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October 15, 2019

VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: *Indiana Southwestern Railway Co. – Abandonment Exemption – In Posey and Vanderburgh Counties, IN, AB-1065X*

Dear Ms. Brown:

Attached hereto is the “Reply Of Indiana Southwestern Railway Co.” to the September 11, 2019 “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.” If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

Enclosures

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

AB-1065X

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

REPLY OF INDIANA SOUTHWESTERN RAILWAY CO.

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**Attorneys for Indiana Southwestern
Railway Company**

October 15, 2019

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

AB-1065X

**INDIANA SOUTHWESTERN RAILWAY CO.
– ABANDONMENT EXEMPTION –
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SUMMARY OF ARGUMENT

On September 11, 2019, counsel for Landowners filed what they entitled “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” (“Motion”). Indiana Southwestern Railway Company (“ISW”) hereby replies in opposition to the Motion and requests that it be denied.¹

There is no factual dispute that ISW’s abandonment authority has expired. As such, under the Board’s rules, the Line² remains within the Board’s jurisdiction. At this point, the primary means to remove the Board’s jurisdiction is for ISW to refile and reobtain abandonment authority. Alternatively, the Landowners may file an adverse abandonment application seeking a finding that the public convenience and necessity no longer require that the Line remains within

¹ By the consent of both parties, the time for ISW to reply to the Motion was extended to October 15, 2019.

² The “Line” consists of approximately 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 STB's federal jurisdiction. The Landowners seek to short circuit that adverse abandonment process by filing their Motion. Without violating the provisions of 49 U.S.C. §10903, over two decades of precedent, and violating ISW's due process rights to contest an adverse abandonment application, the Board has no authority at this stage to remove its jurisdiction over the Line through a simple motion or declaratory order. As such, the Motion should be denied. The proper remedy for the type of relief sought by the Motion is for the Landowners to file an adverse abandonment application in accordance with the regulations at 49 C.F.R. Part 1152.

ARGUMENT

I. THE MOTION SHOULD BE DENIED BECAUSE IT IS PROCEDURALLY AND SUBSTANTIVELY INCORRECT

The Motion seeks to utilize a fact-specific analysis to the issue of whether the Line has been abandoned and requests the Board to find that the Line has been abandoned. If this were prior to 1997, the Motion may have been appropriate. In 1984, the ICC (now the Board) eliminated the long term requirement that railroads file a consummation notice confirming that they have consummated abandonment; thus removing a line from the Board's jurisdiction. Between 1984 and 1997, there was no rigid formula for determining whether a railroad had consummated its abandonment authority. To determine whether a line had been abandoned, the Board and the courts examined the facts on a case-by-case basis, generally through either a motion or a declaratory order request. Being fact-specific, the results were not always the same. Compare Becker v. STB, 132 F.3d 60, 63 (D.C. Cir. 1997) and Fritsch v. ICC, 59 F.3d 248, 253 (D.C. Cir. 1995) (trail conditions could not be imposed because abandonments had already been consummated) with Birt v. STB, 90 F.3d 580, 585 (D.C. Cir. 1996) ("Birt v. STB") (Board retained jurisdiction to impose a trail condition because railroad's actions did not show an intent to abandon).

In a specific policy and regulatory shift to do away with the precise types of complexities associated with determining on a case by case basis whether a line had been abandoned, the Board proposed and adopted new abandonment rules, including reinstituting the requirement to file a consummation notice.³ Accordingly, now, under 49 C.F.R. § 1152.29(e)(2), if a notice of consummation of abandonment is not filed within (i) one year after the service date of the decision permitting abandonment (provided there are no legal or regulatory barriers to consummation), or (ii) 60 days after the satisfaction, expiration, or removal of the last legal or regulatory barrier to consummation, whichever is later, the abandonment authority automatically expires. Upon expiration of the abandonment authority, the common carrier obligation is revived.

As noted, if the consummation notice is not filed and the abandonment authority expires, a carrier once again has an active common carrier obligation and may in fact be required to restore service upon a reasonable request, including, if they have been removed, restoring the tracks and ties. If the carrier does not want to abide by this common carrier obligation to provide service upon reasonable request, the carrier needs to once again obtain either abandonment or discontinuance authority. See Consummation Of Rail Line Abandonments That Are Subject To Historic Preservation And Other Environmental Conditions, EP 678, slip op. at 2 (STB served Apr. 23, 2008) (“Once abandonment authority expires, a new proceeding would have to be instituted if the railroad wants to abandon the line.”) (“EP 678”).

There is no dispute in this proceeding that the NITU that had prevented the line from being abandoned under federal law expired and was not extended. There is also no factual dispute that ISW failed to file a consummation notice within the 60 day period following the

³ Abandonment And Discontinuance Of Rail Lines And Rail Transportation Under 49 U.S.C. §10903, EP 537 (STB served Dec. 24, 1996), clarified and revised, EP 537 (STB served June 27, 1997) (“EP 537”).

expiration of the NITU. These are facts upon which both parties agree. As such, ISW's abandonment authority expired 60 days after the expiration of the last NITU period. At all times the Line remained subject to the Board's exclusive jurisdiction.⁴ It remained subject to the Board's exclusive jurisdiction during the NITU trails use negotiations, see Birt v. STB, and the failure to file a consummation notice 60 days after the expiration of the NITU affirmatively restored ISW's common carrier obligation over the line.⁵

ISW may not now abandon its "rail line (i.e., be relieved of its common carrier obligation to provide rail service over that line and dispose of the property for non-rail use) without express permission from the Board." EP 678, slip op. at 1, citing Chi. & N. W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 321-22 (1981). To obtain that express permission, ISW must comply with 49 U.S.C. §10903 and the regulations at 49 C.F.R. Part 1152 and precedents thereunder. See also, Pinelawn Cemetery – Petition For Declaratory Order, FD 35468 (STB served Apr. 21, 2015) ("A railroad may not abandon a rail line--i.e., permanently close the line and discontinue common carrier rail service--without obtaining prior authorization from the agency. 49 U.S.C. § 10903.") ("Pinelawn"). ISW cannot obtain Section 10903 abandonment authority through a motion or a declaratory order, nor can Landowners.

⁴ The agency retains jurisdiction over rail properties until abandonment authority has been consummated. Hayfield N. R.R. Co. v. Chi. & N. W. Transp. Co., 467 U.S. 622, 633-34 (1984). Here, there was no consummation.

⁵ Because the Line was at all times under the jurisdiction of the STB, the Line could not have reverted to the Landowners, a fact that even the Landowners Motion recognizes and the filing of a takings claim confirms. But contrary to the assertions made in the takings claim case, since a trails agreement was not reached, the property remained under the control of ISW and the exclusive jurisdiction of the STB at all times. Indeed, today, the Landowners are in the same position that they have always been in --- their land is burdened by ISW's real property rights and its common carrier obligation, which cannot be removed absent application of Section 10903.

At this time, ISW has no immediate plans to refile for abandonment authority. ISW continues to discuss the possibility of converting the Line to a trail. ISW and the Indiana Trails Fund continue to discuss trails use. If an agreement is reached, ISW will likely refile for abandonment authority and implement trails use. Alternatively, ISW may continue to maintain the corridor for potential future rail use.⁶

If the Landowners believe that the public convenience and necessity no longer requires the Line to be subject to the STB's jurisdiction and that the STB's jurisdiction should be lifted so that the Landowners may exercise whatever rights they have under state law, ICC and STB precedent is clear: the Landowners must obtain authority under 49 U.S.C. §10903 to remove the STB's jurisdiction. To obtain that authority, the Landowners must file what is known as an adverse abandonment application. See Union Pacific Railroad Company – Abandonment Exemption – In Rio Grande and Minerals Counties, CO, AB-33 (Sub-No. 132X), slip op. at 3-6 (STB served May 3, 2005) (explaining that when third parties wish to terminate the common carrier obligation of a rail carrier over an active rail line the adverse abandonment procedure is the appropriate vehicle and stating that “parties who wish to demonstrate that the public interest permits an active rail line like this one to be abandoned, may file an application with the Board for adverse abandonment authority under 49 U.S.C. 10903.” Id. at 7.⁷

⁶ ISW understands that it has an active common carrier obligation on the Line and is prepared to meet that obligation.

⁷ See also, Modern Handcraft, Inc. – Abandonment – in Jackson County, Mo., 363 I.C.C. 969, 972 (1981); Waterloo Railway Company – Adverse Abandonment – Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine; Canadian National Railway – Adverse Discontinuance – Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine, AB-124 (Sub-No. 2); AB-279 (Sub-No. 3), (STB served May 3, 2004); SMS Rail Service, Inc. – Adverse Discontinuance of Service Exemption – Gloucester County, NJ, AB-1095X (STB served March 2, 2012); and Alloy Property Company, LLC – Adverse Abandonment – Chicago Terminal Railroad In Chicago, ILL., AB-1258 (STB served April 30, 2018).

The regulations at 49 C.F.R. Part 1152, et. seq., provide the process by which to obtain Section 10903 adverse abandonment authority. To the extent the regulations are inapplicable to an abandonment application filed by a party other than the railroad, the party can request and receive waivers from the inapplicable provisions. The City of Chicago, Illinois – Adverse Abandonment – Chicago Terminal Railroad In Chicago, IL, AB-1036 (STB served July 10, 2009) (noting that abandonment and discontinuance applications must conform to the requirements of 49 CFR 1152, subpart C but that in appropriate instances, such as the filing of a third-party, or adverse, abandonment or discontinuance application, the Board will waive inapplicable or unneeded regulations and exempt parties from their underlying statutory provisions.); see also, Napa Valley Wine Train, Inc. – Adverse Abandonment – in Napa Valley, CA, AB-582 (STB served Mar. 30, 2001) and cases cited therein.

The Board has no authority in a post-EP 537 world to “declare” through a motion or a show cause order that Section 10901 track, i.e., track that has an active common carrier obligation attached to it, has been “abandoned.”⁸ Landowners have not cited any authority to the contrary. Given that precedent is clear that an adverse abandonment application is required, the Motion should be denied. To the extent Landowners desire to attempt to obtain Section 10903 abandonment authority, and thus remove the Line from the Board’s jurisdiction, they should be directed to file an adverse abandonment application, which ISW intends to vigorously oppose.

⁸ There is no factual dispute that this was and is a line of railroad as defined under 49 U.S.C. §10901. Unlike Section 10901 track, which requires either an abandonment application, petition, or notice of exemption (or adverse abandonment application) to remove the line from the Board’s jurisdiction, the Board does have authority to issue declaratory orders to determine whether Section 10906 track (i.e., spur, yard, switching track) has been abandoned. Pinelawn, at 11, n. 31 (“As discussed earlier, because the track at issue is yard or spur track, it is excepted from the Board's abandonment authority, which includes adverse abandonments. As a result, the proper vehicle for removing the Board's jurisdiction would be through a declaratory order proceeding.”). This is not Section 10906 track for which a declaratory order may be issued. The only remedy available for a third party to remove the Board’s jurisdiction with respect to this Line is through the adverse abandonment process.

II. EVEN IF THE BOARD APPLIED A CASE-BY-CASE APPROACH, WHICH IT SHOULD NOT DO, THE MOTION SHOULD STILL BE DENIED

The Motion seeks a declaration that the Line has been abandoned. Even if the Board were to apply the pre-EP 537 case-by-case approach and review the request on its merits, the Motion does not show that the Line has been abandoned. Indeed, the Motion and the attached testimony prove precisely the opposite: that ISW's intent since it first achieved abandonment authority was to railbank the Line. This remained ISW's intent even after the trail group's failure to file for an extension of the NITU. The testimony of Mr. Lakemper, Motion at 17-18, citing Tr. 967:16-968:6; 970:1-971:10, and attaching the transcript to the Motion as Exhibit C, confirms that there was never any attempt to consummate the abandonment. As Mr. Lakemper notes several times, in fact the Motion actually bolds the relevant testimony, ISW was negotiating for a trail, wanted to negotiate for a trail, and was still negotiating for a trail within a month of the trial. Clearly, ISW, after receiving its abandonment authority, never intended to consummate that abandonment authority and remove the corridor from the Board's jurisdiction. ISW's intent was to railbank the line and preserve the STB's jurisdiction.⁹

As in Birt v. STB, continued intent to railbank shows an intention not to consummate abandonment.¹⁰ Thus, even though ISW, like UP in Birt v. STB, did discontinue rail service, cancel its tariffs, and salvaged the rails and ties, the intent was not to consummate an abandonment, but to railbank the corridor. As counsel for Landowners knows full well, issuance of an NITU and eventual railbanking of a line does not result in an abandonment and does not

⁹ Railbanking does not result in an abandonment. Indeed, if the Line had been railbanked, ISW would have possessed a residual common carrier obligation on the Line.

¹⁰ Birt v. STB, 90 F.3d 580, *588; 1996 U.S. App. LEXIS 18930, **27 (D.C. Cir. 1996) ("The Commission has previously found that a railroad's continued participation in rails-to-trails negotiations suggests that it does not intend to fully abandon the line, but rather to retain the right-of-way while permitting interim trail use.").

remove federal jurisdiction over a line. Rather, railbanking postpones the abandonment authority and preserves a line under the STB's jurisdiction. Preseault v. Interstate Commerce Commission, 494 U.S. 1 (1990). Indeed, the entire basis for the Landowners takings claim filed for this Line is based on the premise that the Line remained at all times within the jurisdiction of the STB and as such the Landowners reversionary rights have been permanently taken.¹¹ Because ISW intended not to consummate its abandonment authority and to railbank the Line, even if the Board were to apply the no longer applicable case-by-case analysis of whether a line has been abandoned, the Landowners' claim that the Line has been abandoned must fail. As it is with current practice and policy, if the Landowners continue to desire to attempt to remove the Line from the Board's jurisdiction, the remedy is for the Landowners to pursue an adverse abandonment claim, or, if the Line is eventually railbanked, for the Landowners to continue to pursue their takings claim.

CONCLUSION

By filing its Motion, the Landowners seek to have the Board declare that the Line has been abandoned. Since the adoption of EP 537 and EP 678, the Board has no authority to declare a line abandoned on a case-by-case basis. Indeed, if the Board were to grant the Motion, the Board would be violating the provisions of 49 U.S.C. §10903, over two decades of precedent, and violating ISW's due process rights to contest an adverse abandonment application. Furthermore, even if the Board were to review the Motion on a case-by-case basis, it should still

¹¹ Counsel now appears to have reversed course. A finding that the Line has been abandoned, even if it could be done through a Motion, which it cannot, would moot the takings case. In that case, the Landowners (to the extent they are truly reversionary land holders) would if successful in any state quiet title action get their property back unburdened by a rail easement. The same result would occur if the Landowners pursued a successful adverse abandonment case and subsequent quiet title action. On the other hand, if the Line is eventually railbanked as intended by ISW, the Landowners would have the right to continue to pursue a takings claim. However, the Landowners cannot have the benefit of both remedies.

be denied because the facts show that ISW at all times desired to railbank the line to preserve the STB's jurisdiction and not to consummate its abandonment authority. In the end, the proper remedy for the type of relief sought by the Motion is for the Landowners to file an adverse abandonment application in accordance with the regulations at 49 C.F.R. Part 1152.

Respectfully submitted,



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Attorneys for Indiana Southwestern
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October 15, 2019

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Reply of ISW by mailing copies of the same to all parties via prepaid first-class mail to all parties of record in these proceedings or by more expeditious means of delivery.

Dated at Washington, D.C. this 15th day of October, 2019.



William A. Mullins
Attorney for Indiana Southwestern
Railway Company