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Office of Proceedings
December 2, 2019
Part of
Public Record

December 2, 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*
(Sub-No. 1)

Dear Ms. Brown:

On November 1, 2019, Counsel for Landowners (“Counsel”) filed what it termed a “Notice of Supplemental Filing” (“First Supplemental Filing”). The First Supplemental Filing consisted of a copy of a motion filed in the United States Court of Federal Claims in Case No. 17-CV-00667 (“Court Proceeding”). On November 12, Indiana Southwestern Railway Co. (“ISW”) filed a letter response requesting that the First Supplemental Filing be stricken from the record as an unauthorized reply to a reply. Now, on November 21, Counsel has filed another “Notice of Supplemental Filing” (“Second Supplemental Filing”). The Second Supplemental Filing attaches another motion filed in the Court Proceeding. As with the First Supplemental Filing, the Second Supplemental Filing contains numerous assertions and allegations related to ISW’s filings in this proceeding. It is clearly yet another attempt to supplement the record in this proceeding with another unauthorized reply and without an opportunity for ISW to respond to the merits contained within the Second Supplemental Filing. As with the First Supplemental Filing, the Second Supplemental Filing should be stricken as an unauthorized reply to a reply. 49 C.F.R. §1104.13(c).

ISW is not a party to the Court Proceeding. As result, ISW has no opportunity to respond to the merits of the numerous exaggerated, overzealous, and flat out misrepresentations of ISW’s positions that Counsel has asserted in the Court Proceedings. Likewise, because the First and Second Supplemental Filings are not properly filed in this docket and are directed to the Court of Federal Claims, ISW has no opportunity, nor reason, to respond to the merits of those statements

and misrepresentations in this proceeding; statements and misrepresentations that do not belong in this docket and should also be stricken pursuant to 49 C.F.R. §1104.8.¹

It is clear from the facts of this proceeding that the Line remained in the Board's jurisdiction at all times pursuant to application of the Trails Act and the Board's consistent grant of extensions to the Notice of Interim Trail Use ("NITU") that was issued in this proceeding. Upon expiration of the last NITU extension and ISW's failure to then consummate its permissive abandonment authority within the 60 day period following that expiration, the abandonment authority expired and ISW's active common carrier obligation was revived, a common carrier obligation that continues to exist. See 49 C.F.R. §1152.29(e); 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); and 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."). As such, at no time did the Board lose jurisdiction over the Line.

If it is helpful to the Board and to the Court of Federal Claims, ISW does not object to the Board issuing a declaratory statement to that effect, *i.e.*, that the Board retained jurisdiction at all times and the abandonment authority was never consummated. What the Board cannot do, however, is to use a declaratory order proceeding to declare a line that at all times was subject to its jurisdiction as abandoned when a party has not consummated its abandonment authority, and certainly the Board cannot do so at the request of a third party without that third party first filing an adverse abandonment application.

Sincerely,

A handwritten signature in blue ink, appearing to read "William A. Mullins", with a stylized flourish at the end.

William A. Mullins

cc: Parties of Record

¹ The STB is party to the Court Proceedings. As such, the STB's Office of General Counsel is fully aware of the First and Second Supplemental Filings. There is no need to file them in this docket except as a means of prejudicing ISW and avoiding the Board's clear rules prohibiting unauthorized filings. Counsel should also be mindful of its obligations pursuant to 49 C.F.R. §1103.27(b) and (d).