

BEFORE THE
SURFACE TRANSPORTATION BOARD

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(Sub-No. 1)

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

NOTICE OF SUPPLEMENTAL FILING

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Dated: November 21, 2019

The Landowners wish to inform the Board that they have filed their Reply in further support of their renewed motion and memorandum to refer the issue of adverse abandonment to the Surface Transportation Board for determination pursuant to 28 U.S.C. § 1336(b) before the Court of Federal Claims—Chief Judge Margaret M. Sweeney. The Landowners' Reply is attached hereto as Exhibit A.

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CERTIFICATE OF SERVICE

I certify that on this 21st day of November, 2019, copies of this document were served upon all parties via U.S. Mail.

/s/ Thomas S. Stewart

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

WILLIAM R. BUTLER, et al.,	)	
	)	
<i>Plaintiffs,</i>	)	Case No.: 17-CV-00667
	)	
vs.	)	Honorable Chief Judge Margaret M. Sweeney
	)	
THE UNITED STATES OF AMERICA,	)	<i>Electronically filed November 21, 2019</i>
	)	
<i>Defendant.</i>	)	

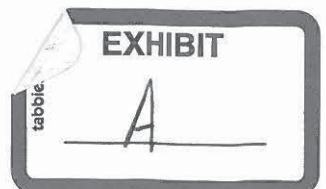
**PLAINTIFFS' REPLY IN FURTHER SUPPORT OF PLAINTIFFS' RENEWED
MOTION AND MEMORANDUM TO REFER THE ISSUE OF ADVERSE
ABANDONMENT TO THE SURFACE TRANSPORTATION BOARD
FOR DETERMINATION PURSUANT TO 28 U.S.C. § 1336(b)**

Plaintiffs renewed motion to formally refer the issue of adverse abandonment to the Surface Transportation Board ("STB") for determination pursuant to 28 U.S.C. § 1336(b) was filed on November 1, 2019 (ECF No. 78). The government's response in opposition was filed on November 15, 2019 (ECF No. 79). This is Plaintiffs' reply in further support of Plaintiffs' renewed motion to refer the issue of adverse abandonment to the STB for determination.

Plaintiffs' renewed motion first set forth the applicable facts and the procedural history and pointed out that none of the applicable facts are actually disputed.¹ Plaintiffs also pointed out that the response filed by the Indiana Southwestern Railway Co. ("ISW") changed everything with respect to the status of Plaintiffs' pending motion before the STB because ISW took the position that the issue of adverse abandonment was not properly before the STB.² In fact, since there obviously is no public convenience and necessity for continued train traffic, a fact that ISW admitted in 2011 and the STB easily concluded and agreed when the NITU was issued, ISW should

¹ See Pls.' Mot., ECF No. 78, at 1-3.

² *Id.* at 4-8.



not be allowed to abuse the STB's abandonment regulations in this fashion to the detriment of these landowners and, at the same time, interfere with this Court's judicial obligations.

The fact that the government's counsel, who ostensibly represents the STB, is arguing against a formal referral of the adverse abandonment question to the STB is both astounding and outrageous. It is one thing for ISW to talk out of both sides of their mouth on the abandonment question but it is another thing completely for the government's counsel to do the same thing. As Plaintiffs' renewed motion pointed out, this Court should formally refer the question of adverse abandonment to the STB for determination to remove any doubt that the STB must address the merits so that this Court, these landowners, and the government itself can all resolve the outstanding issues.³

The government's response, like ISW's response before the STB, is a garbled mess. The government first states that "the Court should deny Plaintiffs' renewed motion... just as it denied Plaintiffs' original motion"⁴ because, purportedly, "nothing has changed."⁵ The government then states that the Plaintiffs should pursue "adverse abandonment proceedings before the Board without the involvement of the Court,"⁶ thereby recognizing that the issue of adverse abandonment should be decided by the STB, ostensibly because "the question of averse [sic] abandonment is already before the STB."⁷ Contrary to the government's argument that "nothing has changed," as the Plaintiffs specifically pointed out, ISW's response actually changed everything because, contrary to the government's statement, the entire reason why adverse abandonment must now be

³ *Id.* at 8-9.

⁴ *See* Def.'s Resp., ECF No. 79, at 1.

⁵ *Id.* at 3.

⁶ *Id.* at 1.

⁷ *Id.* at 2.

referred to the STB by this Court is because it is not clear at all whether the issue of adverse abandonment is now or ultimately will be before the STB based on ISW's response.

One of the astounding arguments made by the government states that "Plaintiffs' renewed motion seeks to once again **improperly circumvent** the STB's established administrative process for adverse abandonment."⁸ In fact, the exact opposite is true. Instead of attempting to circumvent the STB's established administrative process to determine adverse abandonment, **Plaintiffs are specifically trying to implement the STB's administrative process to make sure that the STB specifically rules on the subject.** The government correctly points out that "the administrative process for adverse abandonment provides an opportunity for all interested parties, including the railroad whose property rights are directly at issue, to provide input on adverse abandonment."⁹ That is exactly and precisely what the Plaintiffs are requesting—that the STB initiate an adverse abandonment process so that they can formally determine the issue—the Plaintiffs are not attempting to circumvent that process in any fashion but, instead, specifically invite it.

Setting aside for the moment the fact that the STB recommended that Plaintiffs file a motion for adverse abandonment in lieu of paying a \$27,000 filing fee, the government's position that "nothing has changed" attempts to ignore the fact that ISW filed its response before the STB, which specifically made false statements directly contrary to ISW's testimony in the *Memmer* trial, and directly challenged the notion that the issue of adverse abandonment is properly before the STB. The government's argument ignores the actual statements made by ISW that (1) Plaintiffs' motion should be denied because it is procedurally and substantively incorrect; (2) ISW says that they intend to vigorously oppose any attempt by the Plaintiffs to pursue an adverse abandonment proceeding even though they admitted during the *Memmer* trial that it was their intent to

⁸ *Id.* at 1 (emphasis added).

⁹ *Id.* at 2.

consummate abandonment in 2011 when they filed their Petition for Exemption and still is their intent to do so,¹⁰ and (3) ISW is clearly abusing the STB's regulations pertaining to abandonment in order to coerce someone to pay them something for a right-of-way they have already abandoned. ISW is clearly trampling over these Plaintiffs' property rights, clearly ignoring the Court's responsibility to fashion an appropriate remedy under the Trails Act, and clearly misunderstanding the Plaintiffs' motivations.¹¹ In fact, ISW's pleading before the STB, which is contrary to the law and contrary to their own testimony before this Court in *Memmer*, clearly establishes that the issue of adverse abandonment should be formally referred to the STB to decide the issue in order to remove any doubt whether the STB actually addresses the issue.

The government's statement that "the question of averse [sic] abandonment is already before the STB"¹² also demonstrates the fact that they are talking out of both sides of their mouth because, if that were true, Plaintiffs' renewed motion would be unnecessary. After first stating that the issue of adverse abandonment is already before the STB based on Plaintiffs' pending motion, the government then makes inconsistent statements that ISW opposes Plaintiffs' motion for adverse abandonment, such that the issue is not properly before the STB, "Plaintiffs will be able to obtain a substantive determination of adverse abandonment by the Board,"¹³ presumably if a filing fee of \$27,000 is paid, and that ISW "intends to vigorously oppose"¹⁴ any substantive determination of adverse abandonment, which is ultimately contrary to the facts established during the *Memmer* trial. The simple fact is that the government's argument is a monumental mountain of form over substance—it is not clear that the issue of adverse abandonment is procedurally or

¹⁰ See Pls.' Mot., ECF No. 78, at 6-7.

¹¹ *Id.* at 7-8. As stated, the STB should decide the issue of adverse abandonment so these Plaintiffs can get their land back and so this Court can determine the duration of the taking.

¹² See Def.'s Resp., ECF No. 79, at 2.

¹³ *Id.*

¹⁴ *Id.*

substantively before the STB at this point and a formal referral of the issue of adverse abandonment to the STB by this Court pursuant to 28 U.S.C. § 1336(b) should guarantee that the STB substantively addresses the issue without the silly and outrageous filing fee of \$27,000.

The position advanced by the government's counsel is not only contrary to the recommendation made by the STB, his purported client, but is also contrary to the STB's interest. The STB recommended that Plaintiffs' counsel file a motion pertaining to adverse abandonment in order to avoid a filing fee of \$27,000 and it is frankly outrageous that the government's counsel is opposing that recommendation so as to avoid a substantive determination by the STB on the adverse abandonment issue when a substantive decision by the STB furthers their jurisdiction and is in their interest (the government's interest to reduce the amount of just compensation).

Frankly, based on ISW's response to the STB, it is not clear whether the STB will procedurally and substantively address the adverse abandonment issue now or not. But, what is clear, is that the issue of adverse abandonment is squarely within the jurisdiction of the STB and a determination on the issue of adverse abandonment is necessary both for the Plaintiffs and for this Court and, ironically, should benefit the government as well if the duration of the taking is determined and the amount of just compensation ultimately paid is reduced. The only way to guarantee that the STB substantively addresses the issue of adverse abandonment, in the interest of judicial economy at a minimum, is for this Court to formally refer the issue of adverse abandonment to the STB pursuant to 28 U.S.C. § 1336(b).

Date: November 21, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing was filed with the Clerk of the Court via ECF on this 21st day of November, 2019 with a copy of the same being served via electronic mail (ECF) by the Clerk of the Court to:

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/s/ Thomas S. Stewart
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