

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 1065X

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

Digest:¹ Indiana Southwestern Railway Co. has received regulatory approval to dispose of 17.2 miles of connected rail lines, and the Town of Poseyville, Ind. (Town or Poseyville) is attempting to purchase them through a forced sale process used to continue rail service. The Director of the Office of Proceedings initially found that Poseyville was financially qualified to purchase the lines, and the railroad appealed that finding. In this decision, the Board grants the railroad's appeal because the Town has neither the resources nor access to the resources to purchase the lines. The Director previously had found trail use and public use conditions appropriate here, and the Board imposes those conditions in this decision.

Decided: April 7, 2011

Indiana Southwestern Railway Co. (ISW) filed a notice of exemption to abandon several rail lines in Indiana. The Town of Poseyville, Ind. (the Town or Poseyville) is attempting to purchase the lines through our offer of financial assistance (OFA) process. The Town filed an OFA, and the Director of the Office of Proceedings found that the government entity was financially responsible to pursue an OFA for the lines—a prerequisite finding in order for the OFA process to move forward—and postponed the effective date of the abandonment exemption to permit the OFA process to proceed. The railroad has appealed that decision.

In this decision, we grant ISW's appeal and find that the Town has not shown that it is financially responsible for purposes of pursuing an OFA. Poseyville has some funds, but it concedes that this money is not available to purchase the lines. Although the Town discusses the possibility of seeking additional funds through grants, it has taken no steps toward procuring them. Poseyville also states that there are no shippers on the line, that it has identified no potential shippers, and that it has no current plans for rail service.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

We are therefore rejecting the Town's OFA. Because this is the first time that this agency has granted a request to rebut the presumption that public bodies are financially responsible, we are setting the effective date of this decision as 45 days from its service date. We do so to allow Poseyville time to seek reconsideration or reopening relief prior to the effective date of our decision should any further development regarding financing warrant it.² To accommodate this process, we are exercising our exemption authority to further extend the due date for a request to set terms and conditions until 45 days from this decision's date of service. We also are imposing the trail use and public use conditions that the Director had previously found appropriate for these lines.

BACKGROUND

ISW filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F-Exempt Abandonments to abandon 17.2 miles of interconnecting rail lines extending between: (1) milepost 227.5 at Poseyville, Ind., and milepost 240.2 near German Township, Ind. (approximately 12.7 miles); and (2) milepost 277.5 at Cynthiana, Ind., and milepost 282.0 at Poseyville, Ind. (approximately 4.5 miles).³ ISW certified that no local traffic had moved over the lines proposed for abandonment for at least two years.⁴

On December 20, 2010, Poseyville timely filed an OFA under 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c) to purchase the entire 17.2 miles of rail line for \$376,600. In a reply, ISW questioned whether the Town is financially responsible, noting that Poseyville has a population of only 1,200 and that the railroad estimated that the lines are worth almost \$3.9 million. In addition, ISW questioned whether the Town's offer was for continued rail service, as required by the statute, given the absence of any shippers or traffic on the lines.

In a decision served on December 23, 2010, the Director of the Board's Office of Proceedings ruled on the Town's OFA. The Director found the Town to be financially responsible, relying upon the presumption established by the Board's predecessor, the Interstate Commerce Commission (the Commission), that governmental entities are financially responsible. See 49 C.F.R. § 1152.27(c)(1)(ii)(B). Accordingly, the Director postponed the effective date of the exemption authorizing the abandonment to allow the OFA process to go

² The Town may also seek relief on other possible grounds, including changed circumstances or material error.

³ A more detailed history of this proceeding is set forth in our decision served in this docket on February 11, 2011.

⁴ On November 17, 2010, the Indiana Trails Fund, Inc. (ITF) filed a request for the issuance of a notice of interim trail use (NITU) for the 17.2-mile line of railroad under the National Trails System Act, 16 U.S.C. § 1247(d) (Trails Act), and for a public use condition under 49 U.S.C. § 10905. In a decision served in this proceeding on December 23, 2010, the Board found that ITF has satisfied the criteria for these conditions, but postponed issuing the NITU and imposing the public use condition pending completion of the OFA process. The Board also imposed several environmental conditions on the abandonment authority.

forward and noted that requests to set terms and conditions for the purchase of the line would be due by January 19, 2011.

ISW filed an appeal of the December 23 decision on December 30, 2010. The railroad questions whether Poseyville has sufficient funds to purchase the line, questions whether the Town is acting as a proxy for a third party, and asks for whom the Town would provide rail service. ISW sent discovery requests to the Town on those matters.

The Town filed its reply, in which it opposed the appeal and the discovery. In a decision served on January 13, 2011, the Director tolled the OFA process for 30 days and made the Town's request to set terms and conditions due on February 18, 2011, to give this agency time to rule on the matters before it.

ISW, in order to pursue its appeal, filed a motion to compel discovery from the Town. Poseyville replied in opposition to the motion to compel on January 25, 2011. The Town argued, among other things, that discovery is ill-suited for the expedited OFA process.

In a decision served on February 11, 2011, we granted in part ISW's motion to compel discovery.⁵ We noted that ISW's appeal raises serious concerns that are highly pertinent to the OFA process, and that Poseyville had not provided substantive answers to these concerns. Accordingly, we granted limited discovery on the issues of how the Town will finance the acquisition of the lines, on whether it is pursuing an OFA for the purpose of providing freight rail service on the lines, and on whether it is serving as a proxy for a third party. We also granted an exemption from the timeframe set in 49 U.S.C. § 10904(e) and made any request to set terms and conditions due April 12, 2011. We noted that extending the due date of a request to set terms for 60 days was necessary for the completion of discovery and the issuance of a decision on ISW's appeal of the Director's December 23, 2010 decision.

Poseyville filed its responses to the discovery requests on February 18, 2011. The responses are discussed below. In summary, the Town states that currently it does not possess the funds to purchase the lines. The Town states that it "would likely seek funding through grants" and/or participation from a private operator. The Town also states that it "may consider formation of a port authority" to qualify for additional grants and financing programs.

Based on the Town's responses, the railroad filed the supplement to its appeal on February 25, 2011. The railroad argues that the Town's admissions demonstrate that it is not financially responsible within the meaning of an OFA, that there is no prospect of future traffic, and that the OFA should be rejected on appeal.

Poseyville filed a reply on March 8, 2011. It disputes the claims that it is not financially responsible. While it acknowledges that it does not have sufficient discretionary funds to purchase the lines, the Town notes that it has cash and investments on hand of just over

⁵ The Board compelled the Town to respond to 10 of the 32 interrogatories propounded by ISW.

\$1 million, although it does not intend to use those resources. To make up for the lack of committed resources, the Town points to a number of entities⁶ to which it might apply for funds after the Board establishes the price of the lines through the OFA process. The Town claims that it will then attempt to procure the funds during the 90-day period the Board normally provides between the offeror's acceptance of the terms and conditions for purchase and the closing date for the purchase. The Town also disputes the claim that it is not acquiring the lines for the continuation of rail service. It notes that, although the lines have no shippers or traffic yet, it wishes to acquire them and advertise for future business.

DISCUSSION AND CONCLUSIONS

The Board has reserved for itself the consideration and disposition of all appeals of initial decisions issued by the Director. See 49 C.F.R. §§ 1011.2(a)(7), 1152.25(e)(1)(i). Under 49 C.F.R. § 1152.25(e)(2)(ii), an appeal of the Director's decision will be granted only upon a showing that the prior action will be affected materially because of new evidence, changed circumstances, or material error. Here, ISW claims that new evidence refutes the Director's finding that the Town is financially responsible and that this new evidence warrants overturning her December 23 decision to accept the Town's OFA. We will grant this appeal and reject the Town's OFA because the Town is not shown to be financially responsible for purposes of pursuing an OFA.

The Interstate Commerce Act provides that the OFA process is available only to offerors that are financially responsible. The statute requires that this determination be made at the inception of the OFA process. Thus, 49 U.S.C. § 10904(c) provides that anyone may file an OFA to acquire a line within 4 months after an application to abandon that line has been filed at the Board. Section 10904(d)(1) provides that the railroad may carry out the abandonment unless the Board, "within 15 days after the expiration of the 4-month period described in subsection (c), finds that one or more financially responsible persons (including a governmental authority) have offered financial assistance. . . ."

An OFA to acquire a line for continued rail service need not be detailed, but an offeror must show that it is financially responsible and that the offer is reasonable. See Conrail Abandonments under NERSA, 365 I.C.C. 472 (1981). Our rules provide that an offeror is financially responsible if it has or within a reasonable time will have the financial resources to fulfill proposed contractual obligations. 49 C.F.R. § 1152.27(c)(1)(ii)(B). Offers of financial assistance have been rejected where the offeror has (1) not provided a verified assurance from a third party from which the offeror intended to secure the needed funds (see Union Pac. R.R.—Aban.—in New Madrid, Scott, and Stoddard Counties, Mo., AB 33 (Sub-No. 261) (STB served July 30, 2009)); (2) not provided an agreement with the purported source of funds (see Ariz. & Cal. R.R.—Aban. Exemption—in San Bernardino and Riverside Counties, Cal., AB 1022 (Sub-No. 1X) (STB served July 15, 2009)); and (3) supplied only vague and unsubstantiated

⁶ In particular, the Town lists the Posey County Economic Development Partnership, the Economic Development Coalition of Southwest Indiana, the Indiana Economic Development Corporation, and the Industrial Rail Service Fund as likely sources.

assurance of its ability to fund, or to obtain funding, to purchase a line, and to arrange for operations for a period of two years (see Union Pac. R.R.—Aban. Exemption—in Lassen County, Cal., and Washoe County, Nev., AB 33 (Sub-No. 230X) (STB served Sept. 19, 2008)). Government entities, like Poseyville, are presumed to be financially responsible under the Board’s OFA rules at 49 C.F.R. § 1152.27(c)(1)(ii)(B).

This presumption, although entitled to significant weight, is not conclusive. Under the particular facts of this case discussed below, we find that ISW has rebutted the presumption that Poseyville is financially responsible. On the record before us, we are unable to conclude that Poseyville has or, within a reasonable time, will have the financial resources to fulfill proposed contractual obligations.

In response to ISW’s interrogatory, “Does the Town possess in its accounts sufficient discretionary funds to purchase the Lines at the price published in the Town’s OFA,” the Town replied in a one-word sentence, “No.”⁷ In its reply to ISW’s Supplemental Appeal, the Town twice specifically disavowed that it possesses any funds available to purchase the lines.⁸ It stated that it had made no attempt to raise, borrow or obtain the funds and would make no effort to do so until we set the terms and conditions of the purchase (emphasis added).⁹ Finally, the Town stated that it had formulated no plan for service on the lines and knew of no entity that wanted service over them.

Poseyville has not shown that it has taken any steps toward applying for a grant.¹⁰ Rather, it states that it plans to use the 90-day period the Board customarily provides to offerors

⁷ Response to Requests for Discovery, Request No. 2.

⁸ Reply to Supplement to Appeal, at 2; the Town recites, “Although the Town has stated that it does not have sufficient discretionary funds to purchase the line..., the Town has cash and investments that exceed the amount that it offered for purchase of the line...” The Town does not explain how the existence of funds that are unavailable to pay for the lines render it financially responsible within the meaning of 49 U.S.C. § 10904. The Town also recites, “Although the Town does not have committed resources from which it can fund a purchase of the line,” it “has identified County and State agencies which are shown to be likely sources of grant funds.”

⁹ The Town admits that it “has not begun a grant application process,” and adds that “it would be premature to do so before the purchase price has been established through the OFA process.”

¹⁰ The Town offers no evidence of a likelihood that it would qualify for a Federal, state or other grant except to note that ISW had received grants from the state Industrial Rail Service Fund (IRSF) over a 10-year period, “in spite of providing no discernable benefits in new job creation or investment.” The implication appears to be that, because ISW had received funds, the Town may expect to do the same. The ISW has provided rail service to the state for many years and, as ISW noted in its Supplemental Appeal, most of the IRSF funds it has received have gone to improve grade crossings to the benefit of vehicular traffic. We do not find ISW’s success

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that have accepted terms and conditions set by the Board to seek a grant. This scenario envisions that the Town would agree to acquire the lines pursuant to the terms we set, even though it has no funds to do so. The Town's proposal would render the Board's setting of terms and conditions a meaningless exercise. It would also violate the statutory requirement that the OFA process be available only to a financially responsible party. 49 U.S.C. § 10904(d)(1).

Poseyville's failure to initiate funding efforts sharply contrast with the initiatives displayed by other towns in two recent cases. In Indiana Railroad Co.—Abandonment Exemption—in Martin and Lawrence Counties, Ind., AB 295 (Sub-No. 7X)(STB served Mar. 26, 2010), and in a related case, CSX Transportation, Inc.—Discontinuance of Service Exemption—in Clark, Floyd, Lawrence, Orange and Washington Counties, Ind., AB 55 (Sub-No. 698X)(STB served Apr. 7, 2010), the towns of Bedford, Mitchell, and Salem formed the White River Port Authority to achieve their goals well before OFAs were even due to be filed. Although no OFA was ultimately filed, the towns pursued business opportunities aggressively, and they were able to present a specific statement of their efforts to do so.¹¹ In those two cases a number of communities joined together to seek assistance. There are, likewise, a number of communities located on or near the lines at issue here, but Poseyville does not appear to have made efforts to involve them in its proposed acquisition.

Poseyville likens its OFA to the one filed in Illinois Central Railroad Co.—Abandonment Exemption—in Perry County, Ill., AB 43 (Sub-No. 164X) (ICC served Nov. 8, 1994) (Perry County). In Perry County, a mine owner with available funds agreed to pay the opportunity costs incurred by the abandoning railroad to keep the rail in place for a period of time in order to permit sufficient demand to return to enable the mine to reopen. Poseyville is not offering to pay any of the costs that ISW incurs while Poseyville seeks to acquire state or Federal funds and, in any event, has made no effort to acquire such funds.

We will therefore reject the Town's OFA because the offeror is not shown to be financially responsible. Because the Town has been shown to be not financially responsible, we need not address ISW's arguments that the Town's offer is not for continued rail service.

This is the first time that this agency has granted a petition to rebut the presumption that governmental bodies are financial responsible. Given the novelty of this issue, we will make the decision effective 45 days from the decision's service date in order to give the Town sufficient time to seek review of this decision should it desire to do so before it becomes effective. Under our rules, the Town may present new evidence or changed circumstances regarding financial responsibility to support any appeal. 49 C.F.R. § 1152.25(e)(4).

(. . . continued)

to be persuasive evidence that the Town could expect to prevail in a petition for those funds, given that it has never provided rail service and has no plans or prospects to do so.

¹¹ The towns decided to pursue a NITU to rail-bank the line instead.

To accommodate this process, we will exercise our exemption authority under 49 U.S.C. § 10502 to hold in abeyance the due date for a request to set terms and conditions pending the effective date of the instant decision. We find that the brief delay caused by this exemption is warranted. The exemption will further the rail transportation policy at 49 U.S.C. § 10101(2) by aiding us to render fair decisions in this proceeding and at 49 U.S.C. § 10101(4) by encouraging the development of rail service should the Town demonstrate its financial responsibility. ISW has certified that no local traffic has moved over the lines for at least two years, and thus we conclude that regulation is not necessary to protect shippers from the abuse of market power.

As indicated above, ITF filed a request asking for imposition of a trail use condition and issuance of a public use condition covering the lines. The Director found that the criteria for both had been met but delayed issuing the conditions pending the outcome of the OFA process. Because this decision will end the OFA process absent further action by the Board or a court, we will impose the trail use condition and make effective the public use condition discussed in the December 23 decision upon the effective date of this decision.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. § 10502, we exempt the Town from the filing requirement deadline at 49 U.S.C. § 10904(e) and make its request to set terms and conditions due on May 23, 2011, should it successfully show on review that it is financially responsible under 49 U.S.C. § 10904 and our rules.
2. The decision served on December 23, 2010, is vacated to the extent necessary to permit the abandonment exemption in this proceeding to become effective on May 23, 2011, and the OFA process in this proceeding is terminated on that date as well absent a successful appeal.
3. The abandonment exemption will become effective on May 23, 2011, subject to the conditions previously imposed in this proceeding, and to the condition that ISW shall keep intact the right-of-way, including potential trail-related structures, such as bridges, trestles, culverts and tunnels, and shall refrain from disposing of the corridor (other than the track, ties and signal equipment), for a period of 180 days from May 23, 2011, until November 19, 2011, to enable any state or local government agency, or other interested person, to negotiate the acquisition of the lines for public use. If an interim trail use/rail banking agreement is executed before expiration of the 180-day period, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portion of the line.
4. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

5. Interim trail use/ rail banking is subject to the future use of the property for restoration of railroad operations and to the user's continuing to meet the financial obligations for the right-of-way.

6. If interim trail use is implemented, and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specific date.

7. If an agreement for interim trail use/rail banking is reached by November 19, 2011, and notice, interim trail use may be implemented. If no agreement is reached by that time, ISW may fully abandon the line, after the conditions imposed in this proceeding are met. See 49 C.F.R. § 1152.29(a)(1).

8. This decision and notice is effective on May 23, 2011.

By the Board, Chairman Elliott and Commissioner Mulvey.