

SERVICE DATE - JULY 11, 1997

SURFACE TRANSPORTATION BOARD¹

DECISION

Docket No. AB-43 (Sub-No. 164X)

ILLINOIS CENTRAL RAILROAD COMPANY—ABANDONMENT EXEMPTION—
IN PERRY COUNTY, IL

REQUEST TO EXTEND SUBSIDY

Decided: July 7, 1997

On April 9, 1997, Freeman United Coal Mining Co. (Freeman) filed a petition to reopen this proceeding to extend a subsidy imposed under former 49 U.S.C. 10905 for Illinois Central Railroad Company's (IC) 6.2-mile line between Pinchney (milepost G-60.19) and Pyatts (milepost G-66.43) in Perry County, IL. We will deny Freeman's request.

BACKGROUND

IC filed a verified notice under 49 CFR Part 1152 Subpart F—*Exempt Abandonments* to abandon this out-of-service rail line. A notice of exemption was served and published in the *Federal Register* on August 15, 1994 (59 FR 41783). On September 14, 1994, Freeman filed an offer of financial assistance (OFA) to subsidize the line, under former section 10905. The ICC stayed the effective date of the exemption pending completion of the OFA process.

In a decision served September 19, 1994, the ICC found that Freeman's offer was *bona fide* and reasonable to initiate negotiations. When the parties were unable to agree on the amount and terms of the subsidy, Freeman requested that the ICC set terms. In a decision served January 12, 1995, the ICC set the amount and terms of the subsidy at \$40,182 annually.² While former section 10905 did not specify a time limit for a subsidy, the ICC set the subsidy for 2 years as a reasonable time for Freeman to develop specific and affirmative plans for resuming rail service on the line. The decision further indicated that if rail service had not resumed within 2 years, the parties could file a petition to reopen and reconsider the amount and duration of the subsidy. In a decision served March 28, 1995, the ICC increased the subsidy amount to \$70,894 annually for 2 years, with other terms as set in the January 12 decision. The 2-year subsidy period expired on April 9, 1997.

ARGUMENTS

On April 9, 1997, Freeman filed a petition to reconsider the amount and duration of the subsidy imposed by the ICC in this proceeding. It indicates that rail service has not resumed on the line but claims that it has taken steps to generate rail traffic. Freeman says that it expects to resume operations at its Fidelity Mine in mid-1998 and that it is exploring several other mine locations in Perry County. According to Freeman, one potential user of coal has expressed an interest in coal to be produced from a proposed mine. Freeman indicates that it has discussed with IC using rail

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10904. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

² Appendices inadvertently omitted from the January 12 decision were served on January 19, 1995.

service to dispose of ash produced at its Fidelity Mine. Freeman maintains that these events indicate that rail service may soon resume on the line and justify continuing the subsidy.

On April 28, 1997, IC responded that Freeman's request is contrary to the post ICCTA provisions of 49 U.S.C. 10904(f)(4)(B) and the Board's revised abandonment procedures in 49 CFR 1152.27(h)(5). As IC notes, the ICCTA modified the OFA provisions, now contained in 49 U.S.C. 10904, and placed a 1-year limit on operating subsidies we impose. Section 10904(f)(4)(B). Accordingly, we included the 1-year limit on imposed subsidies in the revised abandonment procedures³ in section 1152.27(h)(5), indicating that:

The statute now places a 1-year limit on operating subsidies imposed by the Board, unless otherwise mutually agreed to by the parties. As a result * * * (1) subsidy agreements imposed by the Board would end after 1 year, and (2) beyond this period any subsidy would be strictly a contractual agreement between the carrier and the subsidizer without the involvement of the Board. *Abandonment*, at page 13.

IC asserts that the Board does not have authority to take any action in this proceeding other than reinstating the notice of exemption, thus permitting it to abandon the line. The carrier states that it has been discussing with Freeman continuing the subsidy outside the OFA framework in the unlikely event the mine is reopened and sufficient traffic is generated.

IC indicates that no traffic has moved over the line for more than 6 years, including the last 2 years during which the line has been subsidized. IC asserts that continuing the subsidy will prevent it from using its assets more productively. It claims that the line has 115-lb. rail that has not been used for more than 6 years. IC maintains that, if the line were abandoned, it plans to use the track to replace 112-lb. rail on another line that is also used for passenger service.

According to IC, Freeman has not shown that rail service would resume on the line and has not committed to reopening any of its mines or shipping any traffic on the line. IC claims that Freeman is merely speculating about future traffic. In IC's view, Freeman is seeking to have the line remain dormant and intact in perpetuity, which it maintains is not the intended purpose of the OFA procedures.

On May 19, 1997, Freeman replied that this proceeding is not governed by the 1-year limit in the ICCTA or the revised abandonment procedures. It points out that this proceeding predates the ICCTA and thus, under section 204(b)(1) of the ICCTA, is subject to the law in effect prior to January 1, 1996, which did not limit imposed subsidies.

Additionally, Freeman claims that, although it has been negotiating with IC to reopen the line, IC has insisted that Freeman withdraw its petition to extend the subsidy before IC will discuss a settlement of the subsidy issues. Freeman expresses concern that, if its petition were withdrawn, it would be at the mercy of IC in negotiating the amount and duration of the subsidy. Freeman further maintains that IC's interests, should be balanced against state and local interests which are undertaking efforts to generate new coal mining operations and to develop new markets for Illinois coal.

Responding to IC's claim that the subsidy prevents it from using its assets more productively, Freeman states that the subsidy reflects IC's opportunity costs in not being able to remove and reuse the track and thus that the carrier currently receives a fair return on the assets invested in the line. Moreover, Freeman notes that IC was found to be the only Class I railroad that was revenue adequate for 1994.⁴ Freeman contends that IC is extremely healthy and profitable and

³ *Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903*, STB Ex Parte No. 537 (STB served Dec. 24, 1996) (*Abandonment*).

⁴ *See Railroad Revenue Adequacy—1994 Determination*, Ex Parte No. 425 (ICC served Aug. 18, 1995).

would not be unduly burdened if the subsidy were extended to enable Freeman to bring its development plans to fruition.

Finally, Freeman disputes that continuing the subsidy is based on speculative future traffic. It states that the ICC knew when it established the subsidy 2 years ago that no traffic moved on the line. In Freeman's view, the issue here is not that no traffic moved on the line, but, rather, the prospect that traffic will move on the line in the near future. Freeman indicates that the steps it has taken to resume coal mining activities at the Fidelity Mine show that the prospects are not speculative. Freeman indicates that it has spent a lot of money on engineers, consultants, surveyors, attorneys, planners, and subsidy fees to go forward with its plans to reopen the Fidelity mine. Freeman anticipates that its mining application will be submitted for approval in September 1997. After approval, Freeman indicates that it will take almost a year to get the new mine opened and ready for coal shipments. It estimates that the first shipment of coal would be between June and September, 1998. Freeman maintains that, given the progress towards reopening the mine, its plans should not be thwarted by allowing the subsidy to terminate and permitting IC to remove the track.

On May 22, 1997, IC responded that it is willing either to sell the line to Freeman at its net liquidation value or to continue the subsidy arrangement outside the OFA framework. IC contends that no further Board scrutiny is required and no further Board authority exists to continue the subsidy.⁵

DISCUSSION AND CONCLUSIONS

We will deny Freeman's request to extend the subsidy. Freeman has been subsidizing the line for 2 years under terms imposed by the ICC. The line has not been used for at least 6 years. At this time, it does not appear that rail traffic would resume over the line in the near future. While Freeman has taken action to resume operations at the Fidelity Mine and is exploring other mine locations, it is clear from the record that the mine will not be able to generate traffic for at least another year. Also, while Freeman is discussing possible use of the line for transporting ash, it has not shown when this traffic would be available. The clearly uncertain and speculative nature of these future traffic claims is such that these claims cannot justify requiring IC to keep the line intact by continuing the subsidy. *Cf. CSX Transp. Inc. v. Surface Transp. Bd.*, 96 F.3d 1528 (D.C. Cir. 1996). Accordingly, we will vacate the stay of the notice of exemption and permit IC to abandon the line. The parties may, of course, negotiate a subsidy agreement outside the OFA process.

We note that this is the proper result whether the Freeman request is considered under the former or the current law. Under the former law we could extend the subsidy period, but we conclude that the period should not be extended. Moreover, extending the subsidy period would be contrary to the letter and spirit of the current law.

Public use condition. The January 12, 1995 decision considered a request by the Illinois Department of Transportation (IDOT) for a 180-day condition under former section 10906 (now section 10905) so that it could negotiate with IC to acquire all or part of the line for public use as a highway. The decision found that, while IDOT had satisfied the public use criteria in 49 CFR 1152.28(a)(2), a public use condition would not be imposed at that time because of the OFA, which takes precedence. The decision further held that, if the OFA process were terminated, a public use condition would be imposed in the decision vacating the stay of the exemption's effectiveness and making the exemption effective.

⁵ IC also moved to strike Freeman's reply, contending that it is a reply to a reply, which is not permitted by the Board's procedural rules. 49 CFR 1104.13(c). On May 30, 1997, Freeman filed a motion to strike IC's motion, contending that the Board's procedures allow it, as the party with the burden of proof, to file the closing pleading. On June 19, 1997, IC replied to Freeman's motion. Both motions and IC's reply reiterate arguments each party raised previously. We will deny the motions to strike in the interest of a more complete record. We note that, contrary to Freeman's assertions, our procedures do not entitle Freeman to file the closing pleading.

We will impose the public use condition in this decision. However, we note that the January 12, 1995 decision found that nearly all of the land in the right-of-way had been conveyed to IC by “right of way” deeds, which granted the carrier an easement that terminates when the line is abandoned. Accordingly, the public use condition may not prove to be effective for property in which IC holds only a rail use easement. *See Fritsch v. ICC*, 59 F.3d. 248, 252 (D.C. Cir. 1995).

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

It is ordered:

1. The motions to strike are denied.
2. Freeman’s petition to reopen and reconsider the amount and duration of the subsidy for the subject line is denied.
3. The stay of the exemption is vacated and the exemption is effective on the effective date of this decision, subject to the condition that IC shall keep intact the right-of-way underlying the line, including bridges, trestles, culverts, and tunnels but excluding track and track materials, for 180 days after the effective date of this decision, unless the property is first offered, on reasonable terms, for sale for public purposes.
4. This decision is effective on August 10, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary