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December 7, 2020

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-1065~~¹

AB 1065 (Sub-No. 2)

Dear Ms. Brown:

As the Board is aware in a decision served January 27, 2020, the Board denied the Counsel for Landowners' ("Counsel") request for a declaratory order instructing Indiana Southwestern Railway Co. ("ISW") to consummate abandonment of the lines and directing ISW to show cause why abandonment has not been consummated, and/or alternatively, requesting the Board to declare the ISW line de facto abandoned. See Indiana Southwestern Railway Co. – Abandonment Exemption – In Posey and Vanderburgh Counties, IN, AB-1065 (Sub-No. 1X)(STB served Jan. 27, 2020) ("Jan. 27th Decision."). In denying the request, the Board explained the following:

- Abandonment authority is permissive, ISW had the right to decide whether to exercise that authority or not, and the authority has since expired.
- Since adopting the notice of consummation requirement, the filing of a notice of consummation provides the only legally cognizable way to consummate abandonment of a rail line subject to the Board's licensing requirements.
- The Landowners cannot circumvent the adverse abandonment process through a motion for declaratory order or to show cause.

Id. at 4-5.

¹ The Board has yet to issue a docket number for this proceeding, but because the applicant is purportedly seeking adverse abandonment authority, the x, which is used in exemption proceedings, is not appropriate for an adverse abandonment proceeding.

Most importantly, the Board explained that if the Landowners wished to try to obtain an abandonment authorization for the Lines over ISW's objection, the proper course is to file an application for adverse abandonment under 49 U.S.C. § 10903 and the regulations at 49 C.F.R. part 1152. Id. Nearly 10 months later and consistent with its last attempt Counsel continues to attempt to "circumvent the abandonment process" by filing a fatally flawed Petition and Motion for Adverse Abandonment ("Petition"). The Petition does not satisfy the requirements for filing an adverse abandonment application pursuant to 49 U.S.C. § 10903 and the regulations at 49 C.F.R. part 1152. As explained below, a party must comply with both the statute and the regulations for the Board to grant an adverse abandonment. Because the Landowners have failed to follow the regulations, the Petition should be rejected.

To file for abandonment authority (including adverse abandonment authority), the party seeking the abandonment must comply with the statutory requirements and all applicable regulations set forth at 49 C.F.R. part 1152. When the entity seeking authority fails to conform with all applicable regulations, the application is substantially incomplete, or the filing is otherwise defective, the Board shall reject the application for stated reasons by order (which order will be administratively final) within 20 days from the date of filing of the application.² See Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, 1 S.T.B. 894; 1996 STB Lexis 352, at **81 (STB served Dec. 24, 1996). See also East St. Louis Junction Railroad Company – Adverse Abandonment – In St. Clair County, IL; Union Pacific Railroad Company – Adverse Discontinuance – In St. Clair County, IL, AB-838, and AB-33 (Sub-No. 189X), slip op. at 3 (STB served June 26, 2003) ("St. Clair Abandonment").

Counsel's submission fails to comply with most if not all of the requirements of 49 C.F.R. part 1152, including but not limited to the following:³

Subpart C: 1152.20(a)(2) [notice to state officials and agencies]; 1152.20(a)(3) [posting requirements]; 1152.20(a)(4) [newspaper notice requirements]; 1152.20(c) [environmental and historic report requirements]; 1152.21 [notice of intent to abandon]; 1152.22(a)(5) [system diagram map]; 1152.22(b) [condition of properties]; 1152.22(c) [service provided]; 1152.22(d) [revenue and cost data]; 1152.22(e) [rural and community impact]; 1152.22(i) [federal register notice]; 1152.24(b) [affidavit of compliance]; 1152.24(c) [service and posting of the application]; 1152.27 [financial assistance procedures]; 1152.28 [public use procedures]; and 1152.29 [trail use/rail] banking].

While the Board allows parties to seek a waiver from certain regulations,⁴ Counsel did not seek any waivers and declined to submit the information required pursuant to 49 C.F.R. Part

² Per the regulations, if an application is rejected, a revised application may be submitted within prescribed time periods.

³ Counsel also used the wrong docket number and it is unclear from their filing whether they paid the applicable filing fee for an adverse abandonment application.

1152. This omission is particularly egregious given that the Board directed them to file an application for adverse abandonment pursuant to 49 U.S.C. § 10903 and the regulations at 49 C.F.R. part 1152 in the Jan. 27th Decision. Instead, Counsel chose to take yet another shortcut. Given the complete failure of Counsel to follow the regulations and the Board's Jan. 27th Decision, the Board should reject the application. See Union Pac. R. Co. - Abandonment - In Douglas Cty, NE, AB-33 (Sub-No. 26) (ICC served May 31, 1985) (rejecting the application for failure to comply with the regulatory requirements); see also Boston and Maine Corporation--Abandonment--In Hartford and New Haven Counties, CT, AB-32 (Sub-No. 82), et al. (STB served Nov. 14, 1997) (rejecting the application for failure to comply with our abandonment and discontinuance regulations at 49 CFR part 1152 and the environmental and historic reporting requirements of 49 CFR part 1105).

Sincerely,

/s/ William A. Mullins

William A. Mullins

Counsel for Indiana Southwestern Railway Co.

cc: Parties of Record

⁴ See St. Clair Abandonment (granting in part the Illinois Department of Transportation's waiver requests).