

SERVICE DATE - APRIL 7, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1065 (Sub-No. 3)

LANDOWNERS—ADVERSE ABANDONMENT—INDIANA SOUTHWESTERN
RAILWAY CO. IN POSEY & VANDERBURGH COUNTIES, IND.

Digest:¹ This decision grants exemptions from certain statutory provisions and waives certain regulatory requirements that normally apply when filing an application for abandonment authority but are either unnecessary here or would be difficult or impossible for a group of landowners in Indiana to comply with should they file an application for adverse abandonment.

Decided: April 6, 2021

In a petition filed on January 7, 2021, a group of landowners (Landowners)² seeks exemptions from certain statutory provisions and waivers of certain regulatory requirements regarding the filing of a third-party, or “adverse,” application for abandonment of 17.2 miles of interconnecting rail lines (the Lines) owned by Indiana Southwestern Railway Co. (ISW) in Posey and Vanderburgh Counties, Ind.³ The petition is unopposed. As discussed below, the Board will partially grant the Landowners’ petition.

BACKGROUND

The Landowners state that they own land adjacent to and/or within the rights-of-way of the Lines, and that such land is burdened by easements that permit use by ISW for railroad purposes. (Pet. 2.) The Landowners assert that ISW has not used the Lines for regulated rail transportation for more than 16 years, and that there is no reasonable prospect for such use of the Lines in the foreseeable future. (Id.) The Landowners state that ISW removed the track materials from the Lines in 2012 without having consummated authority to abandon the Lines. (Id. at 3.) In their petition, the Landowners state that they intend to file an application under

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. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² The 45 Landowners are listed in Appendix 1 to the petition. (Pet. 2; see also id., App. 1.)

³ The Lines extend from: (1) milepost 227.5 at Poseyville, Ind., to milepost 240.2 near German Township, Ind. (approximately 12.7 miles); and (2) milepost 277.5 at Cynthiana, Ind., to milepost 282.0 at Poseyville (approximately 4.5 miles).

49 U.S.C. § 10903 for adverse abandonment in order to pave “the way for actions under Indiana law to free the land from the burden of the easements.” (*Id.* at 2-3.)

On October 25, 2010, in Indiana Southwestern Railway—Abandonment Exemption—in Posey & Vanderburgh Counties, Ind., Docket No. AB 1065X, ISW filed a verified notice of exemption under 49 C.F.R. part 1152 subpart F—Exempt Abandonments to abandon the Lines. Notice of the exemption was served and published in the Federal Register on November 12, 2010 (75 Fed. Reg. 69,520). Subsequently, in a series of decisions, the Board imposed three salvage conditions and issued a notice of interim trail use or abandonment (NITU), authorizing negotiations for interim trail use/rail banking of the Lines under the Board’s regulations at 49 C.F.R. § 1152.29 (implementing the National Trails System Act, 16 U.S.C. § 1247(d)). Four 180-day extensions of the NITU negotiating period were granted, ultimately until November 8, 2013. No interim trail use/rail banking agreement was reached during the NITU negotiating period, and the NITU expired on that date. ISW did not file a notice of consummation of abandonment within 60 days thereafter, and ISW’s abandonment authority therefore expired. See 49 C.F.R. § 1152.29(e)(2). Accordingly, the Lines remain part of the interstate rail network within the Board’s jurisdiction. See id.; Honey Creek R.R.—Pet. for Declaratory Order, FD 34689 et al., slip op. at 4-5 (STB served June 4, 2008).⁴

On November 17, 2020, in Landowners—Adverse Abandonment—Indiana Southwestern Railway in Posey & Vanderburgh Counties, Ind., Docket No. AB 1065 (Sub-No. 2), the Landowners filed an application under 49 U.S.C. § 10903 requesting that the Board authorize the adverse abandonment of the Lines. In a decision served December 7, 2020, the Board rejected the Landowners’ application, finding that the application was substantially incomplete and noting that the Landowners had not requested waiver or exemption from any of the requirements for the notice, form, or content of an abandonment application. Landowners—Adverse Aban.—Ind. S.W. Ry. in Posey & Vanderburgh Cntys., Ind., AB 1065 (Sub-No. 2), slip op. at 3 (STB served Dec. 7, 2020).

The Landowners have now filed their petition requesting exemption from certain statutory provisions and waiver of certain Board regulations that otherwise would apply. The Board will partially grant the petition to the extent discussed below.

⁴ The Landowners in 2019 filed a motion requesting that the Board issue a “declaratory order of abandonment” regarding the Lines. Landowners Mot. 13, 20, Sept. 9, 2019, Landowners—Mot. for Declaratory Order & Injunctive Relief, AB 1065 (Sub-No. 1). ISW replied in opposition, recognizing that it retained a common carrier obligation to provide service on the Lines on reasonable request because it had not exercised its abandonment authority by filing a timely notice of consummation. ISW Reply 5, Oct. 15, 2019, Landowners—Mot. for Declaratory Order, AB 1065 (Sub-No. 1). In a decision served January 27, 2020, the Board denied the Landowners’ motion, explaining that ISW’s authority to abandon the Lines in Docket No. AB 1065X automatically expired when ISW did not file a timely notice of consummation and further explaining that the appropriate procedure to compel the removal of the Board’s jurisdiction over the Lines would be to file an application for adverse abandonment under 49 U.S.C. § 10903 and the regulations at 49 C.F.R. part 1152. Landowners—Mot. for Declaratory Order, AB 1065 (Sub-No. 1), slip op. at 5-6 (STB served Jan. 27, 2020).

DISCUSSION AND CONCLUSIONS

An application to abandon a rail line is governed by 49 U.S.C. § 10903 and the Board's regulations governing abandonment applications found at 49 C.F.R. part 1152 subparts B & C. In appropriate circumstances, however, such as the filing of a third-party, or "adverse," abandonment application, the Board has waived inapplicable and unneeded regulations and granted exemptions from statutory provisions upon request. See, e.g., Alloy Prop. Co.—Adverse Aban.—Chi. Term. R.R. in Chi., Ill., AB 1258, slip op. at 2 (STB served Aug. 16, 2017); Hartwell First United Methodist Church—Adverse Aban. & Discontinuance—Hartwell R.R., in Hart Cnty., Ga., AB 1242, slip op. at 2 (STB served Aug. 30, 2016). The Landowners request waiver of the following regulations, and exemption from the following statutory provisions, as addressed below:

System Diagram Map. The Landowners request waiver of 49 C.F.R. § 1152.22(a)(5), which requires reference to the inclusion of the rail line subject to the abandonment request on the rail carrier's system diagram map (SDM) or narrative, the date on which the line was first listed there for abandonment or discontinuance, and a copy of the line description that accompanies the carrier's map, in compliance with 49 C.F.R. §§ 1152.10 through 1152.13. In support, the Landowners contend that the SDM requirements are not adaptable to noncarriers such as themselves. (Pet. 7.)

The Board will grant the Landowners' request to waive 49 C.F.R. § 1152.22(a)(5). In addition, although the Landowners do not specifically request it, the Board will grant waivers of 49 C.F.R. § 1152.10-14 and § 1152.24(e)(1), which also relate to SDM requirements. Waiver of the SDM requirements is customary in adverse proceedings because the applicant generally does not have access to the SDM. See Port of Benton—Adverse Discontinuance of Rail Serv.—Tri-City R.R., AB 1270, slip op. at 4 (STB served Oct. 31, 2018); Hartwell First, AB 1242, slip op. at 3. And, as explained in the exemption analysis below, the Board will exempt the Landowners from the related requirements of 49 U.S.C. § 10903(c)(2).

Service of Notice on Significant Users. The Landowners state that there are no current significant users of the Lines and therefore seek waiver of the requirement under 49 C.F.R. § 1152.20(a)(2)(i) that they serve notice upon all significant users of the rail line. (Pet. 5.) Because the record indicates that no shippers are using the Lines, the Board will grant this waiver request. See Denver & Rio Grande Ry. Hist. Found.—Adverse Aban.—in Mineral Cnty., Colo. (Mineral County), AB 1014, slip op. at 2 (STB served Oct. 18, 2007). Further, as explained in the exemption analysis below, the Board will exempt the Landowners from the related requirements of 49 U.S.C. § 10903(a)(3)(D).

Service of Notice on Amtrak. The Landowners ask for waiver of 49 C.F.R. § 1152.20(a)(2)(x), which requires that the notice of intent be served on the National Railroad Passenger Corporation (Amtrak). The Landowners state that Amtrak does not operate on the Lines. (Pet. 5.) The Board will grant this request. See Hartwell First, AB 1242, slip op. at 4.

Service of Notice on Labor Organizations. The Landowners seek waiver of 49 C.F.R. § 1152.20(a)(2)(xii), which requires that the notice of intent be served on the headquarters of all duly certified labor organizations that represent employees of the affected rail line. The Landowners believe that there are no such labor organizations. (Pet. 6.) The Board will grant this request. See Palmer Ranch Holdings Ltd.—Adverse Aban.—Seminole Gulf Ry., in Sarasota Cnty., Fla., AB 400 (Sub-No. 5), slip op. at 4 (STB served Sept. 21, 2011).

Posting of Notice at Agency Stations or Terminals. The Landowners seek waiver of 49 C.F.R. § 1152.20(a)(3), which requires posting of the notice of intent at each agency station or terminal on the line to be abandoned. According to the Landowners, there are no agency stations at which the notice of intent could be posted. (Pet. 6.) The Board will grant this request. See Alloy Prop. Co., AB 1258, slip op. at 3. Further, as explained in the exemption analysis below, the Board will exempt the Landowners from the related requirements at 49 U.S.C. § 10903(a)(3)(B).

Notice of Intent. The Landowners request waiver of the prescribed form of the notice of intent found at 49 C.F.R. § 1152.21.⁵ The Landowners argue that the form of the notice is not adaptable in some respects to proceedings involving adverse abandonment applications, (Pet. 5), and they propose to use a modified notice as provided in Appendix 3 to their petition, (*id.* at 7; *see also id.*, App. 3).

The Board has approved form changes in other adverse abandonment cases when the substitute notice is in substantial compliance with the requirements of 49 C.F.R. § 1152.21. See Alloy Prop. Co., AB 1258, slip op. at 4; Hartwell First, AB 1242, slip op. at 3. The Landowners' modified notice of intent is in substantial compliance with the requirements of 49 C.F.R. § 1152.21, and the proposed changes are reasonable in the context of the Landowners' forthcoming application. However, the Board will require the Landowners to amend the language "ISW has not used that land for rail operations for more than 16 years" and "There is no reasonable prospect for such use in the future" to say "The Landowners claim that ISW has not used that land for rail operations for more than 16 years" and "The Landowners claim that there is no reasonable prospect for such use in the future." See Alloy Prop. Co., AB 1258, slip op. at 4 (requiring a similar modification to a notice of intent); Hartwell First, AB 1242, slip op. at 3 (same). Accordingly, the Board will grant the Landowners' request, subject to these changes.

Line Attributes. The Landowners seek waivers of 49 C.F.R. § 1152.22(b)-(d) and (e)(2)-(3), which require that abandonment applications include information regarding the condition of properties, service provided, revenue and cost data, and the rural and community impact. The Landowners claim that this information and data are not available to noncarriers such as them. (Pet. 7-8.) Because the information required by 49 C.F.R. § 1152.22(b)-(d) and (e)(2)-(3) is not typically available to adverse abandonment applicants or has otherwise not been required of them, the Board will grant these waivers. See Hartwell First, AB 1242, slip op. at 4;

⁵ The Landowners also sought a waiver of the filing fee for their petition for waiver and exemptions. By letter dated February 4, 2021, the fee waiver request was denied.

see also N.Y. State Dep't of Env't Conservation—Adverse Aban.—Saratoga & N. Creek Ry. in Town of Johnsburg, N.Y., AB 1261, slip op. at 4 (STB served Feb. 27, 2018).

Environmental and Historic Impacts. The Landowners request waiver of 49 C.F.R. § 1152.22(f), which requires an abandonment applicant to submit information regarding the environmental and historic impacts of the proposed abandonment in compliance with 49 C.F.R. §§ 1105.7 and 1105.8. The Landowners also request waiver of 49 C.F.R. § 1152.20(c), which requires the abandonment applicant to submit the environmental and historic reports described at 49 C.F.R. §§ 1105.7 and 1105.8 at least 20 days prior to filing an application. The Landowners argue that all environmental and historic effects of abandonment were experienced eight years ago when ISW removed all track materials from the Lines without having consummated the abandonment. (Pet. 6.) The Landowners further argue that the proposed adverse abandonment would not result in any change in carrier operations. (Id.)

The Board will deny these requests. The Board generally conducts a full environmental and historic review in adverse abandonment cases, and environmental and historic reports prepared in accordance with 49 C.F.R. §§ 1105.7 and 1105.8 give the Board the information necessary to conduct that review. See Palmer Ranch, AB 400 (Sub-No. 5), slip op. at 6; Norfolk S. Ry.—Adverse Aban.—St. Joseph Cnty., Ind. (St. Joseph), AB 290 (Sub-No. 286), slip op. at 4 (STB served Oct. 26, 2006). Furthermore, although the Board's Office of Environmental Analysis prepared an environmental assessment (EA) in 2010, in connection with ISW's notice of exemption to abandon the Lines in Docket No. AB 1065X, the information in that EA may no longer be current, and the environmental and historic impacts of the Landowners' proposed adverse abandonment may need to be reanalyzed. See Mineral County, AB 1014, slip op. at 4. Therefore, the Landowners must comply with the requirements to prepare and submit both an environmental and historic report if they intend to file an application for adverse abandonment in this proceeding.

Federal Register Notice. The Landowners request waiver of the requirements of 49 C.F.R. § 1152.22(i), which prescribes the wording for the draft Federal Register notice. The Landowners state that some of the provisions of the form of notice are not reasonably adaptable to an adverse abandonment application, (Pet. 9), and the Landowners propose to use the alternative language set forth in Appendix 4 to their petition, (id.; see also id., App. 4). The Board will grant this request because the substitute notice is in substantial compliance with the requirements of 49 C.F.R. § 1152.22(i). See Hartwell First, AB 1242, slip op. at 4.

Offers of Financial Assistance. The Landowners ask for exemption from 49 U.S.C. § 10904, which governs offers of financial assistance (OFAs) to continue rail service. The Board will grant this request. The effect of granting an adverse abandonment is that the Board's primary jurisdiction is withdrawn, thus permitting state, local, or other federal law to apply where there is no overriding federal interest in interstate commerce. See Alloy Prop. Co., AB 1258, slip op. at 5; St. Joseph, AB 290 (Sub-No. 286), slip op. at 6. If the Board ultimately finds that the public convenience and necessity require or permit withdrawal of its regulatory authority in this adverse abandonment proceeding, it would be fundamentally inconsistent with the rationale underlying the adverse abandonment sought here to provide for further Board

regulation under the OFA provisions of § 10904. See Alloy Prop. Co., AB 1258, slip op. at 5; St. Joseph, AB 290 (Sub-No. 286), slip op. at 6.⁶

Exemption Criteria. As indicated, the Landowners seek exemptions from the following statutory provisions corresponding to Board regulations previously discussed: 49 U.S.C. § 10903(c)(2)(A) and (B) (SDMs); 49 U.S.C. § 10903(a)(3)(D) (Notice to Shippers); 49 U.S.C. § 10903(a)(3)(B) (Posting); and 49 U.S.C. § 10904 (OFAs). The Board will grant these exemptions because the application of these provisions is not necessary here to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101. These exemptions would promote the RTP by eliminating unnecessary procedures and thus would expedite regulatory decisions (§ 10101(2)) and foster sound economic conditions in transportation (§ 10101(9)). Other aspects of the RTP would not be adversely affected. Additionally, application of the statutory provisions from which the Board is granting exemptions is not necessary to protect shippers from an abuse of market power, including because, as previously stated, the record indicates that no shippers are using the Lines.

It is ordered:

1. The petition for waivers and exemptions is granted to the extent discussed above.
2. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz.

⁶ For the same reasons, although the Landowners do not specifically request it, the Board will also grant a waiver from the corresponding OFA regulations at 49 C.F.R. § 1152.27.