

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1065 (Sub-No. 1X)<sup>1</sup>

LANDOWNERS—MOTION FOR DECLARATORY ORDER AND INJUNCTIVE RELIEF

Digest:<sup>2</sup> A group of landowners who own property adjacent to 17.2 miles of interconnecting rail lines in Posey and Vanderburgh Counties, Ind., seek a declaratory order instructing Indiana Southwestern Railway Co. (ISW) to consummate abandonment of the lines and directing ISW to show cause why abandonment has not been consummated and why the Board should not declare the corridor abandoned. The Board denies the request, finding that, although ISW was once authorized to abandon the lines, the abandonment was not consummated before the abandonment authority expired and therefore the lines remain within the Board’s jurisdiction.

Decided: January 24, 2020

By motion filed September 11, 2019, certain landowners<sup>3</sup> request that the Board issue a “declaratory order of abandonment” regarding 17.2 miles of interconnecting rail lines in Indiana, owned by the Indiana Southwestern Railway Co. (ISW), and request that the Board order ISW to show cause why abandonment of those lines has not been consummated and why the Board should not declare the corridor abandoned. On October 15, 2019, ISW replied in opposition to the motion. For the reasons discussed below, the Board will deny the requested relief.

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<sup>1</sup> This proceeding, formerly docketed as AB 1065X, is re-docketed as AB 1065 (Sub-No. 1X).

<sup>2</sup> 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 Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>3</sup> The landowners are also plaintiffs in two takings cases pending before the U.S. Court of Federal Claims involving the same 17.2 miles of railroad lines: Memmer v. United States, Case No. 14-135L, and Butler v. United States, Case No. 17-667L. Nine adjacent landowners are plaintiffs in Memmer; 36 adjacent landowners are plaintiffs in Butler. The landowners are collectively referred to as the “Landowners” here. (See Landowners Mot. 2, 2 nn.1 & 3.)

## BACKGROUND

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 17.2 miles of interconnecting rail lines extending (1) from milepost 227.5 at Poseyville, Ind., to milepost 240.2 near German Township, Ind. (approximately 12.7 miles) and (2) from milepost 277.5 at Cynthiana, Ind., to milepost 282.0 at Poseyville (approximately 4.5 miles) (collectively, the Lines). Notice of the exemption was served and published in the Federal Register on November 12, 2010 (75 Fed. Reg. 69,520). By decision served December 23, 2010, three environmental conditions related to salvage activities were imposed. Subsequently, by decision and notice of interim trail use or abandonment (NITU) served on April 8, 2011, the Board, among other things, imposed a condition permitting ISW and the Indiana Trails Fund, Inc. (ITF), to negotiate until November 19, 2011, 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). Several extensions of the NITU negotiating period were granted, which ultimately extended the negotiating period 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 under 49 C.F.R. § 1152.29(e)(2) after the NITU expired.

On September 11, 2019, the Landowners filed a “Motion for Declaratory and Injunctive Relief and Request to Issue Show Cause Order.” The Landowners assert that they own land adjacent to, and hold reversionary interests in, ISW’s right-of-way. (Landowners Mot. 2, 8.) According to the Landowners, there has been no train traffic on the Lines since 2004, and, during the NITU negotiating period, ISW removed the rails and ties. (Id. at 3.) The Landowners contend that ISW intentionally failed to consummate the abandonment pursuant to 49 C.F.R. § 1152.29(e)(2) after the NITU expired because it wants to “extract payment from some source in order to do so.” (Landowners Mot. 3.) The Landowners state that they want federal jurisdiction over the Lines to end so that they can regain their land and put it to productive use. (Id.)

The Landowners request that the Board issue a “declaratory order of abandonment” regarding the Lines, (id. at 13, 20), “directing ISW to consummate the abandonment,” (id. at 9), and they further request that the Board “issue a show cause order to ISW as to why abandonment has not been consummated and why the Board should not declare the corridor abandoned,” (id. at 8). While acknowledging that ISW has never filed with the Board a notice of consummation of abandonment pursuant to § 1152.29(e)(2), the Landowners nevertheless argue that the Lines have been “de facto” abandoned, relying on Modern Handcraft, Inc.—Abandonment in Jackson County, Mo., 363 I.C.C. 969, 971 (1981). (Landowners Mot. 9.) According to the Landowners, they are entitled to a declaratory order of abandonment because there has been no train traffic on the Lines since 2004 and because ISW demonstrated an intent to abandon the Lines when it filed its notice of exemption to abandon in 2010, received Board authority to abandon the Lines in both 2010 and 2011, and removed the rails and ties in 2012. (Id. at 13.)

On October 15, 2019, ISW filed a reply in opposition to the Landowners' motion. ISW states that, because it did not file a notice of consummation within 60 days after the expiration of the NITU on November 8, 2013, pursuant to § 1152.29(e)(2), its abandonment authorization in Docket No. AB 1065X expired. (ISW Reply 4-5, Oct. 15, 2019.) As a result, ISW states that the Lines remain within the Board's jurisdiction, and it retains a common carrier obligation to provide service on the Lines. (*Id.* at 5.) According to ISW, if the Landowners wish to remove the Lines from the Board's jurisdiction, they must file an application for adverse abandonment under 49 U.S.C. § 10903 and 49 C.F.R. part 1152, which, if filed, ISW intends to "vigorously oppose." (*Id.* at 6-7.)

On November 1, 2019, the Landowners supplemented their declaratory order request with a copy of a motion plaintiffs had filed in Butler v. United States, one of the cases pending before the Court of Federal Claims related to the Lines, requesting that the court refer the issue of adverse abandonment to the Board. In that motion, the plaintiffs in Butler explain that they initially filed a petition and motion for adverse abandonment with the Board, but they instead filed the motion for declaratory order to avoid paying a \$27,000 filing fee. (Landowners Suppl. 1 & 4, Nov. 1, 2019.) On November 12, 2019, ISW filed a response objecting that the Landowners' supplemental filing was an impermissible reply to ISW's October 15, 2019 reply in the Board's proceeding that should be stricken. (ISW Reply 1, Nov. 12, 2019.)

On November 21, 2019, the Landowners filed another supplement, in which they include a copy of a reply filed by the Butler plaintiffs in the Court of Federal Claims in further support of the motion requesting referral of the issue of adverse abandonment to the Board. (Landowners Suppl. 2 & Ex. A, Nov. 12, 2019.) On December 2, 2019, ISW filed a response, arguing that the second supplemental filing should also be stricken as another unauthorized reply to ISW's October 15, 2019 reply in the Board's proceeding. (ISW Reply 1, Dec. 2, 2019.)

Finally, in the Butler case before the Court of Federal Claims, in an order issued December 10, 2019, the court for a second time denied, without prejudice, the Butler plaintiffs' motion to refer the issue of adverse abandonment to the Board. Butler v. United States, No. 17-667L (Fed. Cl. Dec. 10, 2019). In an earlier ruling, the court noted that the "proper approach" for plaintiffs would be to independently initiate an adverse abandonment proceeding before the Board if they seek to remove the Board's jurisdiction. Butler, No. 17-667L (Fed. Cl. Aug. 27, 2019).

#### PRELIMINARY MATTER

Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted. However, because the Landowners' November 1, 2019 and November 21, 2019 supplemental filings simply provide copies of their court filings in Butler involving the Lines, the Board will accept these filings in the interest of a complete record. Inclusion of these filings is not prejudicial, as they do not form the basis of this decision, and they help provide context to the other filings before the Board. Therefore, the Board will deny ISW's requests to strike the Landowners' November 1, 2019 and November 21, 2019 filings from the record.

## DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675, 675 (1989).

The Board’s authority over the abandonment of rail lines that are part of the interstate rail network is exclusive and plenary. See 49 U.S.C. §§ 10501(b)(2), 10502, 10903; see also Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 320 (“[T]he authority of the [agency] to regulate abandonments is exclusive.”) To abandon a line of railroad, a railroad must seek advance authority from the Board under 49 U.S.C. § 10903, or an exemption under 49 U.S.C. § 10502. See 49 C.F.R. § 1152.50 (streamlined exemption process under 49 U.S.C. § 10502). Abandonment authority is permissive authority that the railroad may decide not to exercise, in which case the line remains part of the national rail network and within the Board’s jurisdiction. See, e.g., Honey Creek R.R.—Pet. for Declaratory Order, FD 34869 et al., slip op. at 4 (STB served June 4, 2008); see also Hayfield N. R.R. v. Chi. & N.W. Transp. Co., 467 U.S. 622, 633-34 (1984); Birt v. STB, 90 F.3d 580, 589 (D.C. Cir. 1996).

For a line of railroad to be abandoned, a railroad must exercise, or “consummate,” its abandonment authority. The Board cannot force a railroad to consummate the abandonment authority granted; the decision to consummate (or not) remains with the railroad. Honey Creek R.R., FD 34869 et al., slip op. at 4-5; see also Baros v. Tex. Mexican Ry., 400 F.3d 228, 236 (5th Cir. 2005) (noting that the consummation notice requirement “implicitly recognizes that the decision actually to abandon a line rests with the carrier.”).

Under longstanding regulations adopted in 1996,<sup>4</sup> the filing of a timely “notice of consummation” with the Board provides the only legally cognizable way for a railroad to signify that it has exercised the authority granted and intends that the property be removed from the interstate rail network. See Honey Creek R.R., FD 34869 et al., slip op. at 4-5; see also Zorzi—Pet. for Declaratory Order, FD 36016, slip op. at 4-5 (STB served Jan. 31, 2017); Aban. & Discontinuance of Rail Lines & Rail Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894, 943 (1996) (adopting the regulations codified at 49 C.F.R. § 1152.29(e)(2)). A notice of consummation is deemed conclusive on the issue of consummation if there are no legal or regulatory barriers to consummation (such as an interim trail use/rail banking condition). See 49 C.F.R. § 1152.29(e)(2). A railroad has at least one year after the service date of the decision permitting abandonment to decide whether to exercise abandonment authority. See id. If a barrier to consummation exists at the end of the one-year period, the deadline extends until 60 days after

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<sup>4</sup> Prior to 1996, in order to determine if a railroad had consummated an abandonment, the agency employed a case-by-case evaluation of all the facts and circumstances to determine whether a railroad showed a clear intention to remove the line from the national rail network and relinquish the property interest, or if instead the record indicated an intent to preserve the right-of-way for future reactivation of rail service. See, e.g., Becker v. STB, 132 F.3d 60, 62 (D.C. Cir. 1997).

satisfaction, expiration, or removal of the barrier. Id. If consummation has not been effected by the railroad's filing a notice of consummation by that date, the authority to abandon will automatically expire. Id. Once abandonment authority expires, a new proceeding would have to be instituted if the railroad wants to abandon the line. Id.; see also Honey Creek R.R., FD 34869 et al., slip op. at 4. In the meantime, the line remains an active line of railroad subject to the Board's jurisdiction, and the railroad continues to have a common carrier obligation to provide transportation or service on reasonable request. See Zorzi, FD 36016, slip op. at 5; Honey Creek R.R., FD 34869 et al., slip op. at 5; see also 49 U.S.C. § 11101 (common carrier obligation).

The Board will deny the Landowners' motion for declaratory order. The Board cannot compel ISW to consummate the abandonment authority that it previously received in Docket No. AB 1065X. Abandonment authority is permissive, ISW had the right to decide whether to exercise it, and the authority has since expired. See Honey Creek R.R., FD 34869 et al., slip op. at 4; see also Baros, 400 F.3d at 236; V & S Ry.—Discontinuance Exemption—in Pueblo, Crowley, Kiowa, & Otero Ctys., Colo., AB 603 (Sub-No. 4X), slip op. at 2 (STB served May 6, 2016) (stating that because carriers are not compelled to abandon lines, the Board normally grants a carrier's request to withdraw a notice of exemption for abandonment authority) (citing Almono LP—Aban. Exemption—in Allegheny Cty., Pa., AB 842X (STB served Jan. 28, 2004)). ISW never exercised its authority to abandon the Lines because it did not file a timely notice of consummation. ISW's authority to abandon the Lines was subject to a NITU, which is a barrier to consummation. The NITU negotiating period was extended for more than one year. No interim trail use/rail banking agreement was reached during the NITU negotiating period, and the NITU expired on November 8, 2013, so the deadline for ISW to file its notice of consummation became January 7, 2014 (60 days after the NITU expired). See 49 C.F.R. § 1152.29(e)(2).<sup>5</sup> Since ISW did not file a notice of consummation by the January 7, 2014 deadline, ISW's authority to abandon the Lines automatically expired. See 49 C.F.R. § 1152.29(e)(2). Therefore, the Lines remain within the Board's jurisdiction. See Zorzi, FD 36016, slip op. at 5; Honey Creek R.R., FD 34869 et al., slip op. at 5.

While the Landowners acknowledge that ISW did not file a notice of consummation, they nonetheless argue that the Lines have been de facto abandoned, pointing to ISW's cessation of service and ISW's removal of the rails and ties as evidence of ISW's intent to abandon the Lines. However, the Landowners' focus on ISW's actions and intent is misplaced. Since adopting the notice of consummation requirement, the filing of a notice of consummation provides the only legally cognizable way to consummate abandonment of a rail line subject to the Board's licensing requirements. See Honey Creek R.R., FD 34869 et al., slip op. at 5-7 (rejecting the argument that a carrier can de facto abandon a line by paving over part of it, removing a switch, or removing rail from it); see also Zorzi, FD 36016, slip op. at 5.

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<sup>5</sup> Although three salvage-related conditions were also imposed on ISW's authority to abandon the Lines, a salvage condition typically is not a regulatory barrier to the filing of a notice of consummation. See Consummation of Rail Line Abans. That Are Subject to Historic Pres. & Other Env'tl. Conditions, EP 678, slip op. at 4 (STB served Apr. 23, 2008).

Because ISW's authority to abandon the Lines has expired, if ISW wished to abandon the Lines, it would need to institute a new Board proceeding. See 49 C.F.R. § 1152.29(e)(2); see also Honey Creek R.R., FD 34869 et al., slip op. at 4. In the meantime, ISW retains a common carrier obligation to provide transportation or service upon reasonable request. The Landowners' possible remedy if they wish 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.<sup>6</sup> See Jackson Cty., Mo.—Acquis. & Operation Exemption—Union Pac. R.R., FD 35982, slip op. at 3 (STB served Nov. 7, 2019).

The Landowners cannot circumvent the adverse abandonment process through a motion for declaratory order or to show cause. Moreover, the Landowners' reliance on the 1981 Modern Handcraft decision for the proposition that the Lines have already been de facto abandoned is also misplaced. The Board has explained that, although the agency used the term "de facto abandonment" on occasion in the past, Board precedent is clear that a railroad cannot abandon a line of railroad without Board authority and that Modern Handcraft would today be considered an adverse abandonment case. Zorzi, FD 36016, slip op. at 5 & 5 n.6 (citing Modern Handcraft, Inc., 363 I.C.C. at 969 (granting two abandonment applications filed by noncarriers, over the objection of the railroad that owned the right-of-way)).<sup>7</sup> Therefore, as noted above, if the Landowners here wish to try to obtain an abandonment authorization for the Lines over ISW's objection, the proper course is to file an application for adverse abandonment under 49 U.S.C. § 10903 and the regulations at 49 C.F.R. part 1152.<sup>8</sup>

For the foregoing reasons, the Board will deny the Landowners' motion for declaratory order and request for a show cause order.

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<sup>6</sup> The Board can waive otherwise applicable requirements for adverse abandonment application proceedings, upon request, if it finds that the requirements are not needed in a particular case. See, e.g., Alloy Prop. Co.—Adverse Aban.—Chi. Terminal R.R. in Chi., Ill., AB 1258, slip op. at 2 (STB served Aug. 16, 2017).

<sup>7</sup> Indeed, Landowners themselves cite to CSX Corp.—Adverse Abandonment Application—Canadian National Railway, AB 31 (Sub-No. 38) (STB served Feb. 1, 2002), and Chelsea Property Owners—Abandonment—Portion of the Consolidated Rail Corp.'s 30th St. Secondary Track in New York City, N.Y., 8 I.C.C.2d 773 (1992), (Landowners Mot. 10-11), both of which commenced with applications for adverse abandonment authority.

<sup>8</sup> The Landowners here, like other property owners in other similar matters, mistakenly suggest that granting an adverse abandonment should be a simple matter whenever a rail line has been out of service for a period of time. But, in fact, adverse abandonments are typically complex proceedings; in deciding whether to grant an application for abandonment under 49 U.S.C. § 10903(d), the Board, after providing for public input and after conducting statutorily-required environmental and historic reviews, considers whether there is a present or future need for rail service over the line and whether that need is outweighed by other interests. See, e.g., Port of Benton—Adverse Discontinuance of Rail Serv.—Tri-City R.R., AB 1270, slip op. at 4-5 (STB served Oct. 31, 2019).

It is ordered:

1. This proceeding, formerly docketed as AB 1065X, is re-docketed as AB 1065 (Sub-No. 1X).
2. ISW's requests to strike from the record the Landowners' November 1, 2019 and November 21, 2019 filings are denied.
3. The Landowners' September 11, 2019 motion is denied.
4. This decision is effective on its service date.

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