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BEFORE THE
SURFACE TRANSPORTATION BOARD

INDIANA SOUTHWESTERN RAILWAY)
CO. -- ABANDONMENT EXEMPTION --) DOCKET NO. AB-1065X
IN POSEY AND VANDERBURGH)
COUNTIES, IN)

JAN 25 2011
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REPLY IN OPPOSITION
TO MOTION TO COMPEL

THE TOWN OF POSEYVILLE, INDIANA
20 South Cale Street
P.O. Box 194
Poseyville, IN 47633

Replicant

FILED
Office of Proceedings
JAN 25 2011
Part of
Public Record

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DATE FILED: January 25, 2011

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Pursuant to 49 C.F.R. § 1114.21(a)(1) and 49 C.F.R. § 1104.13(a), the TOWN OF POSEYVILLE, INDIANA (the Town) hereby replies in opposition to a Motion to Compel responses to discovery (Motion) filed by Indiana Southwestern Railway Co. (ISW) on January 18, 2011.

At the request of the Board's Staff, this Reply is being filed seven days after the Motion was filed instead of 20 days thereafter provided for in 49 C.F.R. § 1114.21(a)(1) and 49 C.F.R. § 1104.13(a). The requested deviation from the discovery rules is another indication that discovery is not compatible with offer-of-financial-assistance (OFA) proceedings.

REPLY

1. The Statutory Scheme Governing Abandonments And OFAs Does Not Contemplate Discovery

The current statutory scheme governing rail abandonments and OFAs was adopted by virtue of Section 402 of the Staggers Rail Act of 1980. The broad statutory scheme was described at page 125 of the Report of the Committee on Conference on S. 1946, HR Report No. 96-1430, 96th Cong., 2d sess., viz.:

Senate bill. - Section 202 of the Senate bill alters the existing provisions of the Interstate Commerce Act relating to abandonments of railroad lines. This section expedites abandonment proceedings by specifically setting forth time periods within which the Commission must act upon abandonment applications, depending on the complexity of and the opposition to the abandonment proceeding. For example, under existing law, there is no time limit within which an investigation of an abandonment application must be concluded. Section 202(c)(3) places a time limit of 135 days upon such investigations.

Section 202 repeals existing 49 U.S.C. 10905. New section 10905 creates a mechanism that requires railroads to sell a railroad line approved for abandonment to a financially responsible party if the financially responsible party has offered to pay the acquisition cost of the line or the difference between the revenues attributable to providing that service plus a reasonable return on the value of the line. Section 202 also requires rail carriers petitioning for abandonment of a railroad line to provide interested parties an estimate of the subsidy or the minimum purchase price required to keep the line in operation, calculated in accordance with the new provisions in 49 U.S.C. 10905.

The provisions in section 202 assist shippers who are sincerely interested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process.

House amendment. - No provision.

Conference substitute. - The Conference substitute adopts the Senate provision.

Rail carriers thus received a substantial benefit of greatly accelerated processing of abandonments. The *quid pro quo* for that benefit was the requirement that the rail carriers participate in OFA proceedings if abandonment was authorized by the Board. The final paragraph of Section 202 of the Senate Bill aptly identifies the legislative compromise.

The OFA procedure itself is accelerated. For example, no administrative appeal of a Board decision determining the net liquidation value-purchase price of a rail line is permitted. As found by the ICC in *Buffalo Ridge R.R., Inc. - Aban. Bet. Manley, MN and Brandon, SD*, 9

I.C.C.2d 778 (1993), at 779, an administrative appeal would result in delay that would be inconsistent with the statutory scheme, viz.:

... (T)hese decisions were intended by Congress to be final; ... allowing appeals in this circumstance would introduce a delay that would be inconsistent with the statutory scheme ...

It is evidence that discovery in OFA proceedings would cause even more delay than administrative appeals. Consequently, discovery would be even more inconsistent with the abandonment-OFA statutory scheme than would administrative appeals.

How, then, is ISW's concern over the Town's financial responsibility to be resolved consistently with the statutory scheme? First, ISW can attempt to rebut the presumption of the Town's financial responsibility by providing evidence and argument that the Town's OFA should not be accepted for filing because of lack of financial responsibility. ISW attempted to do so in the present case but was not successful.

Once the Director finds that an offeror is financially responsible, a rail carrier can appeal to the Board. Beyond that, the accelerated nature of OFA proceedings provides ISW with all of the relief to which it is entitled consistently with the statutory scheme. Thus, valuation evidence is required to be filed only 30 days after an OFA is filed. A Board decision determining the NLV-purchase price of a line is required to be issued only 60 days after an OFA is filed. Only 10 days thereafter (70 days after an OFA is filed), an offeror is required to state whether it will go forward with purchase of the rail line at the fixed price. That should serve to screen out offerors who do not have sufficient financial means to purchase a rail line. If an offeror states that it will go forward with a purchase, closing is to take place 90 days after issuance of the Board's decision. If an offeror were to be financially unable to close at that time, the Board would

promptly reinstate authority to abandon the line, and the rail line owner would have a right of action against the offeror for breach of contract.

Thus, under a worst-case scenario, a rail line owner might be required to wait until 150 days after an OFA is filed before determining that an offeror is not financially responsible by virtue of the offeror's inability to close a purchase.¹⁷ That period of time constitutes the *quid pro quo* for the benefit of accelerated processing of abandonments under exemption procedure.

As observed by the Board's predecessor in the *Buffalo Ridge* case, *supra*, the potential delay in the OFA process that could result from discovery is entirely inconsistent with the statutory scheme governing abandonments and OFAs. Indeed, where, as here, discovery was not submitted until well after the OFA was filed and accepted by the Board, it is quite possible that discovery disputes could not be resolved until after the time for closing of an OFA purchase. It is difficult to see how that scenario would be of benefit to ISW. In any event, the inconsistency of discovery with the statutory scheme governing abandonments and OFAs provides a solid ground for denial of ISW's Motion to Compel.

2. **Discovery Is Not Available In OFA Proceedings Because OFA Proceedings Are Informal**

ISW has been unable to show that OFA proceedings are formal proceedings required to be determined on the record after hearing, for which discovery is available in accordance with 49 C.F.R. § 1114.21(a). In fact, OFA proceedings are informal and highly accelerated. As such, discovery is not available in OFA proceedings.

¹⁷ Thirty days for filing valuation evidence, plus thirty days for a Board decision on purchase price, plus ninety days for closing, equals 150 days.

The decisions cited in note 1 on page 5 of ISW's Motion do not establish that discovery is available in OFA proceedings. *Railroad Ventures, Inc. -- Aband. Exempt. -- between Youngstown, OH and Darlington, PA*, 2004 STB LEXIS 788 (Docket No. AB-556 [Sub-No. 2X], decision served Dec. 13, 2004), is *sui generis* on the issue of discovery in OFA proceedings. The request for discovery in that proceeding was filed in aid of an effort by an offeror to enforce a prior Board decision that required conveyance of certain assets by the rail carrier in exchange for payment of the purchase price. (*Id.* at *13-18). The discovery was not filed during the course of the primary OFA proceeding. The Board's decision granting a motion to compel responses to that discovery does not support a proposition that discovery is generally available in OFA proceedings.

The ICC did not grant a motion to compel responses to discovery in an OFA proceeding in *Illinois Central R. Co. -- Aband. Exempt. - in Perry County, IL*, 1994 ICC LEXIS 292 (Docket No. AB-43 [Sub-No. 164X], decision served January 12, 1995). On the contrary, the ICC there said (at *3):

... The short deadlines established for the OFA procedure are ill-suited to controversial matters involving discovery ...

It appeared that the offeror in that case voluntarily responded to discovery. The ICC merely denied the offeror's motion to strike evidence based on those voluntary responses (at *4):

Neither did the ICC grant a motion to compel responses to discovery in an OFA proceeding in *Union Pacific R. Co. -- Aband. Exempt. -- in Lancaster County, NE*, 1992 ICC LEXIS 202 (Docket No. AB-33 [Sub-No. 71X], decision served September 28, 1992). There, too, it appeared that the offeror in that case voluntarily responded to discovery (at *9). No issue was raised regarding the propriety of discovery in OFA proceedings.

The decision in the latter proceeding actually undermines ISW's Motion. In that case, the Director of the Board's Office of Proceedings had found that the offeror was financially responsible. (1992 ICC LEXIS 202, at *2). The rail carrier submitted evidence and argument in its reply to the offeror's request to establish conditions and compensation for financial assistance designed to show that the offeror was not financially responsible. The ICC sustained the offeror's motion to strike that evidence and argument, viz. (at *6):

... SF&L asserts that UP should not be permitted to address SF&L's financial responsibility or whether its offer was bona fide, since those issues were disposed of in the June 29, 1992 decision, and no timely appeal was filed ...

We agree with SF&L that UP cannot now raise issues regarding SF&L's financial responsibility and whether its offer was bona fide ...

Here, ISW timely appealed the Director's determination of financial responsibility, as it had a right to do. But ISW does not have a right, in addition, to institute discovery regarding that issue after such a determination has been made. Accordingly, ISW's Motion to Compel should be denied.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the all the reasons stated, ISW's Motion to Compel should be denied.

Respectfully submitted,

A handwritten signature in black ink that reads "William H. Bender". The signature is written in a cursive style with a large initial "W".

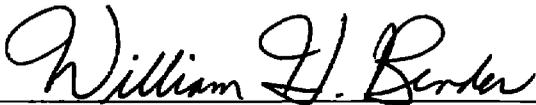
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DATE FILED: January 25, 2011

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2011, I served the foregoing document, Reply In Opposition To Compel, by overnight mail, on the attorneys for Indiana Southwestern Railway Co., William A. Mullins and Robert A. Wimbish, Baker & Miller, 2401 Pennsylvania Avenue, Suite 300, Washington, DC 20037. and on Ms. Venetta Keefe, Senior Rail Planner, Indiana Department of Transportation, 100 North Senate Avenue, Room N955, Indianapolis, IN 46204.



William H. Bender