

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1065X

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

IN THE MATTER OF AN OFFER OF FINANCIAL ASSISTANCE

Decided: December 23, 2010

Indiana Southwestern Railway Co. (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). Notice of the exemption was served and published in the Federal Register on November 12, 2010 (75 Fed. Reg. 69,520). The exemption was scheduled to become effective on December 14, 2010, unless stayed by the Board or a formal expression of intent to file an offer of financial assistance (OFA) under 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(2) was filed by November 22, 2010.<sup>1</sup>

On November 18, 2010, the Town of Poseyville, Ind. (the Town) filed a formal expression of intent to file an OFA to purchase ISW's 17.2-mile line of railroad proposed for

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<sup>1</sup> In a letter dated December 2, 2010, while not seeking any specific relief, the Indiana Department of Transportation (INDOT) states that ISW had certified to the Board that “no local traffic has moved over the line for at least 2 years,” but that it has received different information. INDOT states that ISW has received state grant funds for 2 years to make improvements at selected rail-highway intersections and that its applications have shown a train volume of less than 1 train per day, indicating that some traffic may have moved over the line within the last 2 years. In response, ISW explains that, over the past 2 years, ISW has applied for and received state funds for the improvement of 2 grade crossings at the selected rail-highway intersections, because they had become dilapidated due to lack of revenue service to or from shippers on the line and because various officials had requested the repairs for highway safety purposes. ISW states that, at the time, it had no plans to seek abandonment authority for the line. ISW also explains that, in applying for state funding, it did note that there was weekly (or less) train service over the line but that it has moved only its empty rail cars over the line for rail car storage purposes during the 2-year period. Because ISW's movement of its empty rail cars for storage does not constitute local freight revenue traffic, those movements do not disqualify ISW from the use of the notice of exemption process to obtain abandonment authority for the line.

abandonment. This filing automatically stayed the effective date of the exemption until December 22, 2010.<sup>2</sup> In the filing, the Town requested that ISW provide it with the information set forth in 49 C.F.R. § 1152.27(a), including supporting documentation, and an estimated date on which it would furnish the information and documentation. The Town stated that it would seek a further extension of that effective date such that upon receipt of the information and documentation the Town would have at least 10 days prior to the extended effective date within which to file its OFA.

By petition filed on December 8, 2010, the Town stated that, to date, it had not received the requested information and documentation, and requested that the time period for it to submit an OFA be tolled until 10 days after it received the data requested from ISW. By copy of a letter to the Town dated December 8, 2010, ISW informed the Board that it was providing the Town with the requested information. By decision served on December 10, 2010, the Town's request was granted. The time period for the Town to file an OFA was tolled until December 20, 2010, and the effective date of the exemption was postponed until December 30, 2010.

On December 20, 2010, the Town 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.<sup>3</sup>

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). The Town, as a governmental entity, is presumed to be financially responsible. See 49 C.F.R. § 1152.27(c) (1)(ii)(B). While ISW questions whether the Town is financially responsible given the current economic stress being felt by many state and local governments and given its small population,<sup>4</sup> ISW has not offered

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<sup>2</sup> See 49 C.F.R. § 1152.27(c)(2)(i).

<sup>3</sup> The Town mistakenly thought that its filing fee had been waived pursuant to 49 C.F.R. § 1002.2(c)(i) because it is a local government entity. But a local government entity filing as an owner or proposed owner of a carrier, as the Town would be should it acquire the line as proposed here, does not automatically qualify for a fee waiver and must submit the appropriate fee at the time of its filing. Regulations Governing Fees for Service Performed in Connection with Licensing and Related Services—Policy Statement, EP 542 (Sub-No. 6) (STB served Dec. 6, 2000). In a letter dated December 21, 2010, ISW points out that the Town failed to file the appropriate filing fee and questions whether the Town is a financially responsible offeror. The Town has filed the requisite filing fee along with its waiver request. Under the circumstances, the Town's OFA will be considered as timely filed.

<sup>4</sup> ISW filed another letter on December 23, 2010, in which it cites the Town's population as a basis for questioning whether the Town is financially responsible. ISW also questions whether the Town is a bona fide offeror, because the Town has stated that it intends to have an experienced rail operator provide service over the line. The size of the Town is not determinative here, especially given the Town's valuation of the line. And the intent to use an experienced rail operator to provide rail service over the line does not preclude the Town from pursuing an OFA under the statute and Board rules.

sufficient specifics to rebut the Board's presumption. The Town is thus found to be financially responsible.

The Town's offer is substantially less than ISW's estimated valuation of \$3,884,580. In its OFA, the Town explains the disparity between the amount offered and ISW's asking price. The Town states that, although the asking price was shown as \$3,884,580, it was furnished with backup material that valued the rail line at \$3,812,580, consisting of \$2,804,580 for track materials and \$1,008,000 for land, an amount that is \$72,000 less than the asking price. The Town states that its offer to purchase the line for \$376,600 is based on a net salvage value of track materials of \$136,600 and a land value of \$240,000.

The Town explains the disparity between the value of track materials as follows: (1) ISW contends that the rail in the line is mostly 112-pound rail and that all rail in the line is of relay quality, but the Town states that the majority of rail in the line is 90-pound rail, most of which is not relay quality; (2) ISW contends that there are 4,000 tons of rail and other track materials (OTM) in the line, but the Town states that the actual metal tonnage is considerably less; (3) ISW contends that rail and OTM in the line have an average value of \$620 per ton, but the Town states that such values are much lower; (4) ISW contends that 50% of the crossties in the line are of relay quality with a value of \$10 per tie (No. 2 relay) and \$14.50 per ton (No. 1 relay), but the Town states that the percentage of crossties that are of relay quality is less and that the relay unit values are less than claimed by ISW; and (5) ISW contends that ballast in the line has a value of \$150,000, but the Town states that the ballast has no salvage value.

The Town explains the disparity between the land value as follows: (1) ISW contends that there are 160 acres of land in the rail line right-of-way but its workpapers show that it calculated less than 154 acres; (2) while ISW has failed to provide title information that was requested by the Town and ISW's workpapers do not contain any information regarding title to the right-of-way land, the Town's offer is based on ISW's having marketable fee title to all land in the right-of-way, but the Town reserves the right to lower the amount offered for land if and when there are proceedings for determination of the line's net liquidation value if the Town's investigation reveals that some or all of the land is not held in fee title by ISW; and (3) ISW contends that most of the land in the right-of-way has a value of \$6,000 per acre and that the remaining land has a value of \$3,000 per acre, but the Town states there is no support for either such valuation and has based its offer on a land value of \$1,500 per acre.

Because the Town is financially responsible and has offered financial assistance, the effective date of the exemption authorizing the abandonment will be postponed.

Any person filing a request to set terms and conditions must pay the requisite filing fee set forth at 49 C.F.R. § 1002.2(f)(26), which currently is \$22,600. An original and 10 copies of the request should be submitted along with the fee, in an envelope bearing the docket number of this proceeding, along with the words "Attention: Office of Proceedings, Request to Set Terms and Conditions" in the lower left hand corner.

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) in this proceeding on November 19, 2010. In the EA, OEA states that, pursuant

to 49 C.F.R. §1105.8(c), ISW served an historic report on the Indiana Department of Natural Resources, Division of Historic Preservation (State Historic Preservation Officer or SHPO), but it has not heard from the SHPO and, therefore, has not been able to consider the SHPO's opinion before determining if the rail line may be potentially eligible for listing in the National Register of Historic Places (National Register). Accordingly, OEA recommends in the EA that ISW be required to retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effect) that are eligible for listing or are listed in the National Register until completion of the Section 106 process of the National Historic Preservation Act, 16 U.S.C. § 470f (NHPA), that ISW be required to report back to OEA regarding any consultations with the SHPO and the public, and that ISW not be allowed to file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition.

Pursuant to 36 C.F.R. § 800.2, OEA notes that it conducted a search of the Native American Consultation Database (database) to identify federally recognized tribes that may have ancestral connections to the proposed abandonment project. According to OEA, the database indicated that the following tribes may have knowledge regarding properties of traditional religious and cultural significance within the Area of Potential Effect: the Delaware Nation and the Peoria Tribe of Indians of Oklahoma. OEA has sent a copy of the EA to those tribes for review and comment.

Based upon comments on the EA received by the December 6, 2010 due date, OEA in its Final EA now recommends removal of the historic preservation condition that it recommended for imposition in the EA and now recommends the imposition of the following 3 new conditions requiring ISW to: (1) in the event any unanticipated archaeological sites, human remains, funerary items or associated artifacts are discovered during salvage activities, immediately cease all work and notify OEA, the SHPO, and interested federally recognized tribes, pursuant to 36 C.F.R. § 800.13(b), and OEA shall then consult with the SHPO, interested federally recognized tribes, and ISW to determine whether appropriate mitigation measures are necessary; (2) implement the following best management practices during the salvage process to ensure protection of the federally endangered Indiana bat (*Myotis sodalis*) and the fat pocketbook mussel (*Potamilus capax*), and its habitat — minimize grading and other soil disturbance; minimize tree clearing; avoid wetland disturbances; avoid discharge of demolition debris, waste material, and other pollutants into streams or wetlands; and avoid disturbances to stream channels during the primary fish spawning season (April 1 through June 15); and (3) contact the Indiana Department of Natural Resources, Division of Fish and Wildlife, prior to commencement of any salvage activities on this project concerning removal and salvage methods and any work within the designated floodway, including possible impacts to forested habitat, wetlands, or streams, and stream banks.

OEA indicated in the EA that the right-of-way may be suitable for other public use following abandonment. 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.

ITF has submitted a statement of willingness to assume financial responsibility for the 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, as required at 49 C.F.R. §1152.29, and has acknowledged that the use of the right-of-way for trail purposes is subject to future reconstruction and reactivation for rail service. By letter dated November 23, 2010, ISW advises that it is willing to negotiate interim trail use. Thus, the requirements for issuance of a NITU have been met.

As noted above, ITF also has requested the imposition of a public use condition. ITF requests that ISW be prohibited from disposing of the corridor, other than the tracks, ties and signal equipment, except for public use on reasonable terms, and that ISW be barred from the removal or destruction of potential trail-related structures, such as bridges, trestles, culverts and tunnels, for a 180-day period from the effective date of the abandonment. ITF states that the 180-day period is needed to prepare a trails plan and to negotiate the terms of rail banking with ISW.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. § 10905. See Rail Abans.—Use of Rights-of-Way as Trails—Supplemental Trails Act Procedures, 2 I.C.C.2d 591, 609 (1986). Under § 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. See 49 C.F.R. § 1152.28(a)(2). ITF has met the requirements for imposing a public use condition.

Because ITF has satisfied the requirements for issuance of a NITU and for a public use condition, issuance of a NITU and imposition of a public use condition would be appropriate commencing with the effective date of the exemption. However, an OFA takes priority over a request for issuance of a NITU or for a public use condition. Therefore, issuance and effectiveness of the NITU and the public use condition will be delayed until the OFA process has been completed. If agreement is reached on the sale of the line, the NITU and the public use condition would be unnecessary and unavailable. If no agreement is reached on the OFA, the appropriate decision will be issued.

Appeals to this decision are governed by 49 C.F.R. § 1011.2(a)(7). Any appeal must be filed within 10 days of the service of this decision and will be heard by the entire Board.

As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. Upon reconsideration, the notice served and published in the Federal Register on November 12, 2010, exempting the abandonment of the line described above, is subject to the conditions that ISW shall: (1) in the event any unanticipated archaeological sites, human remains, funerary items or associated artifacts are discovered during salvage activities, immediately cease all work and notify OEA, the SHPO, and interested federally recognized tribes, pursuant to 36 C.F.R. § 800.13(b), and OEA shall then consult with the SHPO, interested federally recognized tribes, and ISW to determine whether appropriate mitigation measures are necessary; (2) implement the following best management practices during the salvage process to ensure protection of the federally endangered Indiana bat (*Myotis sodalis*) and the fat pocketbook mussel (*Potamilus capax*), and its habitat — minimize grading and other soil disturbances; minimize tree clearing; avoid wetland disturbances; avoid discharge of demolition debris, waste material, and other pollutants into streams or wetlands; and avoid disturbances to stream channels during the primary fish spawning season (April 1 through June 15); and (3) contact the Indiana Department of Natural Resources, Division of Fish and Wildlife, prior to commencement of any salvage activities on this project concerning removal and salvage methods and any work within the designated floodway, including possible impacts to forested habitat, wetlands, or streams, and stream banks.
3. The requests for issuance of a NITU and imposition of a public use condition are held in abeyance pending completion of the OFA process.
4. The effective date of the exemption is postponed to permit the OFA process under 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27 to proceed.
5. If the Town and ISW cannot agree on the purchase price, either party may request the Board to establish the terms and conditions of the purchase price on or before January 19, 2011. If no agreement is reached and no request is submitted by that date, the Board will serve a decision that vacates the portion of this decision relating to the OFA process and that implements interim trail use/rail banking and imposes the public use condition.
6. This decision is effective on its date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.