

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. (ISW) has received regulatory approval to dispose of several rail lines, and the Town of Poseyville, Ind. (Town) is trying to buy them through a forced-sale process to continue rail service over the lines. In this decision, we are requiring the Town to produce certain information sought by ISW for use in its appeal of the finding that the Town is qualified to acquire the lines. To make time for the discovery and a decision on the appeal, we are delaying the due date for the Town's request that we determine the value of the lines and the terms of their transfer.

Decided: February 11, 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) is attempting to purchase the lines through our offer of financial assistance (OFA) process. In this decision, we grant in part ISW's motion to compel discovery, seeking more information from the Town to pursue an appeal of a finding made by the Director of the Office of Proceedings that the Town is financially responsible. Because we find that some discovery is necessary here and because we will need time to rule on the appeal before the Town's request to set terms and conditions is due, we are using our exemption authority to make the Town's request to set terms and conditions due 60 days after this decision's date of service. We are also setting a schedule governing discovery to make sure the process runs efficiently.

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

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).

Poseyville, Ind. (approximately 4.5 miles). ISW certified that no local traffic had moved over the lines proposed for abandonment for at least two years.

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 unless its effectiveness was postponed by the filing of a formal expression of intent to file an OFA under 49 U.S.C. § 10904. Pursuant to 49 C.F.R. § 1152.27(c)(2), the OFA was due on November 22, 2010.

On November 18, 2010, the Town filed a formal expression of intent to file an OFA to purchase ISW's 17.2-mile line of railroad proposed for abandonment. This filing automatically stayed the effective date of the exemption until December 22, 2010. 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 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. Among the information provided was ISW's estimate that the lines are worth almost \$3.9 million. 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. In a reply, ISW stated that the Town has a population of about 1,200 and questioned whether the Town is financially responsible and a bona fide offeror.

In a decision served on December 23, 2010, the Director of the Board's Office of Proceedings ruled on the Town's OFA.² The Director rejected ISW's concerns as unsubstantiated and found the Town to be financially responsible. Accordingly, the Director postponed the effective date of the exemption authorizing the abandonment and noted that requests to set terms and conditions for the purchase of the line would be due by January 19, 2011.

² The Indiana Department of Transportation filed a letter dated December 28, 2010, in which it questions whether a statement on a state reporting form dated March 1, 2010, by ISW that there were no line "segments potentially subject to abandonment" would disqualify ISW from using the notice of exemption process to obtain Board abandonment authority for the line. Such a statement does not disqualify ISW from using the Board's notice of exemption process.

ISW filed an appeal of the December 23 decision on December 30, 2010. ISW continues to question if the Town is financially responsible and a bona fide offeror. ISW sent discovery requests to the Town on those matters and attached them to its Board filing. Additionally, ISW stated that it wished to explore alternatives to abandonment with the Town. To pursue such negotiations and provide time to complete the discovery process, ISW asked that the Board toll the OFA process for 30 days.³

The Town filed its reply on January 13, 2011, in which it opposes the appeal. Additionally, the Town objects to responding to ISW's discovery requests and to holding the proceeding in abeyance as requested, citing the expedited nature of the OFA process. The Town, however, went on to request an exemption, pursuant to 49 U.S.C. § 10502(a), from the OFA deadline at 49 U.S.C. § 10904(e) so that the Town may delay filing its request to set terms and conditions for the purchase of the line until a reasonable time after the Board's disposition of ISW's appeal and abeyance request. In a decision served on January 13, 2011, the Board granted ISW's motion to toll the OFA process and made the Town's request to set terms and conditions due on February 18, 2011.

On January 18, 2011, ISW, in order to pursue its appeal, filed a motion to compel discovery from the Town. The Town replied in opposition on January 25, 2011.

DISCUSSION AND CONCLUSIONS

Motion to Compel Discovery. ISW asserts that the Town has not substantively responded to the railroad's 32 discovery requests dated December 23, 2010, and included with ISW's December 30 Board filing. The railroad claims that its discovery requests seek information that is relevant to key issues in this proceeding, and, as such, satisfy the standard for compelling discovery in abandonment and OFA proceedings. ISW argues that its requests are all carefully crafted to address the two issues properly at issue in the appeal, Poseyville's financial responsibility and Poseyville's bona fides. ISW argues that the Board should deem the Town as having waived general or specific objections to ISW's discovery requests because it has only tardily responded that discovery is inconsistent with the OFA's tight deadlines. ISW asks that the Board compel the Town to produce responses within three days of a Board decision on the discovery issue.

The Town replied to the motion to compel on January 25, 2011. The Town again argues that discovery is ill-suited for the expedited OFA process. It also claims that the OFA process is informal, and that the Board's regulation at 49 C.F.R. § 1114.21(a) does not provide for discovery in informal proceedings. Lastly, the Town attempts to distinguish various cases ISW

³ ISW filed a supplement to its appeal and request to hold the OFA process in abeyance on January 12, 2011.

cites for the proposition that discovery is possible in OFA cases.⁴ The Town makes no reference to its financial responsibility or the bona fides of its OFA.

We will grant ISW's motion to compel discovery in part. Although it is true that the Board disfavors discovery in abandonment proceedings due to the strict time constraints, it has set a standard for discovery in these situations. Parties seeking discovery in abandonments must demonstrate both relevance and need. Cf. Cent. R.R. of Ind.—Aban. Exemption—in Dearborn, Decatur, Franklin, Ripley, and Shelby Counties, Ind., AB 459 (Sub-No. 2X) (STB served Apr. 1, 1998)(denying a motion to compel discovery because moving parties failed to show a need for the material or to provide sharply focused requests).⁵

ISW has met the standard for certain of its discovery requests. ISW seeks information to pursue an appeal driven by the railroad's concerns that the Town is not financially responsible or genuinely interested in providing freight rail service. The railroad contends that the Town instead is filing on behalf of an unidentified third party, such as a company in the business of rail salvage. These concerns are highly pertinent to the OFA process, which has a primary goal of continuing rail service. The information related to the concerns appears to be available only from the Town.

Despite these allegations, the Town has not provided a substantive response that addresses concerns raised about its financial responsibility or involvement with third parties. Although the Town is entitled, as a public body, to a presumption of financial responsibility, that presumption could be undercut by evidence obtained through discovery. We believe that ISW's allegations are relevant and serious enough to permit limited discovery. The Board is not aware of another case where the financial responsibility presumption for a public body has been challenged at this stage in the OFA process. However, in other contexts, the agency has indicated that where a "credible challenge" to a presumption has been proffered, offerors may need to respond to the substance of the challenge. See Chelsea Property Owners—Aban.—Portion of the Consolidated Rail Corp.'s West 30th Street Secondary Track in New York, N.Y., AB 167 (Sub-No. 1094) (ICC served Dec. 9, 1992). Here, however, we are simply permitting a small amount of targeted discovery to occur.

Under these circumstances, we will require the Town to respond to the requests needed to provide information on how it 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. Accordingly, we compel the Town to answer Requests 1, 2, 7, 8, 9, 10, 23, 28, 30, and 31, which all relate to the subjects that are pertinent. Although ISW lists

⁴ See R.R. Ventures—Aban. Exemption—Between Youngstown, Ohio, and Darlington, Pa. in Mahoning and Columbiana Counties, Ohio, and Beaver County, Pa., AB 556 (Sub-No. 2X), 7 S.T.B. 1005 (2004); Ill. Cent. R.R.—Aban. Exemption—in Perry County, Ill., AB 43 (Sub-No. 164X) (ICC served Jan. 12, 1995); and Union Pac. R.R.—Aban. Exemption—in Lancaster County, Neb., AB 33 (Sub-No. 71X) (ICC served Sept. 28, 1992).

⁵ We also note that the OFA process does constitute a formal proceeding before the Board.

additional requests, we find that these requests are not necessary for ISW to make its presentation on these points, because those requests are irrelevant or redundant, or because they are unduly burdensome or inconsistent with the expedited nature of the OFA process.

The Town must provide ISW responses to the above listed requests by February 18, 2011,⁶ and ISW must file the supplement to its appeal by February 25, 2011. A reply to that supplement is due by March 4, 2011. The Board will then rule on ISW's appeal, as supplemented.

Petition for Exemption. The Town asks that we exempt it from the statutory deadline at 49 U.S.C. § 10904(e) for its request to set terms and conditions and make that filing due at a reasonable point in the future. The Town claims that it has not had time to prepare its request to set terms and conditions because it has been preparing replies to the other filings submitted in the case. ISW opposes a delay by noting that Congress meant the OFA process to be quick so that abandoning railroads are not subject to protracted proceedings.

We will grant an exemption from the timeframe set in 49 U.S.C. § 10904(e) and make a request to set terms and conditions due April 12, 2011. We find that such action meets the criteria of 49 U.S.C. § 10502. Extending the due date of a request to set terms for 60 days is necessary for the completion of discovery and the appeal process prior to reaching the set terms phase. This exemption will further the rail transportation policy at 49 U.S.C. § 10101(2) by aiding us to render fair decisions in this proceeding. 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.

Although Congress intended the OFA process to follow an expedited schedule, here we find that extraordinary circumstances justify the use of our § 10502 exemption power to extend the OFA deadlines. First, ISW delayed seeking discovery for over a month after the Town filed its formal expression of intent to file an OFA. Second, it is the railroad itself that has initiated the appeal challenging the Director's decision that the Town is financially responsible and questioning whether the Town is genuinely interested in providing rail service. Having raised the concern that the Board's OFA process is being misused by a party that is not financially responsible, ISW cannot complain when the Board takes a small amount of time to fairly resolve that concern.

Therefore, the parties are directed to comply with the timetable set forth above. If necessary, a request to set terms and conditions is due April 12, 2011.

⁶ ISW requests that the Town produce its answers in three days, but this length of time is insufficient given that the Town did not believe it needed to respond to the requests and appears to only possess a small legal staff.

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 April 12, 2011.
2. ISW's motion to compel discovery is granted in part as described above.
3. The parties are directed to comply with the procedural schedule set forth above.

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