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December 23, 2010

VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: STB Docket No. AB-1065X
*Indiana Southwestern Railway Co. – Abandonment Exemption – In Posey and
Vanderburgh Counties, IN*

Dear Ms. Brown:

Indiana Southwestern Railway Co. (“ISW”), the party who seeks abandonment authority in the above-captioned abandonment notice of exemption proceeding, discovered by checking the Board’s website yesterday that the Town of Poseyville, Indiana (“Town”) has supplied the Board with the requisite filing fee to permit the agency to commence a review of the Town’s Offer of Financial Assistance (“OFA”), and to determine whether the filing meets the requirements for acceptance, including whether or not the Town has demonstrated that it is a financially responsible offeror. In short (and as will be explained below), the Town is not a *bona fide* offeror, the Town has not demonstrated (as it should in this case) that it possesses the resources necessary to acquire the targeted rail lines, and that the Town has not been forthcoming about whether it is serving as a proxy for a third party actually driving the OFA process here.

On the basis of its preliminary research, ISW has reason to believe that the Town, with a population estimated at about 1,200, lacks the financial resources on its own to purchase the lines that are the target of the Town’s OFA (the “Lines”). Under the circumstances here, it would be unwise and, most likely, a waste of agency resources for the Director of the Board’s Office of Proceedings (the “Director”) merely to presume that, because the Town is a “governmental entity,” it possesses the financial *bona fides* to allow the OFA proceed. In this case, ISW urges the Director to consider carefully whether the Town should be entitled to a presumption that it is financially responsible.

BAKER & MILLER PLLC

Ms. Cynthia Brown
December 23, 2010
Page 2

In submitting the requisite OFA filing fee – which ISW has previously pointed out should not be waived under any circumstances where a state subdivision seeks to acquire rail lines under the OFA process and will become a common carrier – the Town has indicated that it intends to procure the services of an “experienced rail operator” to provide service on the line if the Town succeeds in acquiring the Lines through the OFA process. The comment is telling, implying the involvement of an unidentified third party in the OFA process, one that most likely has an interest of its own in the future disposition of the Lines.

The Town almost certainly does not on its own possess the resources to purchase the Lines, and, in fact, it may lack available funds to pay the \$22,600 fee necessary for a request for the Board to set purchase price terms and conditions. Accordingly, there is very good reason to conclude that the Town is serving as the proxy for a third party. ISW has been contacted by multiple parties (including a company well known in the rail industry for specializing in rail salvage and for occasionally acquiring active rail lines which are almost all universally later abandoned and scrapped), each expressing an interest in purchasing and/or salvaging the Lines. One of these entities, or another that has not contacted ISW, is quite likely behind the Town’s OFA, and may be providing both legal and financial backing to the Town. Further casting doubt on the Town’s *bona fides*, counsel for the Town has been unwilling to respond to the telephonic inquiries of ISW’s counsel, will not respond to voicemail left for him, and until just this morning refused even to supply an email address at which he may be contacted. Such evasiveness on the part of the Town’s counsel strongly suggests that the Town has information concerning its OFA that the Town and/or those working with it behind the scenes do not wish to have brought to light.

Because the Town intends to use an experienced third party operator to provide rail service on the Lines if it is able to acquire them, this operator, if it has already been selected (as very likely is the case) should come forward as the actual OFA offeror, particularly if that operator is providing financial and other assistance to the Town to facilitate the OFA process and to acquire the Lines. Similarly, if a third party, such as a company in the business of rail salvage, is found to be providing financial backing to the Town to pursue the subject OFA and to purchase the Lines, then that entities’ financial *bona fides* should be considered and that party determined to be a financial responsible person before the OFA is allowed to move forward. In any event, the Board is entitled to, and should expect, far more disclosure in this OFA process than has been provided to date.

Having good reason to conclude, as should the Board, that the Town lacks the resources on its own to purchase the Lines (or even pursue an OFA through a request to set terms and conditions), ISW has prepared discovery which it will promptly serve upon the Town to determine if the Town does in fact possess the resources to purchase the Lines, or whether instead the Town is acting as a proxy for a third party that is attempting to avoid drawing any attention to itself through the OFA process, and to avoid acting as the offeror it should be. Such discovery will illuminate the circumstances precipitating the Town’s OFA efforts.

BAKER & MILLER PLLC

Ms. Cynthia Brown

December 23, 2010

Page 3

For these reasons, ISW urges the Director to find that, under the unique circumstances present here, the Town has not demonstrated that it is financially responsible, and, accordingly, the Director should not allow the OFA to proceed. To protect the integrity of its processes, the Director should, at a minimum, postpone the decision to accept the OFA as bona fide until such time the Town provides more information to establish that it, and not some other entity acting behind the scenes, possesses the funds to purchase the Lines. Finally, consistent with existing Board policies barring filing fee waivers to state subdivisions when seeking to use STB processes to acquire a rail line,¹ under no circumstances should the Board waive the filing fees applicable to OFA processes

Sincerely,

Handwritten signature of William A. Mullins in blue ink, with the initials 'aw2' written below the name.

William A. Mullins

cc: Parties of Record
Venetta Keefe
J. Michael Carr

¹ The Board should also reject the Town's request for a waiver of the filing fee. In Regulations Governing Fees For Service Performed In Connection With Licensing And Related Services – Policy Statement, STB Ex Parte No. 542 (Sub-No. 6)(STB served Dec. 6, 2000), provided no relevant exception to the filing fee waiver rule where the acquiring state subdivision proposed to acquire a line of railroad but also planned to contract with a private company to provide actual rail service. The Board will grant an exception “in extraordinary situations,” but the requestor “must show that the waiver or reduction is in the best interest of the public or that payment of the fee would impose an undue hardship on the requestor.” Id., slip. op a 4. The Town has failed to meet that standard. Furthermore, if the Town can't afford the filing fees, then they certainly aren't a financially responsible offeror.