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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*
(Sub-No. 1)

Dear Ms. Brown:

On November 1, 2019, Counsel for Landowners (“Counsel”) filed what it termed a “Notice of Supplemental Filing” (“Supplemental Filing”). The Supplemental Filing consists of a copy of a motion filed in the United States Court of Federal Claims in Case No. 17-CV-00667. (“Court Motion”). Upon reading the Court Motion, it is clear that the entire Court Motion is fundamentally a reply not directed to the specific takings claim in the court proceeding, but rather directly replying to and responding to the October 15, 2019 reply that Indiana Southwestern Railway Co. (“ISW”) filed in response 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.” (“September 11, 2019 Motion”). Indeed, if the Supplemental Filing attaching the Court Motion was truly solely relevant to the court proceeding, there would be no need to file it in this Surface Transportation Board (“STB”) proceeding. Clearly Counsel was simply trying to devise a means to avoid the Board’s prohibition on filing a reply to a reply. 49 C.F.R. §1104.13(c). Yet, that is essentially what Counsel has done. As such, the Supplemental Filing should be stricken as an unauthorized reply to a reply. James Riffin d/b/a The Northern Central Railroad – Acquisition And Operation Exemption – In York County, PA; James Riffin d/b/a/ The Northern Central Railroad – Petition For Declaratory Order, FD 34501; FD 34552 (STB served Feb. 23, 2005). See also 49 C.F.R. §1104.8.

As to the procedural substance, ISW notes that the Court Motion confirms that originally the Counsel for the Landowners did file at the STB what they termed a Petition for Adverse Abandonment (although without complying with the Board's abandonment regulations) but then withdrew that petition when Counsel was told that there would be a \$27,000 filing fee. The Supplemental Filing also confirms, notwithstanding the Board's precedents and regulations, and even, apparently, Counsel's self-acknowledgment that the proper procedure is to file an adverse abandonment application (Court Motion at 9), that the sole reason that the Landowners' do not now follow that proper procedure remains the filing fee. The amount of the filing fee is not a legal excuse to avoid the Board's clear regulations and precedents.

Counsel for Landowners also claims that it was the "STB" that told him to file a petition for declaratory order in order to avoid the filing fee. It is not clear who or what department within the STB told this to Counsel. The "STB" does not speak through telephonic staff conversations. The "STB" speaks through the General Counsel's pleadings and briefs filed in court proceedings, the Office of Proceeding through official Director's Orders, or through Board or Chairman's orders and decisions. No such pleading, order, or decision setting out the "STB's" position that Counsel for the Landowners did not have to file an adverse abandonment application has been issued. Unfortunately, the Court of Federal Claims is now left with the wrong impression that the "STB" informed Counsel that it could proceed with an adverse abandonment ruling through a petition or motion when no such "STB" holding exists.¹

Finally, contrary to Counsel's claim, ISW does not take the position that "the STB cannot and should not address the issue of adverse abandonment" (Court Motion at 9). Quite the contrary, ISW's position is that when a rail line remains within the Board's jurisdiction, as both parties in this proceeding agree, then the STB is the only government body with the authority to remove its jurisdiction. In the case of a third party, that removal may only come through the filing of an adverse abandonment application, which Counsel has not filed. When, and if, the Landowners' file a proper adverse abandonment application, ISW will address the merits of that application at that time.

Sincerely,



William A. Mullins

cc: Parties of Record

¹ ISW is not a party to the Court of Federal Claims proceeding. ISW suggests that an expeditious ruling on the September 11, 2019 Motion may be the best way to inform the Court as to whether the Landowners may proceed at the STB with its September 11, 2019 Motion or must, as advocated by ISW, file an adverse application.