

SURFACE TRANSPORTATION BOARD

DECISION

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 invoke a forced sale process to continue rail service. The Director of the Office of Proceedings initially found that Poseyville was financially qualified to purchase the lines, but the railroad appealed that finding. The Board granted the appeal and found that the Town did not possess the resources to purchase the lines. The Board did, however, create a 45-day window in which the Town could seek reconsideration by demonstrating that it has acquired the funds. The Town's further submissions fail to demonstrate that the Town can support its proposed acquisition.

Decided: September 22, 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) invoked our offer of financial assistance (OFA) process at 49 U.S.C. § 10904 to purchase the lines. In April 2011, the Board found that the Town had not demonstrated that it was a “financially responsible” party, as required by the statute in order to invoke the OFA process. The Town has filed a letter seeking reconsideration of that decision and asserting that it has secured a commitment of \$1.5 million from a bank for the purpose of purchasing the lines. The Town submitted a supplemental letter on September 1, 2011, discussing the significance of the lines and asking that the Board prevent ISW from removing the track until the Town has the opportunity to present additional information under seal.

In this decision, we find that the Town has failed to demonstrate that it possesses sufficient funds to support the proposed acquisition. Accordingly, we will not disturb our April decision, and the railroad may proceed with its abandonment plans.

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).

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).² ISW certified that no local traffic had moved over the lines proposed for abandonment for at least two years.³

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. ISW filed a reply in opposition to the Town’s OFA, questioning whether the Town was financially responsible under the statute and Board rules because the Town had a population of only 1,200, and the railroad had estimated that the lines were worth \$3.9 million. In a decision served on December 23, 2010, the Director of the Board’s Office of Proceedings 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 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 questioned, among other things, whether Poseyville had sufficient funds to purchase the lines. ISW also pursued discovery with the Town. Based on information it received, ISW supplemented its appeal on February 25, 2011, and the Town replied on March 8, 2011.

In a decision served on April 8, 2011, we granted the railroad’s appeal and found that the Town had not shown that it was financially responsible for purposes of pursuing an OFA. We found that, even though Poseyville had some funds, this money was not available to purchase the lines. As part of our decision, we explained that OFAs have been rejected⁴ when the offers are not backed by adequate evidence.

² A more detailed history of this proceeding is set forth in decisions served in this docket on February 11, 2011, and April 8, 2011.

³ 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.

⁴ See footnotes infra.

Because this was the first time that the agency had granted a request to rebut the presumption that public bodies are financially responsible, we made the decision effective on May 23, 2011, in order to allow Poseyville time to seek reconsideration prior to the effective date of our decision should any further development regarding financing warrant it. To accommodate this process, we exercised our exemption authority to extend the due date to May 23, 2011, for a request to set terms and conditions. The decision was structured so that, absent subsequent action, the OFA process would end and the abandonment authority, as conditioned, would become effective on May 23.

On May 23, 2011, Poseyville filed a one-page letter asking that the Board reconsider or hold in abeyance the agency's April 8 decision. As justification, the Town states that it has secured a commitment of financing in the amount of \$1.5 million from M&I Bank of Indianapolis for the purpose of purchasing the lines.

The railroad replied on May 27, 2011, in opposition to the Town's request. It argues that the Town's filing is untimely and procedurally deficient. ISW asserts that, even if the letter were accepted, the Board could not grant the relief sought because the time to file an OFA has passed. Additionally, the railroad argues that, should the Board nonetheless entertain the letter, the Town has presented insufficient evidence of financial responsibility to warrant restarting the OFA process.

The Town filed an additional letter on September 1, 2011. It states that the rail lines are important for creating jobs and asks that the Board prevent the railroad from removing the track until the Town has the opportunity to present additional information under seal. ISW replied on September 2, 2011, to the Town's September 1, 2011 letter.

DISCUSSION AND CONCLUSIONS

We will deny the relief sought by the Town. In our April 8 decision, slip op. at 4, we explained that OFAs 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;⁵ (2) not provided an agreement with the purported source of funds;⁶ and (3) supplied only vague and unsubstantiated 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.⁷

We have thus explained to the Town that it needed to provide evidence to demonstrate that it is financially responsible for OFA purposes. In its May 23 filing, however, the Town

⁵ See Union Pac. R.R.—Aban.—in New Madrid, Scott, and Stoddard Cntys., Mo., AB 33 (Sub-No. 261) (STB served July 30, 2009).

⁶ See Ariz. & Cal. R.R.—Aban. Exemption—in San Bernardino and Riverside Cntys., Cal., AB 1022 (Sub-No. 1X) (STB served July 15, 2009).

⁷ See Union Pac. R.R.—Aban. Exemption—in Lassen County, Cal., and Washoe Cnty., Nev., AB 33 (Sub-No. 230X) (STB served Sept. 19, 2008).

provides no evidence to support its statement that it has secured a commitment of funds from a bank. For example, there is no executed letter of commitment, or any other form of agreement demonstrating that funds sufficient to support an OFA would be made available, and under what timeframe and conditions. To allow such an unsubstantiated OFA to proceed, particularly over the railroad's objection, would open our process to possible abuse and undermine the Congressional intent that railroads, when they meet the statutory standards, should be permitted to abandon their lines expeditiously.

The Board has long had a process in place to comply with the statutory requirements for abandonments, including providing a full and fair opportunity for interested persons to seek a timely forced sale of rail lines approved for abandonment. See 49 C.F.R. pt. 1152 and § 1152.29. That process affords a reasonable opportunity to submit evidence of financial responsibility. We have extended that process on several occasions in this case to accommodate the Town in its efforts to acquire these lines. For example, in our January 13 decision we granted a request to toll the OFA process for 30 days. In our April 8 decision, we further detailed Board precedent for establishing financial responsibility, and gave the Town an additional 45 days to submit the necessary evidence. The time for the Town to file sufficient additional evidence ended on May 23, when the abandonment authority for these out-of-service lines became effective, and the Town failed to do so by that date. For these reasons, we will deny the Town's request for reconsideration, we will not accept additional evidence from the Town, and we will leave the abandonment authority for these lines in effect.

Although the Town has exhausted our processes, it is free to continue to attempt to purchase the lines independent of this agency's involvement. The abandonment exemption authority is subject to trail use and public use conditions that run until November 19, 2011, as specified in our April 8 decision.

It is ordered:

1. The Town's petition is denied, and the abandonment authority remains in effect.
2. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.