24 objection to the admissibility of that exhibit, but it's
25 actually separately marked as Defendant's Exhibit 113 on

883

1 their exhibit list. It would be much easier to have it
2 admitted as Defendant's Exhibit 113 as opposed to all the
3 Bates number stamps.

4 MR. WEIGERT: Is that the same?

5 Your Honor, it appears that the -- the exhibit that
6 counsel is referring to the DX 113 is a partially executed
7 version of this agreement, not the final version. This is
8 the final version.

9 Am I correct?

10 Okay. I have now -- counsel -- my own cocounsel
11 has clarified for me what DX-113 is agreeable. That's fine
12 to use.

13 THE COURT: Thank you, Mr. Thomas. Very good.
14 So -- so we're actually admitting or have we already
15 admitted? We haven't admitted that. So, Plaintiff's
16 Exhibit --

17 MR. WEIGERT: It's Defendant's Exhibit.

18 THE COURT: This is my hearing. I'm sorry. I
19 thought Mr. Stewart said that. I thought it was odd that
20 you would move this exhibit. I thought you said there was a
21 separate standalone exhibit.

22 MR. STEWART: It's separately listed as Defendant's
23 Exhibit 113.

24 THE COURT: I'm sorry. Thank you. So, you're --
25 am I correct you're moving in Defendant's Exhibit 113?

884

1 MR. WEIGERT: That's correct, your Honor.
 2 THE COURT: That is without objection. It's
 3 admitted.
 4 (Defendant's Exhibit Number 113 was admitted
 5 into evidence.)
 6 My apologies. The acoustics are a little
 7 problematic for me. Thank you.
 8 MR. WEIGERT: For the record, DX-113, that we're
 9 moving in, is actually comprised of two emails and two
 10 versions of the Scrap Rail Sales Agreement. Only the first
 11 version is the fully executed. The second version is
 12 partially executed, that only has the -- the signature of
 13 Ms. Wyatt on behalf of A & K; does not have Mr. Carr's
 14 signature from ISW.
 15 So -- but it does include the final agreement
 16 itself. So, it's okay with us if we call it the exhibit. I
 17 just want to be clear for the record. So, the document
 18 we've been referring to with this witness was the fully
 19 executed version is in that exhibit.
 20 THE COURT: Very good.
 21 MR. WEIGERT: Thank you.
 22 BY MR. WEIGERT:
 23 **Q. Now, Mr. Cullen, I want to --**
 24 MR. WEIGERT: I would also move to admit the check
 25 and cover letter that we discussed, the check for

885

1 1.2 million and the cover letter that was the payment under
 2 this agreement.
 3 MR. STEWART: Your Honor, I similarly have no
 4 objection. It's separately marked as Defendant's
 5 Exhibit 134. I mean, excuse me, 114.
 6 MR. WEIGERT: Yes. That's right, your Honor.
 7 THE COURT: So, you're moving for the admission of
 8 114.
 9 MR. WEIGERT: Of Defendant's Exhibit 114. Thank
 10 you.
 11 THE COURT: Without -- and there is no objection
 12 and it, therefore, is admitted.
 13 (Defendant's Exhibit Number 114 was admitted
 14 into evidence.)
 15 BY MR. WEIGERT:
 16 **Q. Mr. Cullen, I'd like to turn your attention back to**
 17 **what's been marked DX-108.0607. That's the chart we were**
 18 **discussing.**
 19 **See that? The chart of values for the ties and other**
 20 **materials? It's .0607. Do you see that?**
 21 A. (No response.)
 22 **Q. Now, was -- were those the calculations reflected on**
 23 **that chart, you said they were your calculations, right?**
 24 A. Yes.
 25 **Q. Are -- are those calculations -- excuse me.**

886

1 **Did -- did you use those calculations as reflected on**
 2 **that chart to help you develop the numbers that appear in final**
 3 **letter marked DX-108.068 to .0609?**
 4 A. They came out of the same process, yes.
 5 MR. WEIGERT: Your Honor, I'd like to move to admit
 6 into evidence just the chart for now DX-108.0607 into
 7 evidence.
 8 MR. STEWART: Plaintiffs object, your Honor, for all
 9 the reasons previously stated. Lack of foundation and
 10 relevance.
 11 THE COURT: I will admit it.
 12 (Defendant's Exhibit Number 108.0607 was admitted
 13 into evidence.)
 14 MR. WEIGERT: Thank you, your Honor.
 15 BY MR. WEIGERT:
 16 **Q. And Mr. Cullen, let me ask you a question, turn your**
 17 **attention to something we talked about before: A road crossing,**
 18 **prior to the rails being picked up, the rails elsewhere being**
 19 **picked up under the Scrap Rail Sales Agreement, included rails,**
 20 **correct?**
 21 A. That's correct, yes.
 22 **Q. And did it include any other of the materials**
 23 **described in that agreement?**
 24 MR. STEWART: I object, your Honor, to any relevance
 25 whatsoever for the grade crossings that are not at issue in

887

1 this case.
 2 BY MR. WEIGERT:
 3 **Q. I think they are part of the -- am I correct that the**
 4 **crossings are part of the 16.7-mile line, also part of the**
 5 **17.2-mile line?**
 6 A. There were road crossings within those, yes.
 7 **Q. Approximately how many?**
 8 A. I don't know. Eight to ten maybe.
 9 **Q. Okay. And how -- what types of railroad materials**
 10 **were included in a crossing?**
 11 MR. STEWART: Objection. Relevance, your Honor.
 12 THE COURT: I think -- let the Government's counsel
 13 speak.
 14 MR. WEIGERT: Your Honor, these, again, this goes
 15 to, among other things, the statutes and the requirement to
 16 take rails out of the right-of-way. This is within the 17.2
 17 mile right-of-way. So, it's relevant.
 18 THE COURT: I'm going to allow this line of
 19 questioning.
 20 BY MR. WEIGERT:
 21 **Q. And so, all I am trying to ask this witness, perhaps**
 22 **unartfully, is what is in an intact rail crossing before the**
 23 **rails are picked up? What -- how is the crossing like that**
 24 **typical crossing like this within this particular right-of-way**
 25 **constructed?**

888

1 A. It would have a base of some sort, usually hardpan,
2 may have asphalt or rock, from that rock, sub ballast, and then
3 you will have actual railroad ballast.

4 For those crossings, prior to going to the all ballast
5 crossings, so the ballast will be there, the ties will sit on
6 the ballast, the rail would be laid on the ties with the plates,
7 fasteners, spikes. And then what, depending on the type of
8 surface, asphalt probably, some type of guardrail, timber
9 perhaps, on the inside; outside might even be another piece of
10 rail used to use as mud rail or guardrail. I don't think any of
11 those are concrete panel crossings. So, I think probably timber
12 asphalt in them for roads surface.

13 Q. And you have direct, personal experience with those
14 particular crossings in the 17.2-mile corridor, correct?

15 A. Yes.

16 Q. Let me turn your attention to --

17 THE COURT: May I ask a question, please?

18 MR. WEIGERT: Sure.

19 THE COURT: Would I be correct in assuming that it
20 would be expensive to remove the railroad crossings?

21 THE WITNESS: There is additional cost, because,
22 obviously, if you remove the track you have to replace the
23 road surface.

24 THE COURT: And it's held down by asphalt, rock and
25 ballast, which is rock, as well?

889

1 THE WITNESS: Track structures are actually held
2 down by its own weight.

3 THE COURT: I mean, around the railroad crossing it
4 sounds like it was reinforced, the crossing itself has
5 additional reinforcement?

6 THE WITNESS: The sub pan underneath would be
7 somehow reinforced, whether you go down to hard pan that you
8 can tamp against, if you don't have that, you can put
9 asphalt in there, concrete or other material or larger rock,
10 riprap, then you put your sub ballast, then you can tamp
11 from there. But you have to have something to keep it from
12 sinking and something to tamp your ties against.

13 THE COURT: So, it would be more expensive to
14 remove the railroad crossing than regular line of track;
15 would that be correct?

16 THE WITNESS: Well, the actual removal so much
17 isn't the issue. It's the -- the cost of road closure setup
18 in order to be able to pull that out and put something back
19 in that window.

20 THE COURT: Oh, okay.

21 THE WITNESS: Otherwise you would have, obviously,
22 a hole that's going to be eight to ten-foot wide.

23 THE COURT: Okay. Thank you.

24 BY MR. WEIGERT:

25 Q. So, let me ask you this question: Did -- did you ever

890

1 receive a bid or bids for the removal of ties from the 17.2 mile
2 right-of-way?

3 A. I believe Progress did provide a bid to remove the
4 ties.

5 Q. By Progress, you're referring to Progress Rail
6 Services?

7 A. Yes.

8 Q. Let me show you a document, it's at Bates number
9 DX-108.0619 to 0621.

10 This appears to be an email chain with the oldest
11 email being dated June 25, 2010, and the newest one dated
12 January 11, 2011; is that correct?

13 A. Yes.

14 Q. And am I correct in saying that you are either the
15 recipient or the author of every one of the emails in this
16 thread?

17 A. Yes.

18 Q. And as a general matter, what does the -- what is the
19 subject matter of this email thread?

20 A. Focusing on a portion of the bid to dispose of the
21 ties. Purchase ties that would be expected to be grade one and
22 grade two.

23 Q. Along that line, let me focus you in on one of the
24 emails in this thread dated November 18, 2010 at 11:11 a.m. it's
25 on the first page. Do you see that at the bottom?

891

1 A. (No response.)

2 Q. It's an email from someone named Ken Upton to you.

3 A. Yes, I see it.

4 Q. Okay. Who is Ken Upton?

5 A. Progress Rail representative.

6 Q. I see.

7 There's a courtesy copy to Pat Cole. Who is Pat Cole?

8 A. I'm sorry?

9 Q. Sorry. Just curious. It says CC: Pat Cole, who is
10 that?

11 A. Pat Cole is another gentleman at Progress.

12 Q. And this was sent to you so that you received it; is
13 that correct?

14 A. Well, the initial email I sent in.

15 Q. I'm talking about the one -- the email from Ken Upton
16 to Shane Cullen of November 18, 2010 at 11:11 a.m., bottom one
17 on the first page?

18 A. Yes, Ken sent it to me.

19 Q. What is that talking about?

20 A. Well, he was willing to pay for the grade one and two
21 ties and charge to dispose of the junk ties.

22 Q. Okay. And so, reading from this it says: Shane, I'll
23 give you two options on the ties.

24 And I take it that's the first one to dispose of all
25 ties, the cost to you will be \$83,193 total.

892

1 And what I take the second one, if we take the relay
2 number one and number two's and number 33's and scrap on the
3 right-of-way, we will pay you \$45,000.

4 See that?

5 A. Yes, I see it.

6 Q. And so, what did that mean to you?

7 A. Well, he was offering either to dispose of all the
8 ties or buy the ones that would be relay condition and leave
9 the junk ties on the right-of-way.

10 Q. So, number 33's are for the junk ties?

11 A. That's my understanding, yes.

12 Q. And relay number one and two were the ones that had
13 values you calculated, right?

14 A. Yes.

15 Q. Did you take up Mr. Upton on his offer?

16 A. No. No.

17 Q. Instead the ties were left in the right-of-way; is
18 that right?

19 A. Yes.

20 Q. But it's fair to say Mr. Upton assigned a positive
21 value, the relay number one and number two tie; is that right?

22 A. He did, keeping in mind his bid was lower than A & K.

23 Q. His overall -- the overall net amount of his bid was
24 lower?

25 A. Yes.

893

1 Q. Thank you.

2 And is that the reason that you went with A & K over
3 Progress?

4 A. Yes.

5 Q. Okay. Let me turn your attention to a different
6 topic. Rail use. Let me focus you in on the 17.2-mile
7 corridor. Has there been any train traffic on that corridor
8 since 2004?

9 A. Define train traffic. What is train traffic to you?

10 Q. Maybe you can help me out here. I'm referring to it
11 as any type of train whatsoever, it could be storage -- for
12 storage purposes or otherwise.

13 A. After 2004 there would have been storage traffic on
14 that line.

15 Q. And what do you mean by storage traffic?

16 A. Those are railcars stored for customers, own them or
17 lease them, a place for them to go, because they don't have any
18 particular use for them at that particular moment in time. So,
19 we, depending on the agreement, either lease or offer track
20 space for storage.

21 Q. And who are some of your biggest storage customers?

22 A. Anybody in the industry CIT, ARI, all the major car
23 owners.

24 Q. And what are some of the reason they would want to
25 store their cars on their rails?

894

1 A. They store them there because they don't have any
2 lessee for them to use them SNBA or CIT or ARI, all acronyms,
3 but they own the rail car, but they don't actually use the rail
4 car. So, they lease it to other entities: Cargill or ADM or
5 some other company. And during times of -- certain times they
6 don't have lessees for those cars, they put them in storage.
7 The Cargill and ADM of the world, if you don't have any use for
8 that car at that particular time, would put them in storage.
9 Grain cars would be a prime example of cars, seasonal storage,
10 because they're only used in harvest time, most of the time,
11 used at harvest time. Often times, during the middle of the
12 summer, covered hoppers used for grain, would be put in storage.

13 Q. And is it fair to say that ISW and you use the
14 17.2-mile corridor for storage?

15 MR. STEWART: Your Honor, first of all, I object to
16 this whole line of questioning. The possible storage or use
17 of a small portion of the 17.2 miles for storage of cars or
18 even empty cars is irrelevant as a matter of law and it's
19 irrelevant to the exemption procedures.

20 The exemption procedures specifically define train
21 traffic for purposes of utilization of the train traffic and
22 it's defined by the STB as local traffic that either
23 originated or terminated on the line. Does not include the
24 storage of cars or even the use of it for empty cars.

25 So, in essence, they're trying to impeach their own

895

1 exemption procedure, your Honor. And I object to it for
2 foundation purposes and for relevance.

3 MR. WEIGERT: Your Honor, I haven't finished this
4 line of questioning yet.

5 I believe this witness will show that not all the
6 cars are empty. I believe this witness will show that these
7 cars are not all non-revenue. They're actually revenue
8 generating. And that therefore, they fall outside of the
9 legal definition that counsel is referring to.

10 THE COURT: Are you saying that they're revenue
11 generating, because someone is paying, in essence, to park
12 there, just store their car on the line? Is that --

13 MR. WEIGERT: Well --

14 THE COURT: It's contrary to the definition read by
15 Mr. Stewart.

16 MR. WEIGERT: I think that's a question of law and
17 will go to -- can be discussed later.

18 But I think that the facts will get out with this
19 witness may show that that is, you know, we would argue not
20 the case.

21 THE COURT: Well, I'll let you pursue it. And if
22 Mr. Stewart has some cross he can, but ultimately, it's --
23 I'll let you make the record.

24 MR. WEIGERT: Thank you, your Honor.

25 BY MR. WEIGERT:

896

1 Q. So, just being clear, I want to be clear about sort of
2 categories of -- of cars that were running on the rails after
3 2004. Okay?

4 So, you put them all in a classification called
5 storage; is that right?

6 A. Yes.

7 Q. Okay. And I think there was some reference to empty
8 storage.

9 Was there also storage ago of cars in the 17.2-mile
10 corridor that were not empty?

11 A. Yes.

12 Q. And what types of materials did those cars hold?

13 A. The only thing I can think of offhand is the chemical
14 cars for a couple storage cars that stored loaded an empty
15 product.

16 Q. And who are those customers?

17 A. Savic is one of them. DSN is another.

18 Q. Can you spell Savic?

19 A. S-A-V-I-C.

20 Q. And what kind of chemicals, to your knowledge, were
21 stored on that corridor?

22 MR. STEWART: Your Honor, I object. Completely
23 irrelevant as to what was actually stored in those cars.

24 And he has not laid any foundation whatsoever to show that
25 any of the local traffic, whether they stored materials or

898

1 Q. And let's see, during -- how much was it paid?

2 A. Depending on commodity, depending on agreement, on
3 average, switch or loaded car can be around \$300. And I would
4 collect it on the inbound switch and the outbound switch for
5 empty cars, probably in that timeframe around \$100, \$125 for
6 inbound, \$125 for the outbound.

7 Q. And of this traffic on that corridor, what was the --
8 the last run, to your knowledge, most recent run?

9 A. The most recent price?

10 Q. Sorry, the most recent use for this purpose?

11 A. (No response.)

12 Q. In other words, what date did the most -- did -- what
13 is the most recent date upon which these type of cars ran on
14 that corridor?

15 MR. STEWART: I'd object to the form of the question
16 as ran on the corridor, your Honor.

17 BY MR. WEIGERT:

18 Q. Well, you put it -- you're the railroad guy. You put
19 it --

20 A. I think we determined the last storage was even 2009.
21 I think it was 2009 was the last storage report that we had ran.

22 Q. The last storage report?

23 A. That we had ran.

24 Q. Okay.

25 A. Seven, eight and nine.

897

1 not, either originated or terminated on the line, which is
2 the specific definition of local train traffic by the STB
3 itself.

4 THE COURT: You're correct. Sustained.

5 MR. WEIGERT: It's -- oh, and also, yeah, I said
6 that that, actually, is not the only reason we're offering
7 this evidence. It's also has to do with state law
8 abandonment. So, there are multiple purposes. That's not
9 the main one. The main one is state law abandonment, which
10 counsel has felt is a critical issue in this case.

11 THE COURT: I'll let you proceed.

12 MR. WEIGERT: Thank you, Your Honor.

13 BY MR. WEIGERT:

14 Q. Mr. Cullen, so, what we're learning here is after 2004
15 there was storage cars stored on these rails that were not just
16 empty, correct?

17 A. Yes, that's correct.

18 Q. Some of them were full -- some of them were full with
19 chemicals, right?

20 A. Chemicals or other product, yes.

21 Q. And what were some of chemicals that were kept in
22 these cars?

23 A. I don't know the specific type of chemical.

24 Q. Okay. And was ISW paid for this type of use?

25 A. Yes.

899

1 Q. Okay. And to your knowledge, was there any other kind
2 of traffic on the 17.2 mile corridor after 2009?

3 A. There may have been. I mean, it was still -- it would
4 still have been intact until A & K removed it.

5 THE COURT: But are you aware of any?

6 THE WITNESS: I can't recall specific cars.

7 THE COURT: But you do recall -- the last time, to
8 your memory, that you can recall was 2009?

9 THE WITNESS: 2009 is the last time I can confirm I
10 document that we had railcars out there in storage.

11 THE COURT: Okay. Thank you.

12 MR. WEIGERT: Thank you.

13 BY MR. WEIGERT:

14 Q. Let me turn your attention to another document DX-2.29
15 pages 0001 to 0002. You have it in your...

16 (Recess.)

17 MR. WEIGERT: Your Honor, before we continue, based
18 on my discussion with Mr. Cullen, I'd like to move into
19 evidence the email thread we discussed with the progress for
20 the relay ties, Bates number DX-108.0619 to DX-108.0621.

21 MR. STEWART: Same objections, your Honor,
22 foundation and relevance.

23 THE COURT: All right. I will admit them over
24 objection.

25 (Defendant's Exhibit Numbers 108.0619 to 108.0621

900

1 were admitted into evidence.)
 2 MR. WEIGERT: Thank you, Your Honor.
 3 And upon further reflection, I note that the
 4 additional document I was going to discuss is already in
 5 evidence. So, I can spare this witness and spare this Court
 6 further discussion, pending any potential redirect. Thank you.
 7 THE COURT: Okay.
 8 CROSS-EXAMINATION
 9 BY MR. STEWART:
 10 Q. Good morning, Mr. Cullen.
 11 Let me first go back and discuss the discontinuance of
 12 train traffic. And did you, as part of this case, perform some
 13 research concerning the discontinuance of train traffic along
 14 this line?
 15 A. Yes, we did.
 16 Q. And in order to obtain that information, and I'm --
 17 and I'm focusing on the last revenue load movement, you
 18 requested a report from the director of operations center, did
 19 you not?
 20 A. Yes.
 21 Q. All right.
 22 And after you requested that information, you actually
 23 received the information. And based on the information you
 24 received in your research you made a conclusion as to when the
 25 last loaded revenue train traffic took place, did you not?

901

1 A. That's correct.
 2 Q. And in fact, based on that research, you concluded
 3 that the last loaded revenue train you used on the applicable
 4 rail line ceased in 2004, correct?
 5 A. Yes.
 6 Q. All right.
 7 And I know Mr. Weigert asked you some questions about
 8 the possible storage of cars. But first of all, you are not
 9 aware of any storage of cars anywhere on the 17.2 miles after
 10 2009, are you?
 11 A. I can't recall specific cars.
 12 Q. And in fact, there was no discussion whatsoever as to
 13 even if there were cars stored there in the 2007, 2008 or 2009
 14 timeframe, where those cars might have been stored, was there?
 15 A. Not following your question.
 16 Q. Okay. There was no discussion about where those cars
 17 might have been stored during that timeframe, was there?
 18 MR. WEIGERT: Objection. Mischaracterizes
 19 testimony.
 20 THE COURT: And I can't hear -- could you -- would
 21 you mind? I apologize, would you mind sitting or -- so, I
 22 just or speak into the microphone.
 23 MR. WEIGERT: Your Honor, I just object as to
 24 mischaracterization of the testimony. I believe the witness
 25 testified that the location was the 17.2 mile corridor that

902

1 storage --
 2 MR. STEWART: I will rephrase it, your Honor.
 3 THE COURT: Thank you.
 4 BY MR. STEWART:
 5 Q. My question was: You didn't have any idea where along
 6 the 17.2 miles those cars were stored, do you?
 7 A. Not specifically, no.
 8 Q. Okay. You are familiar with the Scrap Rail Sales
 9 Agreement with A & K and the ISW, are you? In fact, you
 10 testified about that?
 11 A. Yes.
 12 Q. And so, time wise, the very first paragraph of the
 13 agreement says that was entered into on August 1, 2011, correct?
 14 A. I don't have it in the front of me. Okay.
 15 Q. I'm not trying to trick you. We can put it back up on
 16 the screen, if you want.
 17 A. That's fine.
 18 Q. And I think the fully executed document was signed on
 19 August 1st by one of the parties and August 2, 2011 by the other
 20 party. Do you remember that?
 21 A. Yes.
 22 Q. Okay. And that contract, so we're clear on that, was
 23 with A & K to remove and salvage all of the switches, rail and
 24 other metallic track materials, correct?
 25 A. Yes.

903

1 Q. And in paragraph two it states that the purchase price
 2 is a million two, right?
 3 A. Yes.
 4 Q. In fact, they gave, exhibit up there, that showed that
 5 that check was paid almost immediately after the agreement was
 6 entered into, was it not?
 7 A. Yes.
 8 Q. All right.
 9 So, the agreement was entered into around August 1,
 10 2011. And that check for a million two was paid within a couple
 11 weeks thereafter, right?
 12 A. Yes.
 13 Q. All right.
 14 Now, although the rails and the other metallic track
 15 materials were salvaged as part of that contract, the crossties
 16 were not part of that contract, were they?
 17 A. No, they were not.
 18 MR. WEIGERT: Objection. They were, your Honor,
 19 this mischaracterizes testimony. Again, they were part of
 20 the contract in that they were required to be left in the
 21 right-of-way. So, in that sense they with part of the
 22 contract.
 23 THE COURT: I -- it was my understanding -- let
 24 counsel rephrase so we're all clear.
 25 It was my understanding Plaintiff's counsel was

904

1 asking about those materials that had been removed pursuant
2 to the contract, but I'll let --

3 BY MR. STEWART:

4 Q. The crosssties were not actually part of the salvage
5 contract that they paid a million two for, was it?

6 MR. WEIGERT: Same. Objection.

7 THE COURT: Why is it an improper question?

8 MR. WEIGERT: Just that there was an express
9 provision, your Honor, in this agreement that -- and it's
10 Section 17, that requires crosssties may be moved away from
11 the center of the right-of-way, but shall not be removed
12 from the right-of-way. So in that sense it's part of the
13 contract and part of the over put. So, that was my point
14 there.

15 THE COURT: And -- and -- and your question was
16 they were not removed?

17 MR. STEWART: No.

18 My question was they were not salvaged as part of
19 1.2 million dollar contract.

20 THE COURT: I think it's perfectly.

21 MR. WEIGERT: Agreed, your Honor.

22 THE COURT: Oh, thank you.

23 MR. WEIGERT: Thank you.

24 BY MR. STEWART:

25 Q. Now --

906

1 BY MR. STEWART:

2 Q. All right.

3 Now, when you say that, essentially, none of the
4 crosssties were functional, that means that they were not
5 economically viable to recover the ties and reuse them for the
6 transportation of trains, right?

7 A. Economically viable for me to recover the ties.

8 Q. Right.

9 And then they would not be economically viable to
10 recover the ties and reuse them, because the cost of labor to
11 pick out the ties that would be salvageable is not economically
12 viable, right?

13 A. That's correct.

14 Q. All right.

15 Now, rail lines are typically abandoned due to the
16 overall condition of the roadbed, and that includes the
17 crosssties, right?

18 A. Yes.

19 Q. And also includes the traffic conditions on the rail
20 line?

21 A. Yes.

22 Q. All right.

23 And you concluded that the tie condition on this
24 particular rail bed was extremely deficient for operating
25 trains, didn't you?

905

1 THE COURT: Did we get an answer?

2 MR. STEWART: I -- I'm not sure.

3 THE WITNESS: They were not salvaged as part of the
4 contract.

5 BY MR. STEWART:

6 Q. Okay. Now, as part of the salvage of the rails, you
7 indicated that the rails were separated from the crosssties and
8 the crosssties were merely left on the right-of-way, right?

9 A. Yes.

10 Q. All right.

11 And in fact, I think you described the process whereby
12 the rails are removed from the crosssties and that actually
13 either damages or can destroy them, right?

14 A. Depending on method, yes.

15 Q. All right.

16 And although the crosssties were left on the
17 right-of-way, none of them were actually functional as
18 crosssties, were they?

19 MR. WEIGERT: Objection. Mischaracterizes
20 testimony.

21 THE COURT: If the witness knows, if the witness
22 can answer, he can answer.

23 THE WITNESS: Our position was they were not
24 functional. It was not economically viable to go back and
25 pick them up.

907

1 A. Yes.

2 Q. All right.

3 Now, since the crosssties were not functional in the
4 future as crosssties, the only reason that the railroad left them
5 was because they were not part of the salvage contract with
6 A & K, right?

7 A. Yes.

8 Q. All right.

9 And that's the only reason they were left there, isn't
10 it?

11 A. They were left there, because we didn't have a need to
12 pick them up at that time.

13 Q. Okay. And although the contract that we referred to
14 earlier was signed on August 1st and August 2, 2011, the work
15 and planning actually started long before that, didn't it?

16 A. Yes.

17 Q. All right.

18 And in fact, you're familiar with the term picking up
19 the track materials or picking up the rails, aren't you?

20 A. Yes.

21 Q. All right.

22 Let me hand you what is marked DX-108.0531.

23 May I approach, your Honor?

24 THE COURT: Please. Thank you.

25 MR. WEIGERT: Objection, your Honor. Outside the

908

1 scope of the direct.

2 THE COURT: I haven't heard --

3 MR. STEWART: That it is. If we can identify it,
4 we'll talk about when the work began to actually salvage the
5 rails and ties and remove the rails and ties in this
6 particular project.

7 THE COURT: It actually is within the scope.

8 MR. WEIGERT: Withdraw.

9 BY MR. STEWART:

10 Q. All right.

11 Now, Mr. Cullen, I have handed you what has been
12 marked as well -- it's marked as Cullen Exhibit Number 7 at your
13 deposition, but for the Court it's DX-108.0531, in the bottom
14 right-hand corner.

15 Do you see that?

16 A. Yes.

17 Q. All right.

18 And this is an email to you from Mr. Carr.

19 Do you see that?

20 A. Yes.

21 Q. All right.

22 And in fact, this is dated, the original email to you
23 from Mr. Carr, is dated July 28, 2010, is it not?

24 A. Yes.

25 Q. And who is Mr. Carr?

909

1 A. He is president.

2 Q. And he actually inquires of you, he says: Can you get
3 me a PDF of a map of the section of track we are going to pull
4 up.

5 Do you see that?

6 A. Yes.

7 Q. All right.

8 And then you actually responded and actually attached
9 a map of the area of the track that were you going to pull up,
10 correct?

11 A. Yes.

12 Q. All right.

13 You also at or about the same time were receiving
14 other bids, were you not?

15 A. I believe so.

16 Q. All right.

17 So, I don't want to bore the Court and all the parties
18 with going through the long list of these, but on, for example,
19 on July 27, 2010, which was the day before this email from
20 Mr. Carr, and roughly three months before the petition for
21 exemption was even filed, you had received a bid from Pioneer
22 rail about the picking up of the rails and ties, had you not?

23 MR. WEIGERT: Your Honor, I object to this line of
24 questioning as irrelevant and redundant. We all agree the
25 track was pulled up.

910

1 MR. STEWART: Well, if we all agree that the rails
2 and ties were pulled up, your Honor that's exactly the
3 language the Court referred to last Wednesday during trial.
4 They're trying to take the position that the ties were not
5 pulled up.

6 MR. WEIGERT: I didn't say ties. This says track.

7 MR. STEWART: Well --

8 MR. WEIGERT: Track is not ties.

9 MR. STEWART: If you let me go through this, then
10 we'll get to that.

11 THE COURT: You may proceed.

12 THE WITNESS: You said Pioneer Rail. I would
13 not -- we wouldn't be --

14 BY MR. STEWART:

15 Q. I'm sorry, email to Pioneer Rail. Let me pull that
16 out, Exhibit Number 11, and I'll just show this to you.

17 Did I say Pioneer Rail? I meant Progress Rail.

18 Let me show you, Mr. Cullen, what has been marked as
19 -- well, it's DX-105.0558 that was marked as Cullen Exhibit
20 Number 11 during your deposition.

21 Do you see that?

22 A. Yes.

23 Q. All right.

24 And this is a letter to you from Progress Rail
25 Services. Do you see that?

911

1 A. Yes.

2 Q. And it is dated July 27, 2010, right?

3 A. Yes.

4 Q. And it is, actually, the day before you received the
5 email from your boss, Mr. Carr, which was dated July 28, 2010,
6 correct?

7 A. Yes.

8 Q. And this is a bid from Progress Rail for \$1,040,000 to
9 remove all rail plates, joint bars, turnouts and miscellaneous
10 scrap steel from the line.

11 Do you see that?

12 A. Yes.

13 Q. All right.

14 And if this is dated July 27, 2010, when did this work
15 actually start to begin the process of salvaging the rail and
16 removing the ties?

17 MR. WEIGERT: Objection. Foundation. This work?
18 Progress wasn't given any contract. There was no work under
19 progress.

20 MR. STEWART: I'll rephrase, your Honor.

21 BY MR. STEWART:

22 Q. Where -- where -- when was the effort initiated to
23 pick up the track materials from this section of the rail line?

24 A. Spring of 2012.

25 Q. I'm sorry. When was the work commenced to actually

912

1 start the effort to obtain a contract to remove the track
2 materials from the track?

3 A. First discussed?

4 Q. Yes.

5 A. I don't recall, specifically. I would assume
6 somewhere around this timeframe.

7 Q. Okay. And this is in late July of 2010?

8 A. Yes.

9 Q. And the contract was entered into in August of 2011,
10 right?

11 A. Yes.

12 Q. All right.

13 THE COURT: Mr. Stewart, I'm sorry to stop you.

14 Just so the record is correct, you're referring to DX-108?

15 You said 105. Did you mean 105.0558.

16 MR. STEWART: I did, your Honor. If I misspoke, I
17 apologize.

18 THE COURT: No worries. I just want to make sure
19 we have a clear record.

20 MR. STEWART: Okay.

21 BY MR. STEWART:

22 Q. Now, what does it mean to you, Mr. Cullen, when your
23 boss refers to the track we are going to pull up. What does
24 that mean to you?

25 A. The segment of rail from 240.2 south of Poseyville out

914

1 of that, since it came into evidence before and it's stipulated
2 to, but the date of this is May 13, 2011 and it's an email from
3 Shane Cullen to Shane Cullen, right?

4 A. Yes.

5 Q. All right.

6 And this refers to, if you look at it, it refers to
7 the — the fact that it is — that ISW, if you start first of
8 the second paragraph, it says ISW has authority to start this
9 work as of Monday May 23rd.

10 Do you see that?

11 A. Yes.

12 Q. And the ISW is requesting final proposal offers in
13 line to secure a contract and receive payment by Monday May
14 23rd.

15 Do you see that?

16 A. Yes.

17 Q. Now, up above where it talks about the rail line it
18 actually talks about the 17.2 miles. And then it says the
19 project is to consist of the removal of rails, switches, OTM,
20 ties and ballast; no bridges, culverts and other structures are
21 not included and are not to be removed or damaged.

22 Do you see that?

23 A. Yes.

24 Q. All right.

25 And why was ISW anxious to start this process and get

913

1 to Cynthiana.

2 Q. Okay. That is the process that was actually
3 documented in the contract with A & K in August of 2011, right?

4 A. Yes.

5 Q. All right.

6 Did you also, and I don't want to belabor this, did
7 you also get other bids from other people after this period of
8 time in July of 2011 -- I'm sorry -- July of 2010 before A & K
9 was actually chosen?

10 A. We had three bids.

11 Q. Okay.

12 A. Progress, J. Smith and A & K.

13 Q. Now, let me show you what has been marked or which is
14 DX-108.0623, which was marked as Cullen Exhibit Number 28 at
15 your deposition.

16 Do you see that?

17 A. Yes.

18 Q. And this is interesting, because this is actually --
19 first of all, what is the date on it?

20 A. May 13, 2011.

21 Q. All right.

22 And this is ten days before the notice of interim
23 trail use became effective on May 23, 2011, right?

24 A. That I don't know.

25 Q. Okay. Well, we -- the Court will take judicial notice

915

1 it completed so that you were paid by May 23, 2011?

2 A. I don't know that.

3 Q. Okay. Why was this email even written? Why did you
4 write an email to yourself?

5 A. I believe this email was sent out to the vendors that
6 were bidding on the project and this is a blind copy to myself.

7 Q. Okay. I'm sorry.

8 A. Blind copy would have went to myself. This is a copy
9 to myself.

10 Q. Okay. So, this is what you sent out to the three
11 vendors that you were communicating with about the possibility
12 of entering into this salvage contract?

13 A. Yes.

14 Q. All right.

15 And you just retained a copy for yourself?

16 A. Yes.

17 Q. All right.

18 And then instead of getting this work started on
19 May 23, 2011, and instead of getting paid on May 23, 2011 or
20 shortly thereafter, the contract was entered into August 1st and
21 August 2nd of 2011 and payment occurred just shortly thereafter
22 in August of 2011, correct?

23 A. Yes.

24 Q. All right.

25 Isn't it true, Mr. Cullen, that since the rails and

916

1 ties were removed in 2012 that the railroad has done no
 2 maintenance of any kind?
 3 A. On the section where the rail has been pulled up?
 4 Q. Yes.
 5 A. Other than what A & K performed, that would be
 6 correct.
 7 Q. Okay. So, when A & K finished their work in the
 8 pulling of the rails and ties the fact of the matter is that
 9 there has been no maintenance performed by the railroad since
 10 that time?
 11 A. Correct.
 12 Q. All right.
 13 And so, the railroad has not, for example, sprayed for
 14 weeds in approximately seven years at a minimum, right?
 15 A. That's probably correct.
 16 Q. And have not mowed it or made any attempt to remove
 17 growth, vegetation, weeds and/or trees, have you?
 18 A. That's correct.
 19 Q. Now, I think we've established that after the rails
 20 were removed and salvaged, the crossties were simply just left
 21 there, right?
 22 A. Yes.
 23 Q. And there are approximately 2800 crossties per mile,
 24 right?
 25 A. Approximately.

917

1 Q. And so, you did an assumption or estimation that there
 2 were roughly 48,000 crossties were just left on the premises,
 3 correct?
 4 A. Yes.
 5 Q. All right.
 6 Now, I want to go back to exhibit -- well, it's
 7 Deposition Exhibit Number 26. You remember the bid you received
 8 to dispose of all the crossties was \$83,193.
 9 Do you remember that?
 10 A. Yes.
 11 Q. And this was a bid where you would be paying them to
 12 remove all of the crossties, right?
 13 A. Yes.
 14 Q. And that bid was received, actually, on November 18,
 15 2010.
 16 Do you remember that?
 17 A. Yes.
 18 Q. All right.
 19 And that was, approximately, six months before the
 20 notice of interim trail use even became effective and 10 or
 21 11 months before the actual salvage contract was signed, right?
 22 A. Yes.
 23 Q. All right.
 24 A. I don't know. I don't know about the trail document.
 25 Q. Okay. So, if the notice of interim trail use was

918

1 May 23, 2011, and this was November of 2010, that would be
 2 approximately six months before the notice of interim trail use?
 3 A. Yes.
 4 Q. All right.
 5 And it -- and this bid was received on November 18,
 6 2010. And the actual salvage contract was not entered into
 7 until August 1st of 2011. So, approximately, ten months before
 8 the salvage contract was entered into, correct?
 9 A. Yes.
 10 Q. All right.
 11 Now, these 48,000 crossties left a real mess, didn't
 12 they?
 13 A. The mess is your interpretation.
 14 Q. How would you describe 48,000 crossties strewn about
 15 -- about a strip 100 feet wide for 17 miles? How would you
 16 describe it?
 17 A. Ties that were left on the right-of-way.
 18 Q. All right.
 19 Let me turn your attention to DX-108.0718. This was
 20 Cullen Deposition Number 46. And this is an email to you dated
 21 February 2, 2012.
 22 Do you see that?
 23 A. Yes.
 24 Q. And this is an email to you from an individual named
 25 Joe Lupfer, L-U-P-F-E-R in Cynthiana, Indiana, is it not?

919

1 A. Yes.
 2 Q. And he emailed you to tell you that it looks like, if
 3 you look there in the second line, A & K Rail Works has gotten
 4 all the rail removed and are done with whatever they are going
 5 to do.
 6 Do you see that?
 7 MR. WEIGERT: Objection. Calls for hearsay. All
 8 hearsay.
 9 BY MR. STEWART:
 10 Q. Yeah, this is what this email says, isn't it?
 11 THE COURT: This is an email he received?
 12 MR. STEWART: It's an email he received from
 13 Mr. Joe Lupfer on February 2, 2012.
 14 MR. WEIGERT: If he's using this to establish the
 15 truth of the matter asserted, it's hearsay.
 16 MR. STEWART: I'm -- I'm -- I'm going to establish
 17 several things by this email, your Honor, but also the
 18 timetable of when the work was completed.
 19 THE COURT: You can proceed.
 20 MR. STEWART: All right.
 21 BY MR. STEWART:
 22 Q. Now, I don't know that I got an answer to that
 23 question. It looks like he says there that A & K Rail Works has
 24 gotten all the rail removed and are done with whatever they're
 25 going to do.

920

1 Do you see that?

2 A. Yes.

3 Q. And does that coincide with your recollection or -- or
4 knowledge that the -- the work was completed on or about this
5 time in early February of 2012?

6 A. Yes.

7 Q. All right.

8 It goes on to say there now there is a lot of
9 crossties and mess left behind.

10 Do you see that?

11 A. Yes. All right.

12 Q. All right.

13 At that's the way Mr. Lupfer described it to you was
14 there that there was a real mess left behind, right?

15 A. That's his description, yes.

16 Q. All right.

17 And then he actually is looking for some work, is he
18 not?

19 He says: Do you have any updates on the rails to
20 trails taking over or any other info on selling some of the
21 property or cleaning it up?

22 Do you see that?

23 A. Yes.

24 Q. All right.

25 How did you respond to Mr. Lupfer?

921

1 A. I don't believe so. I think I forwarded that to Dan.

2 Q. Okay.

3 A. Forwarded back to Joe, copy to Dean, legal counsel.

4 Q. All right.

5 Now, let me hand you what has been marked as -- well,
6 is Bates stamped DX-108.0721, which was marked as Cullen
7 Deposition Number 48 during your deposition.

8 Do you see that?

9 A. Yes.

10 Q. All right.

11 Now, if you'll look at the first page of this, there
12 is another email from Mr. Lupfer to you dated March 21, 2012.

13 Do you see that?

14 A. Yes.

15 Q. And so, this is almost exactly one month after the
16 prior email from Mr. Lupfer, which was -- actually, I take that
17 back, it's almost six or seven weeks before the prior one was
18 February 2, 2012, and this one is March 21, 2012.

19 Do you see that?

20 A. Yes.

21 Q. And he's asking you for updates on the 17 miles of
22 abandon rail line.

23 Do you see that?

24 A. Yes.

25 Q. And he indicates to you that the farmers are concerned

922

1 about the old crossties and junk floating in the fields when it
2 floods.

3 Do you see that as well?

4 MR. WEIGERT: Your Honor, I'm going to have to have
5 a standing objection regarding hearsay. I think counsel is
6 trying to confuse matters and establish the matters asserted
7 by these parties that's not in court. I think it's hearsay.

8 MR. STEWART: I'll rephrase the question, your
9 Honor.

10 THE COURT: Thank you.

11 MR. WEIGERT: I may have to have a standing
12 objection here, because he keeps repeating these words that
13 really are hearsay. I think he's trying to confuse matters.

14 MR. STEWART: I'll rephrase the question, your
15 Honor.

16 THE COURT: Thank you.

17 BY MR. STEWART:

18 Q. Are you aware that farmers were complaining about the
19 old crossties floating in the ditches or in their fields?

20 A. I am aware by this email that he thinks so, yes.

21 Q. Okay. Were you aware of that as of March 21, 2012?

22 A. Yes.

23 Q. All right.

24 He also then talks about complaints about the street
25 crossings in town.

923

1 Were you aware of any complaints from people about the
2 street crossings in town?

3 A. Seems like Poseyville had made a comment regarding to
4 them.

5 Q. Okay. And then he indicates that he was still
6 interested in cleaning it up or working something out with
7 somebody.

8 Do you see that?

9 MR. WEIGERT: I have to object. I think the witness
10 is testifying from this document, not from his own personal
11 knowledge.

12 THE COURT: And you are correct. So, it has to be
13 his -- his personal knowledge. Simply because another
14 individual writes to this witness, to Mr. Cullen, and
15 describes certain things, it could be his way of seeking
16 business. The descriptions may be accurate, they may not
17 be, but let's see how you can probe this.

18 BY MR. STEWART:

19 Q. Did you communicate with Mr. Lupfer about doing some
20 clean-up work on this project after the 48,000 railroad ties
21 were left behind?

22 A. I don't recall a discussion after the fact.

23 Q. Okay. And he indicated on several different occasions
24 that he was interested in cleaning it up, didn't he?

25 A. Let me correct that. I think originally I had

924

1 telephone calls with him and then forwarded this email to Dan
 2 once I found out what he wanted.
 3 Q. Okay. And he continued to try to get your interest in
 4 actually hiring him to clean up the railroad ties that were left
 5 behind, didn't he?
 6 A. Yes.
 7 Q. All right.
 8 Let me hand you -- well, first of all, did you discuss
 9 this matter of the clean up of the crossties with anyone else,
 10 other than Mr. Lupfer?
 11 A. Mr. Lupfer was soliciting for business, really wasn't
 12 a discussion. I didn't have a detailed discussion with anybody
 13 else except Progress Rail in the initial bids.
 14 Q. Let me hand you what has been marked as Defendant's
 15 Exhibit 108.0723, And you did follow up with respect to
 16 Mr. Lupfer's comment about leaving a real mess behind, didn't
 17 you?
 18 A. I'm sorry, say again.
 19 Q. You did follow up concerning Mr. Lupfer's comment
 20 about a real mess left behind, didn't you?
 21 A. Well, there was incidence where someone reported ties
 22 were getting off the right-of-way.
 23 Q. Okay. And if you'll look at the -- your email at the
 24 bottom of this chain on DX-108.0723, you sent an email to
 25 Mr. Jim Huenefeldt, didn't you?

925

1 A. Yes.
 2 Q. And who is Mr. Jim Huenefeldt?
 3 A. He is a representative of A & K.
 4 Q. Okay. And in fact, and this is dated March 22, 2012,
 5 is it not?
 6 A. Yes.
 7 Q. And you actually inquired of Mr. Huenefeldt to advise
 8 on the tie and mess comments, did you not?
 9 A. Yes.
 10 Q. All right.
 11 And then there was a further exchange with Mr.
 12 Huenefeldt, was there not?
 13 A. Further what?
 14 Q. Further email exchange with Mr. Huenefeldt?
 15 A. Yes.
 16 Q. All right.
 17 And you respond to him on March 22, 2012 about the
 18 fact that there had been -- that there had been a concern stated
 19 that they were in the drainage ways and to float in the field.
 20 In the mess comment: Are they piled or strung out?
 21 Do you see that?
 22 A. Yes.
 23 Q. All right.
 24 And even before that, even before you responded, he
 25 inquired of you as to whether or not you wanted those ties

926

1 picked up, did he not?
 2 A. He did.
 3 Q. And he says: Do you want us to get you a number to
 4 pick up the ties?
 5 Do you see that?
 6 A. Yes.
 7 Q. And you responded: No. The concern was if they were
 8 in the drainage ways to float in the field and the mess comment,
 9 are they piled or strewn out, right?
 10 A. Yes.
 11 Q. And he responded to you, didn't he?
 12 A. Yes.
 13 Q. And he never gave you a bid specifically to pick up
 14 the ties, did he?
 15 A. I don't recall one.
 16 Q. All right.
 17 MR. WEIGERT: I have to interpose an objection.
 18 This appears to be just a portion of a longer email thread.
 19 There's page two at the bottom. And there's a continuation
 20 of this email thread on DX-108.0722, that prior page.
 21 MR. STEWART: Your Honor, this is the way it was
 22 produced to us.
 23 If Mr. Weigert wants to ask further questions about
 24 this topic, he certainly can.
 25 MR. WEIGERT: I'll just -- I'm just alerting the

927

1 Court and for the record noting that that is just a
 2 portion -- half of an email thread that is two pages long.
 3 And counsel is misleading the Court and making a bad record
 4 if he's just including the second page.
 5 MR. STEWART: Your Honor, I'm entitled to ask this
 6 witness cross-examination questions on this email exchange
 7 with Mr. Huenefeldt. And if the Government wants to ask
 8 follow-up questions concerning the topic or any other topic,
 9 they're more than welcome to?
 10 THE COURT: I will let you proceed?
 11 MR. STEWART: Okay.
 12 THE COURT: The Government can point out the way in
 13 which you may or may not be misleading me.
 14 BY MR. STEWART:
 15 Q. Now, after you inquire a second time to Mr. Huenefeldt
 16 about the mess comments, Mr. Huenefeldt responded to you, didn't
 17 he?
 18 A. Yes.
 19 Q. And his comment was: I'm going to talk to my people,
 20 but I am certain that they aren't in drainage ways and they
 21 should be piled off to the side. Some farmers, myself being
 22 one, have to find things to complain about.
 23 Do you see that?
 24 A. Yes.
 25 Q. Did he ever respond to you to let you know as of

928

1 March 22, 2012, whether or not the ties that were left behind
2 were stacked up or just thrown about?

3 A. There is a later email that he acknowledged it was
4 done.

5 Q. Okay. And when was that done?

6 A. I want to say in April, end of April.

7 MR. STEWART: Okay. I have no further questions,
8 your Honor.

9 MR. WEIGERT: I have just a couple of additional
10 questions on redirect.

11 REDIRECT-EXAMINATION

12 BY MR. WEIGERT:

13 Q. First of all, Mr. Cullen, I think you mentioned that
14 none of the ties were functional economically or economically
15 viable for me to reuse; is that correct?

16 A. Yes.

17 Q. Nevertheless, you assigned a value of close to
18 \$300,000 total for half of the 48,160, correct?

19 MR. STEWART: Objection, your Honor. That's not
20 his testimony before and it was an assumption without
21 actually even observing the condition of the crossties.

22 MR. WEIGERT: I think we've been through that, your
23 Honor. I think there was a sufficient basis for establishing
24 that this witness has a better basis than any other person to
25 value those ties that were left.

930

1 MR. WEIGERT: Thank you, Your Honor.

2 BY MR. WEIGERT:

3 Q. Just want to point out also that this bidder, Progress
4 Rail Services, may have assigned a positive value to the relay
5 ties of \$45,000; isn't that right, Mr. Cullen?

6 A. Yeah. Yes.

7 Q. But you chose not to sell those ties to Progress Rail
8 Services, because the net price that they were offering you for
9 the whole Evansville Project was lower than the price you
10 actually got from A & K, correct?

11 A. Yes.

12 Q. Okay.

13 Let know now turn your attention to that one page
14 exhibit that counsel pointed you to DX-108.0723.

15 Do you see that?

16 A. (No response.)

17 Q. Okay. I'd now like to turn your attention to the page
18 just prior to that, DX-108.0722. Now you tell me if I'm right
19 or wrong here, but do these two pages taken together represent a
20 single email thread comprised of emails every single one I think
21 you were either the author of recipient; is that true?

22 A. Yes, it appears to be.

23 Q. And let me turn your attention to that first page of
24 this email thread at the bottom there's an email from Shane
25 Cullen to Jim Huenefeldt and it's dated March 22, 2012 at

929

1 THE COURT: Well, what --

2 MR. WEIGERT: I'm just referring to the value
3 testimony that's already been made and pointing out the
4 distinction between the testimony he gave to Mr. Stewart
5 that he, for his own purposes, decided that they were not
6 economical for him to reuse. That is not the same statement
7 that they were -- they did not have value is that the
8 equivalent to a statement they do not have value in the
9 market.

10 MR. STEWART: Your Honor, they obviously do not have
11 value. They're still there.

12 And the question for the Court to decide is whether
13 they're functional for continued rail traffic, not whether
14 they have any value whatsoever.

15 THE COURT: I understand both of your arguments. I
16 will -- I -- I don't have to set a value with respect to the
17 ties.

18 The witness has testified he did not go out and
19 inspect the ties. He simply used his own methodology in
20 determining what he thought they were -- they were worth.

21 And for purposes of this trial, liability doesn't
22 hang in the balance of the precise amount of the value of
23 those ties.

24 But I'm going to let you proceed and let you clear
25 up what you think were any -- whatever you want to pursue.

931

1 3:05 p.m. and it reads: Well, this guy is after the job. So
2 like I -- so, like I stated, it's probably a good bit of
3 marketing.

4 Do you see that?

5 A. Yes.

6 Q. What did you mean by that?

7 A. I'm sorry.

8 Q. I'm just wondering what you meant by this?

9 A. This guy was, obviously, soliciting for work.

10 Q. Right.

11 And you -- and -- and the statement he made regarding
12 the condition of ties on the right-of-way, were -- were his
13 opinion, right?

14 A. The opinion of the gentleman soliciting for work?

15 Q. Of Mr. Lupfer.

16 A. Yes.

17 Q. And did you have any independent knowledge of that
18 accorded with that or was that just his opinion?

19 A. That was just his opinion.

20 Q. You had no independent basis to support that opinion,
21 right?

22 A. Correct.

23 MR. WEIGERT: No further questions, except to say
24 that if counsel moves for page two of this exhibit of this
25 email thread to be entered into evidence, we would ask that

932

1 page one be admitted as well.
 2 THE COURT: I haven't -- there's been no motion.
 3 MR. WEIGERT: Okay.
 4 MR. STEWART: Are you finished? I'm sorry.
 5 MR. WEIGERT: I have no further questions for
 6 now. Thank you.
 7 MR. STEWART: I have no more questions, your Honor,
 8 but I'm sorry, but I do want to offer those exhibits. And I
 9 have no objection whatsoever for him offering a second page
 10 to that exhibit.
 11 THE COURT: Okay. So, would you, please, make
 12 clear which exhibits you are entering into evidence? I know
 13 they're all DX exhibits, I believe, starting with ten?
 14 MR. STEWART: Yes, your Honor, the first one is
 15 DX-108.0531.
 16 THE COURT: Any objection?
 17 MR. THOMAS: Just a minute, your Honor.
 18 THE COURT: Okay. Thank you.
 19 MR. WEIGERT: What is the full range of pages there,
 20 counsel?
 21 MR. STEWART: I'll just go with DX-108.0531.
 22 Attached to it is a map of the rail line, your Honor, which
 23 we can exclude. So, it's just the one page DX108.0531.
 24 MR. WEIGERT: No objection, your Honor.
 25 THE COURT: Admitted.

933

1 (Defendant's Exhibit Number 108.0531 was admitted
 2 into evidence.)
 3 The next exhibit?
 4 MR. STEWART: DX-108.0558.
 5 MR. WEIGERT: No objection, your Honor.
 6 THE COURT: Admitted.
 7 (Defendant's Exhibit Number 108.0558 was admitted
 8 into evidence.)
 9 MR. STEWART: The next one is DX-108.0623.
 10 MR. WEIGERT: No objection, your Honor.
 11 THE COURT: Admitted.
 12 (Defendant's Exhibit Number 108.0623 was admitted
 13 into evidence.)
 14 MR. STEWART: The next one is DX-108.0718.
 15 MR. WEIGERT: No objection, your Honor.
 16 THE COURT: Admitted.
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 18 into evidence.)
 19 MR. STEWART: The next one is DX-108.0721.
 20 MR. WEIGERT: No objection.
 21 THE COURT: Admitted.
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 23 into evidence.)
 24 MR. STEWART: And the last one is DX-108.0723.
 25 And I believe the Government wanted to add 0722 and

934

1 we have no objection.
 2 MR. WEIGERT: No objection if that 0722 is added.
 3 THE COURT: And -- and 23 as well.
 4 MR. WEIGERT: Correct, those two as well.
 5 THE COURT: Admitted.
 6 (Defendant's Exhibit Number 108.0722 and 108.0723
 7 were admitted into evidence.)
 8 THE COURT: Any redirect?
 9 MR. WEIGERT: No, your Honor.
 10 May I suggest, given it's a little after 12 noon,
 11 that we perhaps break for lunch?
 12 THE COURT: Very good.
 13 Is the witness excused?
 14 MR. WEIGERT: The witness is excused.
 15 THE COURT: Very good. Thank you.
 16 When shall we resume? How long do you like for
 17 lunch?
 18 MR. WEIGERT: An hour and 15 minutes, your Honor.
 19 THE COURT: An hour 15. So, 1:30.
 20 MR. WEIGERT: Sure.
 21 (Recess.)
 22 MR. WEIGERT: United States calls Daniel A.
 23 LaKemper.
 24 THE COURT: If Mr. LaKemper would come forward and
 25 take the witness box.

935

1 (Witness was duly sworn.)
 2 DIRECT EXAMINATION
 3 BY MR. WEIGERT:
 4 Q. Good afternoon, Mr. LaKemper.
 5 A. Afternoon.
 6 Q. Please, state and spell your name for the record?
 7 A. Daniel A. LaKemper. D-A-N-I-E-L. A.
 8 L-A-K-E-M-P-E-R.
 9 Q. My name is David Weigert. I'm an attorney with the
 10 U.S. Department of Justice representing the United States in
 11 this case.
 12 I believe we last spoke at your deposition on April --
 13 April 2, 2019, here in Peoria.
 14 Do you recall that?
 15 A. Yes.
 16 Q. Where do you live, Mr. LaKemper?
 17 A. Morton, Illinois.
 18 Q. Tell us about your educational background?
 19 A. I have BS from Bradley University. JD from the
 20 Creighton University School of Law.
 21 Q. And where are you currently employed?
 22 A. I'm sorry.
 23 Q. With whom are you currently employed?
 24 A. Pioneer Railroad Services Inc.
 25 Q. What is your current position?

26 (Pages 932 to 935)

In the Matter of:

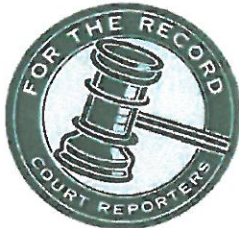
Jeffrey Memmer, et al. v. USA

May 7, 2019

Trial

Vol. 5

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932

934

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 2 THE COURT: I haven't -- there's been no motion.
 3 MR. WEIGERT: Okay.
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 3 BY MR. WEIGERT:
 4 Q. Good afternoon, Mr. LaKemper.
 5 A. Afternoon.
 6 Q. Please, state and spell your name for the record?
 7 A. Daniel A. LaKemper. D-A-N-I-E-L. A.
 8 L-A-K-E-M-P-E-R.
 9 Q. My name is David Weigert. I'm an attorney with the
 10 U.S. Department of Justice representing the United States in
 11 this case.
 12 I believe we last spoke at your deposition on April --
 13 April 2, 2019, here in Peoria.
 14 Do you recall that?
 15 A. Yes.
 16 Q. Where do you live, Mr. LaKemper?
 17 A. Morton, Illinois.
 18 Q. Tell us about your educational background?
 19 A. I have BS from Bradley University. JD from the
 20 Creighton University School of Law.
 21 Q. And where are you currently employed?
 22 A. I'm sorry.
 23 Q. With whom are you currently employed?
 24 A. Pioneer Railroad Services Inc.
 25 Q. What is your current position?

936

938

1 A. General counsel.

2 Q. What are your duties as general counsel?

3 A. I handle the legal matters that are directed to me by
4 the president.

5 Q. And who is the president?

6 A. J. Michael Carr.

7 Q. Are you also an officer of that company?

8 A. No.

9 Q. Is Pioneer Railroad Services affiliated with other
10 companies as a parent or subsidiary?

11 A. No. Pioneer Services is the subsidiary. Pioneer Rail
12 Corporation is the parent corporation.

13 Q. And does Pioneer Railcorp have other subsidiaries?

14 A. Yes.

15 Q. Those are wholly owned?

16 A. Yes.

17 Q. Is one of those Indiana Southwestern Railway Inc.?

18 A. Illinois -- Indiana Southwestern Railway Company, yes.

19 Q. Company?

20 A. Yes.

21 Q. And we'll be referring to as ISW. Is that okay?

22 A. Yes.

23 Q. In addition to Pioneer Railroad Services Inc. you act
24 as general counsel for Pioneer Railcorp and all its
25 subsidiaries, including ISW?

1 Q. Okay. Are you familiar with the definition of the
2 17.2-mile rail corridor at issue in this case?

3 A. Definition?

4 Q. Yes. Are you familiar with that 17.2-mile rail
5 corridor at issue in this case?

6 A. I'm aware of that corridor, yes.

7 Q. And is that corridor comprised of interconnecting rail
8 lines extending between one mile most 227.5 at Poseyville,
9 Indiana and milepost 240.2 near German Township, Indiana, which
10 is approximately 12.7 miles and the stretch between milepost
11 277.5 at Cynthiana, Indiana and milepost 282.0 at Poseyville,
12 Indiana, approximately 4.5 miles?

13 A. I haven't memorized the milepost numbers, but it
14 sounds right.

15 Q. Okay. I'll just be referring to that corridor here
16 as "corridor" or "rail line" or "right-of-way," unless
17 specified otherwise. Okay?

18 A. I would prefer you don't refer to it as rail line
19 because that can get confusing with ISW and the two lines that
20 comprise that. So, corridor is fine.

21 Q. Okay. We'll use corridor then. Thank you.

22 Are you familiar with the notice of exemption that was
23 filed -- any type of notice of exemption that was filed by ISW
24 in that case?

25 A. Generally, yes.

937

939

1 A. All of the subsidiaries except Heartland Rail
2 Investments, which is a, technically, I guess, subsidiary. I
3 cannot act as general counsel for that entity.

4 Q. Okay. But for the other entities you do?

5 A. Yes.

6 Q. Okay. When did you start working for Pioneer or one
7 of it's affiliated companies?

8 A. 1986.

9 Q. What was your first position there?

10 A. I was outside counsel.

11 Q. I'm sorry, you were out?

12 A. Outside counsel.

13 Q. Oh, outside counsel.

14 And what was your next position?

15 A. I was part-time inhouse for a while. Then I was out
16 house again. Then I came inhouse for several years. Then I was
17 out again. And since 2010 I think I've been full time inhouse
18 counsel.

19 Q. And did you take a hiatus between 2001 and 2003?

20 A. Yes, I took a job with a small law firm. I still did
21 occasional work for Pioneer.

22 Q. Okay. And were you inhouse prior to 2001?

23 A. Yes.

24 Q. For how long prior?

25 A. Since 1992.

1 Q. And was that filed, as far as you know, in October
2 of -- on October 25, 2010?

3 A. It was October 2010. I don't remember the exact day.

4 Q. That's fine.

5 And the 17.2-mile corridor we just mentioned was the
6 subject of that exemption notice; is that right?

7 A. Yes.

8 Q. And did -- and ISW was the filer there or was it a
9 different entity?

10 A. It was ISW.

11 Q. Okay. And did ISW end up filing a notice of
12 consummation of abandonment?

13 A. No.

14 Q. Does the railroad believe it still holds a -- still
15 holds property rights in the 17.2-mile corridor in combination
16 of fee and easement?

17 MR. STEWART: Object, your Honor, to the form of
18 that question. It calls for, actually, speculation and
19 conjecture and also legal conclusion.

20 THE COURT: Sustained. Rephrase, please.

21 BY MR. WEIGERT:

22 Q. Do you, in your capacity as general counsel, believe
23 that ISW holds an interest in the 17.2 mile corridor?

24 MR. STEWART: Same objection, your Honor. Calls for
25 legal conclusion. Really, frankly, doesn't matter what

940

1 Mr. LaKemper thinks about the title and ownership, since the
2 Court has already ruled.
3 THE COURT: I will allow the witness to testify to
4 his personal understanding.
5 MR. WEIGERT: Thank you, your Honor. That's all
6 I'm asking.
7 THE WITNESS: Okay. I'm sorry. Would you repeat
8 the question?
9 BY MR. WEIGERT:
10 Q. Sure.
11 Is your personal understanding as general counsel for
12 ISW that ISW currently holds property rights in the 17.2 mile
13 railroad corridor that --
14 A. That is my understanding, yes.
15 Q. And can you characterize the rights as you understand
16 it?
17 A. As you said, combination fee/easement. I think
18 there's some condemnation rights. There may be some adverse
19 possession. I don't remember.
20 Q. And do you know, approximately, the percentage it's
21 held in fee versus the percentage it's held in easement?
22 MR. STEWART: Your Honor, I object. Totally
23 irrelevant. Lacks any foundation whatsoever.
24 THE COURT: I'll allow the Government to ask the
25 witness what he understands about the corridor. It's not

941

1 binding on me. It's just his understanding as general
2 counsel, which is -- no, I didn't mean that to any -- any --
3 diminish you in your capacity as general counsel.
4 THE WITNESS: My understanding is based upon the
5 appraisal that we received from the local appraiser back at
6 the time of the STB filing. I don't remember what his exact
7 percentages were, but he was an Indiana real estate expert.
8 I am not, so...
9 BY MR. STEWART:
10 Q. Is it your understanding that the vast majority is
11 held in fee?
12 MR. STEWART: Your Honor, I object for the record.
13 THE COURT: Well, this -- I will sustain that
14 objection.
15 MR. WEIGERT: I'll move on.
16 THE COURT: If the Government wants to put on this
17 appraiser to testify to what his or her findings are or were
18 at the time, then that's fine, but otherwise, no.
19 MR. WEIGERT: I'll move on.
20 BY MR. WEIGERT:
21 Q. Mr. LaKemper, have you tried to sell -- let me put it
22 another way.
23 Has ISW tried to sell its interest in the 17.2-mile
24 corridor?
25 A. Referring to the entire corridor?

942

1 Q. Or any portion thereof?
2 A. We did sell a small portion of it to Cynthiana back
3 around the time of the filing.
4 We have had ongoing discussions with what I call the
5 trail group, I think is the Indiana Trails Foundation, about
6 selling the entire corridor.
7 We have had some off and on discussions with the City
8 of Poseyville about it -- the entire corridor, at least the
9 Poseyville to Evansville part of it, but there's been no -- none
10 of it's been reduced to offers or draft documents, it's all been
11 discussion.
12 Q. Have Plaintiffs in this case offered to acquire the
13 easement interest in the 17.2-mile corridor?
14 A. Well, there was a discussion, short discussion. I
15 believe they, again, were looking at more than just the
16 easement, but we -- we didn't pursue that at that time.
17 Q. And what -- when was that time?
18 A. Few weeks ago.
19 Q. And were there any conditions on that? Would you say
20 that there was an offer made at that time?
21 A. I wouldn't -- I wouldn't characterize the as a legal
22 offer. I would characterize it as an expression of interest.
23 Q. Was -- was there an amount associated with that
24 expression of interest that was offered to be paid to ISW?
25 A. Yes, there was.

943

1 Q. And how much was that?
2 A. It's in the email. I don't remember.
3 Q. So, you -- did you say learned about this by email; is
4 that right?
5 A. Yes, it was made by email, as I recall.
6 Q. And you recall if that -- well, let's see if that
7 expression of interest came along with any conditions?
8 A. Well, I mean, I would expect in any real estate deal
9 there would be conditions, but I don't -- I don't remember
10 anything stuck out in my mind as other than, you know, they
11 wanted the property.
12 Q. Was there a condition regarding the timing of the
13 transaction?
14 A. Well, they wanted to do it very quickly.
15 Q. How quickly?
16 A. Talking about within a couple weeks.
17 Q. Before a certain date?
18 A. Before trial date.
19 Q. Before the trial date in this case?
20 A. Yes.
21 Q. And that would be April 29th, 2019; is that right?
22 A. I think so.
23 Q. Did the railroad agree to pursue this expression of
24 interest?
25 A. No, we did not.

944

1 Q. Why not?

2 A. Because we're currently in discussions about a
3 possible buyout and our buyer has prohibited us from engaging in
4 those kinds of transactions or discussions pending arriving at a
5 deal with them or --

6 Q. Are you at liberty to share with us who the potential
7 buyer is?

8 A. Probably not.

9 Q. Who -- who is that buyer? I'll just ask the question.

10 A. Do I have to answer?

11 THE COURT: I don't give legal advice. I render
12 legal decisions, but I don't give legal advice.

13 THE WITNESS: Well, I think I have a problem
14 answering that, unless the Judge tells me I have to.

15 BY MR. WEIGERT:

16 Q. Okay. Maybe we can talk about the nature of the
17 interest of that buyer.

18 What is the nature of the interest of that buyer?

19 A. They want to buy Pioneer Railcorp and including all of
20 its subsidiaries.

21 Q. Would that also include ISW?

22 A. Yes.

23 Q. And would that also include the 17.2-mile corridor?

24 A. Yes.

25 Q. That's the corridor at issue in this case, right?

945

1 A. Yes.

2 Q. And is the closing date set yet for that acquisition?

3 A. No.

4 Q. Do you expect that closing date will be set soon?

5 A. If we're -- we're going to have a board meeting to
6 vote on a -- a -- an agreement or you know, yes or no. And my
7 understanding is, it's going to be next week.

8 THE COURT: I'm sorry, I just -- I don't understand
9 the testimony. It was my understanding -- I thought you
10 said there was an -- was the expression of interest that you
11 mentioned that by the -- by a farmer or was or are you
12 talking current time that you have a firm offer to sell or
13 is that the more nebulous expression of interest?

14 THE WITNESS: We cannot pursue the what I described
15 was an expression of interest from the Plaintiffs in their
16 purchase of the corridor, because of our obligations to the
17 potential buyer of our company.

18 THE COURT: Understood now.

19 If -- if either counsel believes it's appropriate
20 to obtain more details regarding the sale, I'm not saying
21 that it is, we could keep that portion of the transcript
22 under seal. So I just want to make that offer.

23 It sounds like it may not be relevant, but so, it's
24 not necessary, but I just want to make that offer.

25 Thank you. I just wanted to make -- thank you.

946

1 THE WITNESS: Thank you, Your Honor.

2 BY MR. WEIGERT:

3 Q. I would like to show you a document that's been marked
4 PNR-000040 to PNR-000043.

5 A. Thank you.

6 MR. WEIGERT: And I'll just represent for the
7 record that this appears to be an email thread containing
8 emails dated from April 4, 2019 to April 9, 2019. And that
9 Mr. LaKemper is listed as either the author or recipient of
10 every one of those emails.

11 BY MR. WEIGERT:

12 Q. Is that right, Mr. LaKemper?

13 MR. STEWART: Your Honor, while the witness is
14 reviewing this, I need to interpose an objection to this
15 entire line of questioning as being totally irrelevant.

16 THE COURT: Well, we'll have to wait to hear what
17 the question is before we -- and it's -- this exhibit has
18 been marked 117? Is that DX-117?

19 MR. WEIGERT: It is.

20 THE WITNESS: Yes.

21 MR. WEIGERT: Defense Exhibit 117.

22 THE COURT: Not trying -- I wasn't trying to be
23 flip. I just really -- I just want to make sure we're all
24 on the same page.

25 MR. WEIGERT: That was very helpful.

947

1 THE COURT: This wasn't from someone else's
2 deposition. Whole different pagination within your trial
3 exhibits. So, thank you.

4 MR. WEIGERT: It was a good question. Thank you.
5 Appreciate it.

6 THE WITNESS: I sent some of these emails and some
7 of these emails were sent to me.

8 BY MR. WEIGERT:

9 Q. That's right.

10 So, you -- do you recall this chain?

11 A. Generally, yes.

12 Q. Let me focus your attention on an email dated April 4,
13 2019 at 12:03 p.m. I believe it's a -- the first one in this
14 thread and therefore, the last in the document.

15 A. Okay.

16 Q. Now, that is an email from Elizabeth McCulley
17 addressed to you; is that right?

18 A. Yes.

19 Q. Copy to Thomas Stewart?

20 A. Yes.

21 Q. And let me turn your attention to the second to last
22 full paragraph, there it says -- the first sentence says:
23 Taking all this into consideration on behalf of all of our
24 landowners, we will offer \$100,000 for the easement portions of
25 the entire 17.2 miles.

948

1 Do you see that?

2 A. Yes.

3 MR. STEWART: Your Honor, I object to the use of
4 this exhibit in this fashion.

5 First of all, there's not a question pending. He's
6 just trying to read it to the witness. And it's also
7 entirely irrelevant to any issue in this lawsuit.

8 MR. WEIGERT: Your Honor, I'm going to ask a
9 question. This has nothing to do with -- this particular
10 one has to do with refreshing his recollection regarding
11 what this interest or offer consisted of.

12 THE COURT: All right. Proceed.

13 BY MR. WEIGERT:

14 Q. So, Mr. LaKemper, this says: We will offer \$100,000.
15 Does that help clarify whether or not this was an offer or mere
16 expression of interest?

17 A. Well, I mean, I guess you could characterize it as an
18 offer, but I don't think if I had said, yes, I'll take it, it
19 would be a binding contract. So, I mean...

20 Q. And let me focus on the next section it says: We will
21 offer \$100,000 for the easement portions of entire 17.2 miles.

22 Does that refresh your recollection as to whether it
23 was for just the easement portions?

24 MR. STEWART: Your Honor, I object to this entire
25 line of questioning as being totally relevant to anything.

949

1 Our landowners want the land back. And they made an offer
2 for it. I'll stipulate to that.

3 But to use this witness as trying to testify about
4 a particular offer on this particular land at any point in
5 the time is totally irrelevant to whether there was a taking
6 or not.

7 THE COURT: Overruled.

8 THE WITNESS: Well, they characterize the easement
9 portions as -- as being approximately 90 percent of the line
10 in previous paragraphs. So, I guess in my mind it was
11 because we had a different breakdown of the amount that was
12 easement. I guess in my mind it was more than just what we
13 considered the easement.

14 BY MR. WEIGERT:

15 Q. So, what you or ISW considers to be the easement is
16 less than 90 percent -- sorry -- the easement portions of the
17 corridor are less than 90 percent; is that correct?

18 A. Yes, that's correct.

19 Q. How much less?

20 MR. STEWART: Your Honor, I object to this entire
21 line of questioning. What this witness may decide or think
22 about what is easement and what is fee has already been
23 ruled upon by this Court.

24 THE COURT: You're -- you're right. I'm just
25 getting his view. Nevertheless, this is -- this line of

950

1 questioning is not violative of any of the rules. So, you
2 may proceed.

3 MR. WEIGERT: Thank you, Your Honor.

4 And I'm happy to discuss more about the relevance
5 if you'd like, but let's just proceed for now.

6 BY MR. WEIGERT:

7 Q. Let me point -- so -- so, again, if could you answer
8 that question, that would be great.

9 A. Well, my understanding would be based on the appraisal
10 that we got that I referred to previously.

11 Q. That's okay. I'm interested in your understanding.

12 A. (No response.)

13 Q. How much less -- so, I'm asking you, this says
14 90 percent easement. And what is your understanding?

15 A. I don't remember what that appraisal came in at
16 exactly.

17 Q. That's okay.

18 A. I think it was somewhere around 50/50, but you know,
19 without having it in front of me, which I mean, I think you have
20 it, if you want to --

21 Q. That's fair.

22 THE COURT: And I --

23 BY MR. WEIGERT:

24 Q. As you sit here, I'm not -- I'm not asking more than
25 that, because it's going to, you know, your interactions here

951

1 and what -- what you know your response was to this.

2 May I focus your attention on the next sentence. It
3 says: Our offer is contingent on the railroad's consummation of
4 abandonment under federal law or at least starting that
5 proceeding before April 29th. And the landowners will find a
6 way to dispose of the crossties as well so that you can still
7 avoid that cost.

8 Does that refresh your recollection as to the details
9 of the contingency that came along with this offer?

10 A. Yes.

11 Q. And let me ask you this: Did you -- does this --

12 MR. WEIGERT: What I'd like to ask about this, your
13 Honor, that this be entered into evidence.

14 MR. STEWART: Objection, your Honor, for a variety
15 this of reasons.

16 THE COURT: I -- that does not come as a surprise.
17 I'll admit the document.

18 (Defendant's Exhibit Number 117 was admitted
19 into evidence.)

20 MR. WEIGERT: Thank you, Your Honor.

21 I have no further questions with possible redirect.

22 CROSS-EXAMINATION

23 BY MR. STEWART:

24 Q. While you've got Exhibit 117 in front of you --

25 A. (No intelligent response.)

952

1 Q. -- if you'll turn your attention to that very first
2 email exchange that Mr. Weigert was referring to.
3 Do you see that?
4 A. (No response.)
5 Q. And the last page of the first full paragraph.
6 A. First full paragraph? Okay.
7 Q. Yeah.
8 And it says: Our position is really quite simple.
9 Do you see that?
10 A. Yes.
11 Q. The need to start the taking of the corridor has been
12 abandon under state law when the rails and ties were removed.
13 And I put in parenthesis removed in quotes, because we frankly,
14 cannot believe how stupid the Government's position is on that.
15 And your landowners are entitled to receive
16 compensation for either a continuing taking or a permanent
17 taking, depending on what happens in these discussions.
18 Do you see that?
19 A. Yes.
20 Q. And that was the -- a statement of our position that
21 we made to you?
22 A. That's what -- that's what it says.
23 Q. Okay. And it goes on to say that the analysis of
24 issues based on taking law is only part of the equation for
25 lawyer landowners since they have not been able to use the

953

1 corridor, because ISW never formally consummated abandonment
2 under federal law.
3 Do you see that?
4 A. Yes.
5 Q. I don't remember if Mr. Weigert asked you a question
6 or not. Your abandonment under federal law, you have not
7 actually consummated under federal law as of yet, have you, Mr.
8 LaKemper?
9 A. We haven't.
10 Q. Okay. And then it goes on to say: We know that you
11 previously told us that ISW never formally abandon the corridor,
12 because you didn't have to and that you were looking for some
13 compensation for the interest that you still hold under federal
14 law.
15 Do you see that?
16 A. I see that.
17 Q. And more than the money for a taking, our landowners
18 simply want to reclaim the corridor and start farming it.
19 Do you see that?
20 A. I see that.
21 Q. Okay. As a result we are interested in formulating
22 some model where everybody wins.
23 Do you see as well?
24 A. Yes.
25 Q. Okay. Now, I want to direct your attention first to

954

1 Joint Exhibit Number 1.
2 MR. WEIGERT: Objection, your Honor, outside the
3 scope.
4 MR. STEWART: You recall I referred to Joint Exhibit
5 Number 1 in detail.
6 THE COURT: You did. So --
7 MR. WEIGERT: I'll wait and see.
8 THE COURT: Okay.
9 MR. WEIGERT: Thanks.
10 THE COURT: As of now your objection is overruled.
11 BY MR. STEWART:
12 Q. Let me hand you a copy, Mr. LaKemper, so you have one
13 in front of you.
14 A. Okay.
15 Q. Now, that document Exhibit Number 1 is dated
16 October 25, 2010.
17 Do you see that?
18 A. Yes.
19 Q. It was actually your intent to seek and receive
20 abandonment authority for the 17.2 miles at issue when you filed
21 that notice of exemption, was it not?
22 MR. WEIGERT: Objection. Outside the scope.
23 THE COURT: Overruled.
24 BY MR. STEWART:
25 Q. Was it not, Mr. LaKemper?

955

1 A. It was -- it was our intention to cease rail service.
2 We -- we were aware -- became aware very quickly of the interest
3 of the trail rail which would have, I guess, prevented a
4 complete abandonment.
5 Q. My point is: Is that at the time that this was filed
6 on October 25, 2010, you specifically sought authority from the
7 STB to abandon the line, correct?
8 A. ISW sought authority to abandon the line, yes.
9 Q. Yes, that's the whole purpose of Joint Exhibit Number
10 1 was to get that authority?
11 A. Correct.
12 Q. All right.
13 Now, the process you used was the exemption procedure,
14 was it not?
15 A. Yes.
16 Q. All right.
17 And that means, basically, that there would have been
18 no train traffic for at least two years?
19 A. Correct.
20 Q. All right.
21 Now, you'll turn to Exhibit D, which is on page 16 of
22 this exhibit.
23 A. Okay.
24 Q. It's entitled Certification of Compliance With
25 Environmental and Historic Report Requirements.

956

1 Do you see that?

2 A. Yes.

3 Q. This too was a requirement that you had to prepare to
4 fill out in order to get final authority from the STB to allow
5 you to abandon the line, correct?

6 A. Correct.

7 Q. All right.

8 Now, if you'll turn to page 20, and you'll look at the
9 actually the last sentence on that page, it says: Upon
10 obtaining authority to abandon the lines, ISW will salvage the
11 lines, track and track material and will dispose of the real
12 estate.

13 Do you see that?

14 A. Yes.

15 Q. All right.

16 And that was your intent. Actually, it was formed by
17 the company even prior to this time, was it not?

18 A. Yes.

19 Q. All right.

20 So, some time back in either the spring or the summer
21 of 2010 the company reached a conclusion that it was your intent
22 to go ahead and seek authority to abandon the line?

23 A. Yes.

24 Q. And then when this was filed, you actually
25 specifically told the Surface Transportation Board that upon

958

1 incur losses associated with the ownership of unused rail
2 assets.

3 Do you see that?

4 A. Yes.

5 Q. So, you didn't want to keep the line in place and have
6 the costs associated with that course of action without having
7 any customers on the line, right?

8 A. Correct.

9 Q. All right.

10 And given these two alternatives, one was to go ahead
11 and abandon the line, which you started with this abandonment
12 exemption procedure, and the other one was to not abandon the
13 line, right?

14 A. That's the -- that's the two alternatives that are
15 presented there, yes.

16 Q. And ISW, basically, concluded that to not abandon the
17 line was an untenable alternative, correct?

18 A. We did not want to maintain the line in place.

19 Q. Okay. Now, if you'll go on on page 21, and it's
20 really under land use there, the first full paragraph it says:
21 ISW believes that the proposed abandonment is consistent with
22 and would promote existing land use plans. And that the land
23 adjoining the lines consists of a combination of rural farmland
24 residential areas of some forested land.

25 Do you see that?

957

1 obtaining authority to abandon the line that you were going to
2 go ahead and salvage the lines track and track material.

3 Do you see that?

4 A. Yeah.

5 Q. All right.

6 Now, if you'll turn to the next page, which is page
7 21, and in the, what I'll call the second first full paragraph,
8 it's after that one line there, it says: As indicated above,
9 upon obtaining abandonment authority, ISW plans to remove the
10 line's rail and salvageable track material such as tie plates,
11 fasteners, crossties and possibly the upper layer of ballast.

12 Do you see that?

13 A. Yes.

14 Q. All right.

15 And at this time even as early as October of 2010, it
16 was the railroad's intent to remove and salvage all of the
17 salvageable track material, right?

18 A. Right.

19 Q. And the actual planning and negotiations for that
20 removal and evaluation process was even going on at the time
21 that that was filed in October of 2010, wasn't it?

22 A. I believe so.

23 Q. And if you go back to page 21, it goes on to say that
24 the only alternative to abandonment, which is the start of this
25 next paragraph, would be for ISW not to abandon the line and to

959

1 A. Yes.

2 Q. All right.

3 And at the bottom of that page, which is page 21, and
4 it goes on to page 22 it says: ISW does not believe that there
5 is any prime agricultural land that would be adversely affected
6 by the proposed abandonment. As indicated above, the land goes
7 through farmland, residential and forested land.

8 And then it says: Furthermore, the proposed rail line
9 abandonment should not in any way contribute to farmland loss
10 and could in fact, permit the abandon right-of-way to be
11 converted, wherever practicable, to farmland use.

12 Do you see that?

13 A. Yes.

14 Q. And what does that mean?

15 A. Well, it means that the abandonment is not going to
16 diminish the existing farmland in that area.

17 And there is the possibility that part of the
18 right-of-way will be converted to additional farmland.

19 Q. Okay. If it was abandoned and then, indeed, if it
20 reverted, you knew that the adjoining landowners would convert
21 it into productive farmland, didn't you?

22 A. Well, it was a possibility.

23 Q. In fact, you knew at that time and in fact, you
24 expected it to happen, didn't you?

25 A. One could assume that it was likely to happen to some

960

1 degree, yes.

2 Q. Now, if you go to page 28, and the last paragraph
3 under section five where it says: A brief narrative history.
4 It starts off by saying: ISW intends upon the effectiveness of
5 the class exemption to terminate its rail common carrier
6 obligation over and to abandon the lines.

7 Do you see that?

8 A. Yes.

9 Q. And so, it was your intent at that point in time long
10 before even the trail operators or the potential trail operators
11 got involved, it was your intent to terminate your rail common
12 carrier obligation and to go ahead and abandon the line,
13 correct?

14 A. That's what it says, yes.

15 Q. All right.

16 And it says, again, that ISW would salvage the rail
17 and track material that proposed positive net salvage value and
18 reuse them elsewhere in its system.

19 Do you see that?

20 A. Yes.

21 Q. All right.

22 Now, ultimately, the effectiveness of the class
23 exemption process that the railroad followed was the permission
24 authority from the STB to abandon the line, wasn't it?

25 MR. WEIGERT: Your Honor, I have to object to this

961

1 line. This document has been in evidence and counsel is
2 just walking us through a document that could be addressed
3 in briefing afterwards.

4 MR. STEWART: Well, your Honor, this is key for two
5 reasons. One, they have brought up the issue of abandonment
6 and their intent to abandon, which is specifically
7 throughout this document.

8 Second of all, this is the very first time that any
9 witness really knowledgeable about what this document
10 contains has been on the witness stand and can testify about
11 it.

12 And ultimately, your Honor, it is going to go
13 directly, when I'm finished here, to the duration of the
14 taking, which is a key question for this Court to decide.

15 THE COURT: I'll allow the testimony.

16 THE WITNESS: Could you repeat the question,
17 please?

18 BY MR. STEWART:

19 Q. The ultimate effectiveness of this class exemption
20 process that the railroad followed was the permission or
21 authority from the STB to abandon the line, was it?

22 A. Yes.

23 Q. So clearly, the entire purpose of the exemption
24 process was to go ahead and terminate ISW's common carrier
25 obligation and then go ahead and abandon the line, correct?

962

1 A. The purpose of the filing is to terminate common
2 carrier obligation and abandon the line, yes.

3 Q. Okay. Now, you -- first, I don't know if you need to
4 get into this or not. Well, I'm going to do it. It will just
5 take a minute.

6 Let me hand you what has been marked as Joint Exhibit
7 Number 2.

8 This has a service date at the top of November 12,
9 2010, does it not?

10 A. Yes.

11 Q. All right.

12 MR. STEWART: And this is, actually, the subject of
13 joint stipulation number six, your Honor, for the record.

14 BY MR. STEWART:

15 Q. But Mr. LaKemper, this is the STB statement on
16 November 12, 2010, that they have actually accepted and approved
17 the abandonment exemption, is it not?

18 A. No, it's not.

19 It's a -- it's a notice that the abandonment filing
20 has been made.

21 Q. Okay. And if you'll look at page bottom of page
22 three, it specifically says that pursuant to provisions of 49
23 C.F.R. Section 1152.29-E2, ISW shall file a notice of
24 consummation with the board to signify that it's exercised the
25 authority granted in fully abandoning the line.

963

1 Do you see that?

2 A. Yes.

3 Q. All right.

4 And in fact, in that same paragraph it says: If
5 consummation has not been effected by ISW's filing of notice of
6 consummation any November 12, 2011, and there are no legal
7 regulatory barriers to consummation, the authority to abandon
8 will automatically expire.

9 Do you see that?

10 A. Yeah.

11 Q. All right.

12 And so, from that date, which is the date of -- this
13 is November 12, 2010, the railroad had one year until November
14 12, 2011, to file a consummation of abandonment under 49 C.F.R.
15 Section 1152.29-E2, correct?

16 A. At that time, yes.

17 Q. Yes.

18 And that is really before the trail people got
19 involved, right?

20 A. Yes.

21 Q. All right.

22 We, and I'm going to try to short circuit this,
23 Mr. LaKemper, but the need to -- you've actually seen the notice
24 of interim trail use in this case, have you not?

25 A. Yes.

964

1 Q. And it is dated or becomes effective May 23, 2011,
2 right?
3 A. Without seeing it...
4 Q. All right. I'll give it to you.
5 Let me hand you, Mr. LaKemper, what has been marked as
6 Joint Exhibit 6.
7 This actually has a service date at the top of April
8 8, 2011.
9 Do you see that?
10 A. Yes.
11 Q. And then if you'll turn to page seven, where it says
12 it is ordered.
13 Do you see that?
14 A. Yes.
15 Q. And it says under 49 U.S.C. Section 10502 it says
16 the -- the? Well, not actually where I wanted to see it, but
17 if -- turn to paragraph two. I'm sorry.
18 It says: This proceeding to the extent to permit the
19 abandonment and exemption in this proceeding is to become
20 effective on May 23, 2011.
21 Do you see that?
22 A. (No response.)
23 Q. That's in the second paragraph, it is ordered.
24 A. Yes.
25 Q. Okay. Now, this particular document grants an initial

966

1 THE COURT: I'm going to allow the witness to
2 answer, if he -- if -- if he can.
3 THE WITNESS: Some -- some people refer to it as
4 rail banking, yes.
5 BY MR. STEWART:
6 Q. Okay. Now, in paragraph seven, the second part of
7 that paragraph says: If no agreement is reached by that time,
8 which is November 19, 2011, which is the initial six-month
9 period of time to negotiate a possible trail use agreement, the
10 railroad was given authority to or -- or permission to fully
11 abandon the line, were they not?
12 A. Correct.
13 Q. All right.
14 Now, that's the first six-month period of time to
15 possibly negotiate a trail use agreement. And at that
16 particular time it was still your intent to abandon the line or
17 to enter into a trail use agreement, wasn't it?
18 A. Or to enter into an agreement with the town for an
19 OFA, one of those three.
20 Q. One of those three.
21 And then I think it's pretty clear, Mr. LaKemper, that
22 there were various extensions to continue negotiations after
23 May 23, 2011, through an including November 8, 2013, right?
24 A. There were multiple extensions.
25 Q. And I want -- want to go through all of them. I think

965

1 180-day period of time to negotiate a possible trail use
2 agreement, does it not?
3 A. Or an OFA.
4 Q. Okay. And you'll look at paragraph four, under it is
5 ordered, it says: If an interim trail use rail making agreement
6 is reached it must require the trail user to assume for the term
7 of the agreement full responsibility for management.
8 Do you see that?
9 A. Yes.
10 Q. And then if you look at paragraph five, it says: If
11 interim trail use rail banking is subject to future use of the
12 property for restoration of railroad operations and to the users
13 continuing to meet the financial obligations for the
14 right-of-way.
15 Do you see that?
16 A. Yeah.
17 MR. WEIGERT: Your Honor, I object to this line in
18 the sense that there's no questions.
19 THE COURT: Yes. I -- I agree sustained.
20 BY MR. STEWART:
21 Q. All right.
22 Is paragraph five, what is generally referred to as
23 the rail banking provision of the trails act, Mr. LaKemper?
24 MR. WEIGERT: Your Honor, I object. There's no
25 reason to lead this witness through this questioning.

967

1 we've actually stipulated to all of that, but at that point in
2 time Mr. LaKemper, on November 8, 2013, why was there no further
3 request to continue those trail use negotiations?
4 A. Well, that's something you'd have to ask the trail use
5 people, because it's their responsibility to file that extension
6 request.
7 Q. And I believe you said earlier that either the trail
8 group dropped the ball or ISW failed to remind them to file for
9 another extension, right?
10 MR. WEIGERT: Objection. Foundation.
11 BY MR. STEWART:
12 Q. Is that right?
13 THE COURT: You could -- you can ask the witness
14 what his understanding was.
15 BY MR. STEWART:
16 Q. Okay. At that time November 8, 2013, did the trail
17 group drop the ball in their failure to file a further request
18 for a negotiating period extension?
19 A. They did not file for an extension.
20 Q. Okay.
21 A. That is correct.
22 Q. And ISW failed to remind them, right?
23 A. Apparently.
24 Q. Okay. It was still actually your intent at that point
25 to negotiate with the trail group, wasn't it?

968

1 A. Yes.
 2 Q. All right.
 3 And it's -- and it is still your intent to follow
 4 through and finalize the abandonment or a trail use agreement,
 5 isn't it?
 6 A. Yes.
 7 Q. All right.
 8 Now, you had no customers and you had and did not want
 9 any of that continued expense, even at that time, November of
 10 2013, right?
 11 A. Correct.
 12 Q. And nothing has been done in terms of filings with the
 13 STB, to your knowledge, since November 8, 2013, right?
 14 A. That's correct.
 15 Q. All right.
 16 And you have not formally consummated the abandonment
 17 under Section 1152.29-E2 even though permission to do so was
 18 granted on several occasions, right?
 19 A. Correct.
 20 Q. All right.
 21 And it is -- it is a fact, isn't it, Mr. LaKemper,
 22 that to this day it is still your intent to find or negotiate
 23 for a trail use agreement?
 24 A. We are pursuing that as a possibility, yes.
 25 Q. All right.

969

1 Now, in fact, and I think you indicated this in
 2 response to Mr. Weigert's questions, you have had ongoing
 3 negotiations with the possible trail operator since November 8,
 4 2013, haven't you?
 5 A. Yes.
 6 Q. All right.
 7 And in fact, you're still having those discussions and
 8 negotiations, aren't you?
 9 A. Yes.
 10 Q. In fact, even the day before your deposition, which
 11 was April 2nd, as Mr. Weigert pointed out, you had had
 12 additional discussions about that with the potential trail
 13 operator, the day before your deposition, right?
 14 A. Correct.
 15 Q. Which would have been April 1, 2019, right?
 16 A. Correct.
 17 Q. So, those discussions are still ongoing to this day?
 18 A. Correct.
 19 Q. Right?
 20 A. Yes.
 21 Q. And they are still interested, aren't they?
 22 A. They are.
 23 Q. All right.
 24 And you're still interested, aren't you?
 25 A. Yes.

970

1 Q. All right.
 2 In fact, I think you -- you're even looking for or
 3 were looking for a possible financing arrangement of some kind,
 4 were you not?
 5 A. We were discussing financing arrangements with the
 6 trail group, yes.
 7 Q. In addition to the potential trail operator, you have
 8 had contacts with other parties who have shown an interest,
 9 haven't you?
 10 A. Yes.
 11 Q. Okay. But nothing has been signed to date?
 12 A. Correct.
 13 Q. All right.
 14 So we're clear on this, the railroad has no current
 15 intention to reinstall the rails and ties, do you?
 16 A. No.
 17 Q. All right.
 18 And despite the fact that the NITU expired on
 19 November 8, 2013, you have had ongoing discussions and
 20 negotiations to negotiate a deal and those negotiations and
 21 discussions have actually taken place within a month of this
 22 trial, right?
 23 A. Correct.
 24 Q. All right.
 25 You actually foresee continuing your negotiations with

971

1 the trail people, don't you?
 2 A. Well, at the moment they're kind of on hold too,
 3 because of our potential buyout, but that is something that will
 4 likely be resumed by somebody.
 5 Q. Okay. And you'd like that to happen, wouldn't you?
 6 A. It's -- it's -- it's one option that the railroad has
 7 that allows it to fully divest the property in one transaction.
 8 Q. And hopefully, you want this issue resolved one way or
 9 the other in the not too distant future, don't you?
 10 A. Yes.
 11 MR. WEIGERT: Your Honor, I object to this line in
 12 that there's no Government action at issue here.
 13 MR. STEWART: Oh, please, forgive me, your Honor.
 14 The Government action is the requirement that they
 15 consummate abandonment under federal law, as you said in the
 16 opening statement.
 17 THE COURT: Agreed. The -- the objection is
 18 overruled.
 19 BY MR. STEWART:
 20 Q. All right.
 21 Let me turn just briefly, Mr. LaKemper, to the salvage
 22 of the rails and ties itself.
 23 And I think we already established that ISW started
 24 working on a contract to salvage the salvageable or valuable
 25 materials as early as the spring or summer of 2010, right?

35 (Pages 968 to 971)

972

1 A. I believe it was some time before the filing was made.

2 Exactly when that --

3 Q. All right.

4 A. -- was, I wasn't involved in the beginning of those
5 negotiations.

6 Q. Now, after the or during this process where the rails
7 were salvaged and the ties were left behind, the process is to
8 separate the rails from the crossties, right?

9 A. That's my understanding.

10 Q. All right.

11 And you salvaged or the railroad salvaged the rails
12 with this \$1,200,000 from A & K, because the rails obviously had
13 value, did they not?

14 MR. WEIGERT: Objection. Way outside the scope.

15 MR. STEWART: Your Honor, this is my
16 cross-examination of this witness that they called and they
17 talked repeatedly in this trial in the opening door
18 repeatedly in this trial whether or not these had value --
19 whether the ties had value.

20 MR. WEIGERT: Your Honor, this counsel specifically
21 decided not to call this witness. And he's treating this
22 witness as a direct and going way beyond the scope of our
23 direct.

24 MR. STEWART: No, the contrary, your Honor. I am
25 cross examining this witness and that's my right, because

973

1 the Government called this witness.

2 THE COURT: Well, but there are contours that you
3 have to observe within your cross-examination.

4 As I recall, it was the last witness where the
5 Government was trying to get in some evaluation testimony.
6 It was not this witness.

7 MR. STEWART: All right.

8 BY MR. STEWART:

9 Q. Mr. LaKemper --

10 THE COURT: So, that's --

11 MR. STEWART: So, you're sustaining the objection?

12 THE COURT: So, I'm sustaining the objection.

13 MR. WEIGERT: Thank you, Your Honor.

14 BY MR. STEWART:

15 Q. Mr. LaKemper, the rails were part of the -- were part
16 of the contract, because they had value, were they not?

17 MR. WEIGERT: Objection. Same objection, actually.

18 THE COURT: What were you -- your -- where are you
19 going?

20 MR. STEWART: Your Honor, this witness is an expert
21 on that contract, because he actually helped write it and
22 approved it.

23 And I wanted to explore the extent of the contract
24 with this witness as it related to the ties.

25 THE COURT: But I don't believe that came up during

974

1 the Government's direct.

2 MR. WEIGERT: That's correct, it did not.

3 And counsel had an opportunity to do this with the
4 prior witness and he chose not to.

5 THE COURT: That's correct.

6 MR. STEWART: Your Honor, I believe I'll call this
7 witness then in rebuttal and that's all -- that's all the
8 questions I have at this time.

9 THE COURT: All right. Well, then we'll --

10 MR. WEIGERT: Your Honor, I remind the Court,
11 humbly, that Plaintiffs have rested.

12 MR. STEWART: We rested on your direct case, your
13 Honor. We have not rested on rebuttal at all.

14 THE COURT: And that's correct.

15 MR. WEIGERT: I don't think -- did they say they
16 were not planning rebuttal?

17 MR. STEWART: No, we did not.

18 THE COURT: No.

19 In fact, I thought there -- there might be.

20 As I recall the Government reserved their expert
21 appraiser, Mr. Matthews, for possible rebuttal. And I think
22 that was the only witness that they noted for rebuttal --
23 noticed for rebuttal.

24 MR. WEIGERT: I think that's right.

25 THE COURT: So, do you have any -- and then we can

975

1 get into whether or not this witness can be called as

2 rebuttal witness by the Plaintiff when -- so, we'll just --
3 do you have any redirect?

4 MR. WEIGERT: Briefly, your Honor.

5 REDIRECT-EXAMINATION

6 BY MR. WEIGERT:

7 Q. Mr. LaKemper, I would like to show you a document it's
8 Defense Exhibit 118.

9 MR. WEIGERT: And I'll represent for the record
10 that it's a -- another email thread it spans from June 4,
11 2018, to June 5, 2018, and it's got Bates numbers PNR-000015
12 to 16.

13 BY MR. WEIGERT:

14 Q. Do you see that Mr. LaKemper?

15 A. Yes.

16 Q. And I believe you are either the author or the
17 recipient of every one of these emails; is that correct?

18 A. I believe that's correct, yes.

19 Q. I'd like to turn your attention to the very last email
20 in that thread, which is the first in this document, it's
21 June 5, 2018 at 12:51 p.m.

22 Do you see that?

23 A. Yes.

24 Q. And you write there and I quote: Just as a heads up,
25 it looks like the last train probably ran 9/2/11.

976

1 Do you see that?

2 A. Yes.

3 Q. And that was a representation you made to Ms.
4 McCulley, I believe. What did you mean by that statement?

5 A. I'm sorry, what did I mean by what?

6 Q. I'm just curious what you meant by that -- that
7 statement there in your email?

8 A. Well, there was a question about trains running on the
9 line after the last revenue train ran, which started a two-year
10 clock running. And it appeared that there may have been a
11 company train, if you will, that ran September of 2011.

12 Q. And when you say company train, what do you mean by
13 that?

14 A. A train of the company sent out there to probably
15 assist in the salvage of the rail.

16 Q. And what is the basis for your understanding that the
17 last company train probably ran on September 2, 2011 -- a very
18 specific date?

19 A. I would have gotten that from the operations center.

20 Q. The operations center of ISW?

21 A. Yes.

22 Q. And does this concern the 17.2 mile corridor we've
23 been discussing?

24 A. Yes.

25 Q. So, this was a train that ran on 17.2 mile corridor

977

1 September 2, 2011; is that correct?

2 A. Yes.

3 MR. WEIGERT: I have no further questions.

4 MR. STEWART: I don't have any further questions.

5 MR. WEIGERT: I'm sorry, one other point it -- I'd
6 like to enter Defense Exhibit 118 into evidence, please.

7 MR. STEWART: Objection, your Honor.

8 THE COURT: And -- and can we -- the exhibit you
9 just gave me?

10 MR. WEIGERT: Correct.

11 THE COURT: And did it -- I apologize. I thought
12 you said 119. It's 118.

13 MR. WEIGERT: I meant to say 118.

14 THE COURT: Okay. I wasn't -- you may very well
15 have. I just -- no -- no, I just -- I'm sorry there's a
16 little bit of a reverberation up here. And so, I just want
17 to make sure that the record is accurate.

18 And I apologize if I'm muddying it in any way.

19 All right.

20 MR. STEWART: Your Honor, object, because number
21 one, it was not the subject of my cross and so it's outside
22 the line of redirect.

23 Number two, it is irrelevant as a matter of law,
24 because as he testified, it was a company train and not an
25 overhead train traffic and at minimum what they're really

978

1 going to do, I suppose, is trying to impeach their own
2 witness, Mr. Cullen, that said the last revenue train
3 traffic was in 2004 or they're trying to impeach their own
4 exemption procedure that the STB passed about recent train
5 traffic within two years, either way, it's totally
6 irrelevant.

7 MR. WEIGERT: Your Honor, it's not outside the
8 scope, because counsel lead Mr. LaKemper through an
9 extensive discussion of environment and historical report as
10 part of exemption notice. The line had been out of service
11 for over two years, that was in 2010 referring to going back
12 to 2008, at least. And so, this is relevant within --
13 within the scope in that respect, number one.

14 Let me finish my response, please.

15 MR. STEWART: I haven't said anything yet.

16 THE COURT: Neither did I.

17 MR. WEIGERT: Okay. Excuse me.

18 Number two, it doesn't just go to that point in
19 compliance or not with the STB procedures, it also goes to
20 the question of state law abandonment practical way
21 abandonment as an issue in this case counsel has put forward
22 many theories of abandonment and this is relevant to
23 rebutting that.

24 MR. STEWART: Your Honor, my definition -- he said
25 the witness testified that it was possibly used during the

979

1 removal of the rails and ties. And anything that happened
2 as part of the process after the state law abandonment.

3 I have no idea what he is talking about practical
4 abandonment either, never heard a legal term or factual
5 term, but the fact of the matter remains this remains
6 totally irrelevant.

7 THE COURT: I -- I -- I'm going to allow the
8 exhibit to be admitted, but it will go to weight. I mean,
9 it will -- I'll afford it the weight that's appropriate.

10 It does say in the email it looks like the last
11 train probably ran. So, it is nothing definite there. So,
12 it's -- it's admitted.

13 It is admitted, but again, I'll give it the
14 appropriate weight. There's nothing definitive about when
15 the last train actually ran or the nature of the train or
16 anything else, so...

17 (Defendant's Exhibit Number 118 was admitted
18 into evidence.)

19 MR. WEIGERT: Thank you, your Honor. Nothing else
20 for redirect, your Honor.

21 THE COURT: Very good.

22 I assume no re-cross.

23 MR. STEWART: No recross, your Honor, but I would
24 like to call Mr. LaKemper very briefly on rebuttal.

25 MR. PINKSTON: Your Honor, the United States rests

980

1 it case at this point.

2 THE COURT: I have a big favor to ask you well,
3 Mr. Pinkston if you wouldn't mind, you see the microphone.
4 I don't care, you may come to the podium or you may be
5 seated, I just need to hear you. You have somewhat of a
6 soft voice any way.

7 MR. PINKSTON: Yes, Your Honor, I have
8 discovered that throughout the trial.

9 THE COURT: I can hear you crystal clear right now.

10 MR. PINKSTON: Right.

11 The United States rests, your Honor.

12 THE COURT: Okay. And I believe we had a request
13 from the Plaintiff to call a witness on.

14 MR. STEWART: Rebuttal, your Honor, briefly. I'd
15 like to call lead Mr. LaKemper on the stand, very briefly.

16 MR. PINKSTON: Your Honor, I'd like to object
17 the use of this witness as rebuttal witness primarily -- who
18 is this witness rebutting?

19 MR. STEWART: Rebutting the entire argument advanced
20 by the Government or attempted to be advanced by the
21 Government that the ties had any value.

22 MR. PINKSTON: We maintain our objection.

23 THE COURT: Pardon me?

24 MR. PINKSTON: We maintain our objection, your
25 Honor.

981

1 THE COURT: Is -- is -- is there a requirement that
2 you note -- you notice to your rebuttals -- that your
3 rebuttal witnesses are in advance of trial?

4 MR. STEWART: Not that I'm aware of, your Honor.

5 THE COURT: Okay. I know there was -- there was
6 some that you said that you thought you would call that you
7 are not calling.

8 MR. STEWART: I was alerting the Court so witnesses
9 would not be excused at the time.

10 THE COURT: Okay. Okay. I'm going to allow it and
11 we'll try and keep very narrow questions.

12 MR. STEWART: I promise, your Honor, only four or
13 five.

14 THE COURT: Okay. Okay.

15 MR. PINKSTON: Thank you, Your Honor.

16 THE COURT; thank you.

17 DIRECT EXAMINATION

18 BY MR. STEWART:

19 **Q. Mr. LaKemper, the rails were salvaged as part of the**
20 **contract with A & K, because they had value, right?**

21 A. Correct.

22 **Q. All right.**

23 **And the crossties were left behind, because they had**
24 **no value, correct?**

25 MR. WEIGERT: Objection. Foundation.

982

1 THE COURT: That's a fair objection. If you want
2 to lay a foundation.

3 MR. STEWART: All right.

4 BY MR. STEWART:

5 **Q. Mr. LaKemper, if the crossties had had any value to**
6 **the railroad, would they have been salvage as part of the**
7 **contract as well?**

8 A. If they had had value to the contractor A & K or some
9 other contractor, we probably would have sold the ties as well.

10 **Q. And in fact, they were left behind, because they**
11 **specifically had no value in your opinion, right?**

12 MR. WEIGERT: Objection. Foundation.

13 THE COURT: Overruled.

14 THE WITNESS: There was nobody that wanted to bid
15 on the ties, other than as a deduction from the amounts
16 given for the metal.

17 BY MR. STEWART:

18 **Q. And they were in no shape to be utilized to run trains**
19 **after they had been removed from the rails, were they?**

20 MR. WEIGERT: Objection. Foundation. This witness
21 has no personal knowledge.

22 THE COURT: Sustained.

23 Let's see if the foundation can be laid.

24 BY MR. STEWART:

25 **Q. You've been working for the railroad since, I believe**

983

1 **you said, 1982 or 1986?**

2 A. 1986.

3 **Q. Do you have an understanding or knowledge that when**
4 **the rails are separated from the ties and left out on the**
5 **railroad right-of-way, whether or not they are functional for**
6 **continued train use or not?**

7 A. If they were have any class one tie there's a
8 possibility some of them could be.

9 **Q. And these particular --**

10 MR. WEIGERT: Objection. Counsel is not letting the
11 witness finish his response.

12 BY MR. STEWART:

13 **Q. I apologize. I thought you were finished. Go ahead.**

14 A. These were old branch line ties and it's -- it's
15 unlikely that after they've been removed from the rails there
16 wouldn't be much useable surface left.

17 **Q. Okay. Thank you. That's all I have, Mr. LaKemper.**

18 THE COURT: Actually I have a question: Did you
19 use the term a branch line tie?

20 THE WITNESS: Yes.

21 THE COURT: Is that -- what precisely is a branch
22 line tie? Is it not a typical tie? Is it -- is it some
23 sort of inferior tie or is it just where a tie goes on the
24 track? What does that mean?

25 THE WITNESS: Well, in -- in a typical low density

984

1 what we would call branch line operation, like ISW, the ties
2 would be smaller, older, lower quality than you're running
3 70-mile an hour unit trains on the class one mainline.

4 Their ties are going to be bigger, heavier, better quality.

5 THE COURT: Okay. So, if I'm on Amtrak going from
6 Washington to New York I'm not going to find branch line
7 ties along that track?

8 THE WITNESS: I think all of those are concrete
9 now, but --

10 THE COURT: Okay. Fair enough.

11 THE WITNESS: -- assuming there are some that are
12 still wood, you would not find branch line ties on that
13 line. That's correct.

14 THE COURT: Thank you.

15 MR. WEIGERT: No further questions, your Honor.

16 THE COURT: Very good. Then the witness is
17 excused. Thank you very much --

18 THE WITNESS: Thank you.

19 THE COURT: -- for coming.

20 THE WITNESS: Okay.

21 THE COURT: You can just leave them right there,
22 sir. Thank you so much.

23 Before I close the record, I just want to make sure
24 we get the one housekeeping matter: Are Plaintiffs and the
25 Government satisfied that they have properly moved all their

985

1 exhibits into evidence and as counsel have said, this is not
2 a trick question. I just want to make sure as you know for
3 both sides we've tried to -- if someone's counsel has used
4 an exhibit we try to make sure that it's -- they're
5 cognizance of the fact this he didn't move for it to go into
6 the record. And so we just want to -- I just want to make
7 sure that everybody has their exhibits properly admitted.

8 So, if you have any questions now about whether or not
9 you've moved for the admission of a document you want in
10 evidence, speak now or forever hold your peace and I'll
11 start with Plaintiffs and then we'll move to the Government.

12 MR. STEWART: I have two potential housekeeping
13 issues, your Honor the. First one was Exhibit 23, the
14 compilation, Plaintiffs Exhibit 23, which was the
15 compilation of damages for a finite period until
16 November 18th or November 8, 2013. And the second was until
17 May 23, 2019. And the third was permanent take. I believe
18 the Court excluded that, but said it could be used as a
19 demonstrative exhibit and attached as part of the record.
20 And then I made a comment at the time about substituting a
21 23 dot A for that to actually summarize the testimony for
22 the temporary take period through October 1, 2018, which was
23 in all of the reports. And we're prepared to do that, your
24 Honor if the Court allows it, otherwise we'll just leave the
25 record as it is.

986

1 THE COURT: What is the government's view?

2 MR. PINKSTON: Well, your Honor, our view is
3 that could be used in post-trial briefing.

4 THE COURT: I think that's the best way to proceed.

5 MR. STEWART: That's fine, your Honor.

6 THE COURT: Thank you.

7 MR. STEWART: And then the second one is I'm not
8 even sure there was an exhibit, to make sure the record is
9 clear, we would request that the Court take judicial notice
10 of Indiana State Law Abandonment Statute, which is Section
11 32-23-11-6. We should ask the court to take judicial notice
12 of that statutes early on. It was used in my opening
13 statements. It been referred to several times during the
14 trial. We didn't formally ask the Court to take judicial
15 notice of it.

16 MR. WEIGERT: Your Honor, you should be aware that
17 that is just a portion of the Indiana statute at issue. And
18 we would ask that that entire portion of chapter of the
19 statute be included, if anything. And post-trial briefing
20 will bring this out. So, it's unnecessary. We specifically
21 want Section 7 in there and there are some sections that may
22 be relevant as well.

23 THE COURT: I'm not trying give you a hard time,
24 but it seems like you're trying to have it both ways, either
25 take judicial -- I'll just take judicial notice of that --

987

1 the entire section. And in addition, you can refer to
2 whatever part you believe is appropriate in post-trial
3 briefing. So that's -- so that's fine.

4 Now, move on. Is there any -- so that completes
5 the --

6 MR. STEWART: Nothing further from the Plaintiff,
7 your Honor.

8 THE COURT: Is there anything for the Government,
9 any other exhibits that you think that you --

10 MR. PINKSTON: Your Honor, I think all the
11 exhibits we were concerned with have been admitted.

12 THE COURT: Excellent. Okay. Very good.

13 Well then, I'm now closing the record.

14 Hearing adjourned at 2:43 p.m.
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988

1 CERTIFICATE OF REPORTER

2
3 I, Bobbi Hamlin, a Certified Shorthand Reporter (IL),
4 and Registered Merit Reporter within and for the State of
5 Illinois, do hereby certify the foregoing hearing was taken by
6 me to the best of my ability and thereafter reduced to
7 typewriting under my direction; that I am neither counsel for,
8 related to, nor employed by any of the parties to the action in
9 which this deposition was taken, and further that I am not a
10 relative or employee of any attorney or counsel employed by the
11 parties thereto, nor financially or otherwise interested in the
12 outcome of the action.
13
14

15 s/Bobbi Hamlin
16 Registered Merit Reporter
17 Certified Shorthand Reporter
18 IL CSR #084-002797
19
20
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989

1 ADMITTED EXHIBITS

2
3 DX PAGE DESCRIPTION
4 108.0531 933 7/28/2010 email from Shane Cullen, Subject:
5 RE: ISW Abandonment
6 108.0558 933 7/17/2010 letter from Ken Upton, RE:
7 Indiana Southwestern Railway Co. take-up.
8 Cynthiana Branch, Tail track and Mainline
9 from MP 228-240.2
10 108.0607 886 Chart of values for ties and other materials
11 108-0619 900 1/11/2011 email chain from Ken Upton,
12 Subject: RE: Evansville, IN Track
13 108-0620 900 1/11/2011 email chain from Ken Upton,
14 Subject: RE: Evansville, IN Track
15 108-0621 900 1/11/2011 email chain from Ken Upton,
16 Subject: RE: Evansville, IN Track
17 108.0623 933 5/13/2011 email from Shane Cullen
18 108.0718 933 2/2/2012 email from Shane Cullen, Subject:
19 RE: railroad
20 108.0721 933 3/21/2012 email from Joe <joelupfer@sit-
21 co.net>, Subject: Rail property
22 108.0722 934 3/22/2012 email chain from Jim Huenefeldt,
23 Subject: RE: Rail Property
24 108.0723 934 3/22/2012 email chain from Jim Huenefeldt,
25 Subject: RE: Rail Property

990

1 113 884 7/29/2011 email chain with attachments from
2 Jim Huenefeldt, Subject: ISW CONTRACT
3 CORRECTED
4 114 885 8/9/2011 letter from Karla Anderson,
5 Reference: Payment for Evansville Project
6 and Insurance Certificates
7 117 951 4/9/2019 email chain from Dan LaKemper,
8 Subject: RE: Memmer/Butler - ISW line
9 118 979 6/5/2018 email chain from Dan LaKemper,
10 Subject: RE: Poseyville
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