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Office of Proceedings

November 5, 2012

Part of

Public Record

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November 5, 2012

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: *Rail Switching Services, Inc. – Operation Exemption – Line Of Pemiscot County
Port Authority In Pemiscot County, Missouri, FD 35685*

*Pioneer Railcorp – Continuation In Control Exemption - Rail Switching Services,
Inc., FD 35686*

Dear Ms. Brown:

Attached hereto is the "Reply Of Pioneer Railcorp And Rail Switching Services, Inc." to the "Petition To Reject Exemptions" filed by the Pemiscot County Port Authority in the above captioned proceedings. If there are any questions about this reply, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

Enclosures

cc: J. Michael Carr
Hon. Charles "Chip" Nottingham
Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

Docket No. FD 35685

**RAIL SWITCHING SERVICES, INC.
– OPERATION EXEMPTION –
LINE OF PEMISCOT COUNTY PORT AUTHORITY
IN PEMISCOT COUNTY, MISSOURI**

DOCKET NO. FD 35686

**PIONEER RAILCORP
– CONTINUATION IN CONTROL EXEMPTION –
RAIL SWITCHING SERVICES, INC.**

REPLY OF PIONEER RAILCORP AND RAIL SWITCHING SERVICES, INC.

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November 5, 2012

**Attorneys for Pioneer Railcorp and Rail
Switching Services, Inc.**

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

Docket No. FD 35685

**RAIL SWITCHING SERVICES, INC.
– OPERATION EXEMPTION –
LINE OF PEMISCOT COUNTY PORT AUTHORITY
IN PEMISCOT COUNTY, MISSOURI**

DOCKET NO. FD 35686

**PIONEER RAILCORP
– CONTINUATION IN CONTROL EXEMPTION –
RAIL SWITCHING SERVICES, INC.**

REPLY OF PIONEER RAILCORP AND RAIL SWITCHING SERVICES, INC.

On October 15, 2012, Rail Switching Services, Inc. (“RSS”), at that time a wholly-owned non-common carrier subsidiary of Pioneer Railcorp (“Pioneer”), filed a notice of exemption (“Notice”) under 49 CFR Part 1150 to operate as a rail common carrier over a line of railroad owned by the Pemiscot County Port Authority (“PCPA”). Concurrent with the Notice, Pioneer, a non-carrier holding company that owns several shortlines subject to the jurisdiction of the Surface Transportation Board (“STB” or “Board”), filed a notice of exemption (“Control Notice”) pursuant to 49 CFR Part 1180 to continue in control of RSS once RSS became a carrier pursuant to the Notice.¹ On October 26, 2012, PCPA filed a “Petition To Reject Exemptions” (“Petition”)

¹ Collectively, the Notice and the Control Notice are referred to as the “Notices.”

requesting that both Notices be rejected before they become effective. Pioneer and RSS hereby reply to the Petition, and request the Director to deny the Petition.

SUMMARY OF ARGUMENT

PCPA requests that the Board² reject the Notices on three grounds: (1) the matter is unsuited for the notice of exemption process because it is allegedly complex and controversial; (2) the Notices were false and misleading, ostensibly because RSS does not have an agreement with PCPA; and (3) as a contract operator on PCPA's STB-regulated rail line, RSS is not required to obtain STB common carrier authority. None of PCPA's claims provides a basis for the Director to "reject" the Notices.

The matter is neither controversial nor complex. PCPA is the only party objecting to the Notices. No shipper, community, environmental group, land use group, local or state government, or other railroad has opposed the Notices. In the absence of significant and substantial controversy and opposition or substantial complex issues of property or environmental law, this matter does not fit within Board precedent where a notice has been rejected. The Notices involve the routine invocation of the Board's class exemptions, and involve no unique or complex issues.

PCPA's second argument (regarding the alleged absence of a contract) likewise is not grounds to reject the Notices. There was nothing false or misleading about the Notices. There is in fact an existing and effective agreement between the parties, which was fully disclosed to the Board by RSS. What PCPA's argument boils down to is its belief that the contract between

² PCPA's request is directed at the Board, but it is the Director of the Office of Proceedings that has been delegated the authority to initially rule upon a petition to reject a notice of exemption. Saratoga and North Creek Railway, LLC – Operation Exemption – Tahawus Line, Docket No. FD 35559, 2012 STB LEXIS 188, *11 (STB served May 10, 2012). For ease of reference, unless specific to its context, this Reply will use the terms "Board," "STB" and "Director" interchangeably.

PCPA and RSS does not grant RSS the right to conduct common carrier operations subject to an STB licensing prerequisite. Yet, RSS had a good faith belief that the agreement not only allowed them to file for authority to operate, but, in fact, required it to do so.

If there is a dispute about the scope of RSS's contractual rights, then that is a matter for the courts to decide, not the Board. The Board does not involve itself in contractual disputes or interpretations. Furthermore, because the Board's authority is permissive only, allowing the Notices to take effect will not preclude PCPA from pursuing any contractual remedy. Rejecting the Notices, on the other hand, could result in delaying the provision of common carrier service to the shippers located on PCPA's rail line, and require RSS to return to the Board again for duplicate authority.

Likewise, STB precedent and the contract itself required RSS to obtain authority due to – (1) the nature of the changing traffic mix on the line; (2) the possibility that RSS would need to handle traffic over an STB-regulated line of railroad between BNSF and any shipper (and not just for MMT and not just for car storage); and (3) the fact that RSS is not PCPA's agent (PCPA doesn't even attempt to argue as such). If it had opted against seeking such authority, RSS could have itself been in violation of Board precedent and the ICC Termination Act of 1995.

ARGUMENT

I. THE APPROPRIATE STANDARD TO APPLY WHEN RULING UPON PCPA'S PETITION

The Board's standard for requests to reject, stay, or postpone opposed notices of exemptions is somewhat confusing and sometimes appears inconsistent. At times, when a class

exemption filing is opposed, the Board has – in the absence of the formal stay standards³ or clear evidence of false or misleading information – issued a “housekeeping” stay to postpone the effective date of the notice and allow the parties to file additional information.⁴ At other times, the Board has directed parties seeking to postpone the effective date of a notice to file a stay request subject to the standard stay criteria.⁵ Still at other times, the Board has granted a petition to reject a notice of exemption on the basis that the notice failed to comply with the Board’s regulations, contained false or misleading information, or was otherwise inappropriate for the notice of exemption process. But in these latter cases, the Board has most often acted after the notice has taken effect.⁶

³ Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)(“Holiday Tours”); Virginia Petroleum Jobbers Ass’n v. Fed. Power Comm’n, 259 F.2d 921, 925 (D.C. Cir. 1958).

⁴ Steelriver Infrastructure Partners LP – Control Exemption – Patriot Rail Corp., STB Docket No. FD 35622 (STB served May 25, 2012); BNSF Railway Company – Trackage Rights Exemption – Union Pacific Railroad Company; and Union Pac. R.R. – Abandonment Exemption – in LaFourche Parish, La., STB Docket No. AB-33 (Sub-No. 277X) (STB served Jan. 30, 2012). Whether the agency can lawfully impose such significant equitable relief through a housekeeping stay without complying with the usual stay analysis has never been tested in court.

⁵ See e.g. Portland And Western Railroad, Inc. – Trackage Rights Exemption – Union Pacific Railroad Company, STB Docket No. FD 34883 (STB served July 13, 2006). In a case somewhat similar to the issues at dispute here, the Board allowed the notice to become effective and refused to grant a stay petition. The Board noted that any issues could later be addressed in a petition to revoke. Raritan Central Railway, L.L.C. – Operation Exemption – Heller Industrial Parks, Inc., Docket No. FD 34514 (STB served June 25, 2004)(“Raritan”).

⁶ Utah Southern Railroad Company, LLC – Change In Operators Exemption – Iron Bull Railroad Company, LLC, STB Docket No. FD 35558 (STB served Sept. 21, 2012)(“Utah Southern”)(rejecting a notice filed years earlier because the notice contained deliberately false and misleading information); and Riverview Trenton R.R. – Acquisition & Operation Exemption – Crown Enterprise, STB Docket No. FD 33980 (STB served Feb. 15, 2002)(“Riverview Trenton”)(revoking a class exemption after the effective date because the transaction attracted substantial controversy and opposition, and because the notice would serve to convert non-common carrier trackage into a line of railroad subject to Board oversight – an element of the transaction that the Board considered unusual for the class exemption process).

Still, there are other lines of precedent where a petition to reject was filed before the effective date and the Director or the Board has granted such a petition, sometimes before and sometimes after the effective date. Such petitions were granted generally on the grounds that the transaction was so substantially complex and controversial that it should not be considered under the notice of exemption process, the notice was missing information required by the regulations, or it contained false and misleading information that was clear on its face. In such cases, the Board dispensed with a stay entirely.

Here, PCPA has not requested a housekeeping stay, nor should one be issued. Curiously enough, however, as this Reply was being drafted and was close to being filed, PCPA supplemented its Petition, requesting a stay under the Holiday Tours test. RSS and Pioneer will address PCPA's stay request in a separate reply, but at this stage, suffice it to say that PCPA has not and cannot satisfy the Holiday Tours test. If the Notices take effect, which they should, the prudent procedural course is for PCPA to present its issues (if it continues to believe it must) in the context of a petition to revoke.⁷

Nonetheless, here, PCPA seeks rejection before the effective date and on the basis that the matter involves "unusual, complex, controversial issues not suitable for handling under the 'class exemption' approval processes" (Petition at 2-3). It couples to this argument the additional claim that rejection of the Notices is appropriate because they are allegedly false and

⁷ RSS and Pioneer do not admit to any of PCPA's allegations. But even if they were true, the proper procedural course is to deal with such allegations through a petition to revoke or reject to be addressed after the effective date of the Notices. See, e.g., Raritan, Milwaukee Industrial Trade Center, LLC, d/b/a/ Milwaukee Terminal Railway – Acquisition and Operation Exemption – Line Owned By Milwaukee Industrial Trade Center, LLC d/b/a/ Milwaukee Terminal Railway, STB Docket No. FD 35133 (STB served June 16, 2010)(revoking exemption after it took effect for mis-use of process for non-rail purposes); Jefferson Terminal Railroad—Acquisition & Operation Exemption—Crown Enterprises, 5 S.T.B. 461 (2001)(revoking class exemption after effective date and requiring an application or petition for exemption); and Riverview Trenton.

misleading (due to the alleged lack of an agreement granting RSS common carrier rights). Even if the Director follows the more amorphous standards that PCPA seems to rely upon (and to expect the Board to employ here without reflection), PCPA has not met its burden on either front. The Petition should be denied.

II. PCPA HAS NOT MET ITS BURDEN TO PROVE THAT THE NOTICES SHOULD BE REJECTED BECAUSE THE SUBJECT TRANSACTION IS NEITHER COMPLEX NOR CONTROVERSIAL AND BECAUSE THERE IS NO MISLEADING OR FALSE INFORMATION

A. This Matter Is Neither Complex Nor Controversial

Setting aside the legality of whether the Board should reject a notice before its effective date⁸ – and the Board or the Director have only adopted this approach of late and only when a notice raised truly unusual, complex, or controversial issues—the Board should not follow that course here. The following review of the most recent cases employing this approach reveals that the facts of this case fall squarely outside of those precedents.

In Southern San Luis Valley Railroad, LLC – Acquisition And Operation Exemption – Iowa Pacific Holdings, LLC, Docket No. FD 35586, et al.; (STB served Feb. 10, 2012), the STB rejected two related notices of exemption before their effective date. But the Board rejected them because the transaction – (1) involved an attempt to obtain post-acquisition authority for line acquired some four years prior; and (2) involved prior ultra vires rail line transactions that the Board correctly reasoned gave rise to significant controversy and substantial factual and legal issues for the Board that needed to be resolved through the application or petition for exemption

⁸ If PCPA were to be allowed to file its petition to reject, supplement that petition without leave several days later, and if the Board were to elect, in turn, to rule on the supplemented petition before the Notices effective date, then RSS and Pioneer would be forced to respond without regard to their procedural rights to reply within the normal 20-day period. Such a turn of events would deprive RSS and Pioneer of their rights to undertake discovery and present information produced through discovery to the Board. Ruling on petitions to reject or revoke after the effective date allows parties to utilize fully their procedural due process rights.

process. The agency took the same approach in Saratoga and North Creek Railway, LLC – Operation Exemption – Tahawus Line, Docket No. FD 35558 (STB served Nov. 23, 2011)(notice rejected out of concern that the exemption-seeker was invoking STB authority as a subterfuge to permit the entity to provide intra-state passenger service – a tactic of understandable concern if true) and Saratoga and North Creek Railway, LLC – Operation Exemption – Tahawus Line, Docket No. FD 35559 (STB served May 14, 2012)(noting, in denying an opponent’s “appeal” that Director may reject notices that raise substantial controversy or substantial factual and legal issues – but finding that none existed)(collectively, “Saratoga”).

In this proceeding, there are no substantial controversial or complex factual or legal issues. Unlike in Saratoga, there is no question that RSS is seeking authority to conduct legitimate common carrier operations. Also unlike Saratoga, this matter has not generated substantial and extensive opposition – only PCPA intends to block the transaction based upon its interpretation of a contract that clearly grants RSS the right to provide railroad operations. RSS seeks authority to provide contract switching between shippers on the line and BNSF. No shippers, communities, environmental groups, land use groups, local or state governments, or other railroads have filed in opposition to RSS’s authority request.⁹ RSS is not trying to invoke the Board’s authority so as to assert federal preemption,¹⁰ nor is it involved in any pending legal dispute, aside from the PCPA Petition. As is discussed below, RSS is seeking authority under the good faith belief that, given the changing nature of its operations, STB precedent requires it to obtain authority.

⁹ See Saratoga, Jefferson Terminal and Riverview Trenton.

¹⁰ See U.S. Rail Corporation – Lease And Operation Exemption – Shannon G., A New Jersey Limited Liability Company, STB Docket No. FD 35042 (STB served Oct. 8, 2008).

The only issue here is a dispute between the parties regarding the scope of RSS's contract rights (another issue dealt with below). Even then, such a simple dispute does not rise to the level of "substantial," and it doesn't present issues that require "considerable scrutiny."¹¹ Instead, this case is similar to Ohio Valley Railroad Company – Acquisition And Operation Exemption – Harwood Properties, Inc., Docket No. FD 34486 (STB served Sept. 28, 2004 and Feb. 23, 2005)("Ohio Valley"). In that case, the track had previously been operated as switching/industrial track, much as RSS has previously done on PCPA's line. Ohio Valley Railroad ("OVR") sought to become a carrier and operate over the track as a common carrier. A connecting carrier, perceiving that the notice was a tactic driven by ulterior motives opposed OVR's request, and sought rejection and/or a stay of the notice of exemption. The Board denied those requests. The Board held that the notice was neither incomplete nor inaccurate nor false and misleading. The Board noted there was no community concern, no "substantial controversy," and that OVR was not required under the regulations to supply additional information for why it was seeking to operate as a common carrier when that had not been the case previously. Here also, there is no community concern, no "substantial controversy," and the Notices contain all required information. Although it is not required to do so, RSS will explain here why it believes it needs common carrier authority.

PCPA's attack on the Notices as raising complex or controversial issues warranting the use of a more involved STB proceeding is self-serving and, ultimately, illogical. The guiding principal behind the cases discussed in this section in which the Board granted a request for rejection was that Board determined the issues presented in the proceeding were better addressed

¹¹ Steelriver Infrastructure Partners LP, Steelriver Infrastructure Associates LLC, Steelriver Infrastructure Fund North America, LP And Patriot Funding LLC – Control Exemption – Patriot Rail Corp., et. al., Docket No. FD 35622 (STB served June 15, 2012)("Steelriver").

and resolved upon a more thoroughly-developed record. Those cases entailed the evaluation of additional evidence not required in notice of exemption proceedings, and they required the Board to make reasoned decisions based upon such additional information.

The only “complexity” or “controversy” here is PCPA’s assertion that RSS is exceeding its contractual rights by seeking to operate over PCPA’s rail lines as a rail common carrier. That is not a complexity or controversy that the STB can and should sort out. This is fundamentally a contractual dispute.¹² Either RSS has the contractual right and obligation to seek STB authority to operate on PCPA’s rail line or it does not, but that is for a court or a mediator to decide. If RSS has properly interpreted the contract, and properly sought STB authority to operate, then what would be the benefit of a prolonged Board proceeding? On the other hand, if PCPA is correct about the scope of the operating contract, then it has the right to do so under appropriate state law. PCPA should not lure the Board into wasting the agency’s time and resources on an illogical, dragged-out proceeding that hinges entirely upon rail operating contract interpretations that neither party is asking, or could ask, the Board to supply in the first place.

B. The Notices Do Not Contain False Or Misleading Information

Unable to prove that the Notices should be rejected under the “substantial controversy test,” PCPA attempts to argue that the Notices are “misleading” and thus should be rejected. The sole basis for this argument is that there is, allegedly, no “agreement” authorizing RSS to undertake common carrier operations. PCPA does not argue that the Notices were incomplete, nor could they. The Notices contained all of the required information. RSS hid nothing. Nor does PCPA argue that there is no relevant agreement between the parties, as both parties acknowledge an agreement exists. The dispute is over the scope of that agreement, which RSS

¹² In fact, Board intervention and interpretation of contract terms would be unprecedented and wholly inconsistent with agency decisions and policy.

understands permits it to seek and obtain the requisite STB authority to operate, while PCPA insists that it does not. This is a pure contractual dispute involving a difference of opinion regarding the terms of an agreement under which RSS is clearly entitled to conduct rail operations over PCPA's lines, and it is therefore a matter for a court or a mediator to decide, not the STB. Accordingly, because the Notices were complete and are not materially misleading, they should be upheld.¹³

Unlike the situations in Winamac,¹⁴ San Francisco Bay,¹⁵ or Utah Southern,¹⁶ PCPA cannot argue that there is no agreement, as clearly there is one. Nor can it argue that all of the facts were not disclosed. There is a fully valid agreement – the existence of which PCPA does not dispute – authorizing RSS to operate over PCPA's line. That agreement was disclosed to the Board and all relevant regulatory requirements were completed.

In RSS's opinion, there should be no dispute over the scope of the contract. The contract grants to RSS the right to provide shippers on the line with switching services to connect those shippers with the BNSF for line-haul service purposes. The RSS-PCPA relationship dates back

¹³ See New Hampshire Central Railroad, Inc. – Lease And Operation Exemption – Line Of The New Hampshire Department Of Transportation, Docket No. FD 35022, (STB served Dec. 1, 2007)(petition to reject denied because notice contained all information and was not misleading by not disclosing information not required by the regulations); Ohio Valley, slip op. at 3 (STB served Sept. 28, 2004)(regulations do not require a notice filer to explain why it has chosen to seek Board authority in a particular transaction or provide information other than that required by the regulations).

¹⁴ Winamac Southern Railway Company – Trackage Rights Exemption – A. & R. Line, Inc., Docket No. FD 35208 (STB served Jan. 9, 2009)(notice rejected because of substantial questions over whether there was an agreement between the parties).

¹⁵ San Francisco Bay Railroad-Mare Island – Operation Exemption – California Northern Railroad, Docket No. FD 35304, et al. (STB served Dec. 6, 2010)(notices rejected because notice-filer failed to disclose the proper track owners, and because some of the agreements to govern operations were still in the negotiation stage).

¹⁶ Utah Southern involved flat-out misrepresentations to the Board about which parties had valid authority and under which agreements. In that case, the notice-filer deliberately misled the Board. No such deliberate misrepresentations have occurred here nor are they alleged.

2008. The original 2008 contract merely provided RSS with the right to store out of service rail cars. In February of 2012, the parties replaced the 2008 contract with a new one. The new contract states that RSS is to “use” the line to operate as a “non-common carrier contract switcher” (§ 4 and § 7), but there are three other important caveats to this limitation. First, and most importantly, RSS has the “exclusive use of the line for all rail purposes” aside from PCPA’s right to conduct its own common carrier operations and individual shipper rights to provide their own switching. Second, although shippers may provide their own switching, shippers cannot affect a direct car exchange with BNSF. RSS was given the exclusive right to “retrieve from or deliver cars to the BNSF” (§ 4).¹⁷ Finally, the contract specifically provided that while the parties did not believe STB authority was required at that time, if STB authority was required, then RSS was to obtain that authority. (§ 7)

At the time the 2012 contract was signed, neither party thought the contract required STB authority. Both parties mistakenly assumed that the PCPA line was not a common carrier rail line, but rather a private line track not subject to the Board’s jurisdiction. Furthermore, until recently, even if STB authority was required, there was no need to obtain that authority because there were no active shippers on the line. RSS was simply continuing to provide car storage services, which both parties agreed did not require STB authority.

¹⁷ BNSF, the only carrier connecting to PCPA’s rail lines, has no STB authority to operate over the PCPA line (which is a common carrier line subject to the Board’s jurisdiction) to serve directly new customers located there, and thus BNSF has no license to “invade new territory.” As it is, the shippers located on PCPA’s lines lack the right to “retrieve from or deliver cars to the BNSF.” Only RSS is entitled to provide service between PCPA line shippers and BNSF. Likewise, PCPA has not initiated common carrier operations as an intermediate carrier linking its customers with BNSF. Accordingly, the only entity authorized via contract to provide rail service over the line to connect shippers with BNSF is RSS. As the only carrier with the right to provide service to/from the shippers and BNSF, whether as a contractor for PCPA or in its own right, RSS must obtain STB authority to conduct those operations. See Section IV.

The circumstances changed when RSS learned about the plans of Marquis-Missouri Terminal LLC ("MMT"). RSS learned that MMT desired to receive unit trains of liquid fuels originating in North Dakota and unloaded at the Port of Pemiscot. In reviewing and preparing for that service, service that RSS thought it was going to provide, RSS discovered that PCPA's line was in fact built pursuant to STB authority. As such, RSS learned that PCPA was a common carrier and the line a common carrier line of railroad. This discovery is another reason that RSS has now concluded that it requires STB authority to operate.

PCPA intends for BNSF to be the originating and terminating carrier. However, PCPA ignores that MMT does not have the legal right to receive or deliver cars to/from BNSF. RSS is the only carrier with both the ability and contractual right to provide that service. MMT is unlikely to remain the only shipper to locate on the line. PCPA is actively pursuing other customers. As such, given the evolved nature of the operations on the line, STB authority is now required for RSS to conduct those operations, and, in full compliance with its contract, RSS has sought that authority.

Accordingly, it is undisputed that there is an agreement between the parties, and in RSS's opinion, RSS now needs STB authority to fulfill its contractual rights. RSS disclosed these intentions in the Notice. There was nothing in the Notice that was misleading or false. RSS discusses its contract rights here, not because it expects the Board to resolve the contract issues (that is a matter for the court or a mediator to decide), but rather to show that there is a good faith justification for RSS' decision to file its Notice. In light of its agreement with PCPA, the fact that an active shipper has located on the line, and that RSS will no longer be using the line strictly for car storage, RSS must provide service to MMT and any other shippers as provided in its agreement with PCPA. As such, RSS believes in good faith that it must obtain STB authority

to provide that service. While there may be a dispute between the parties as to the extent of RSS's contract rights, such a dispute does not rise to the level of a "substantial controversy" or "substantial complexity" nor were the Notices misleading so as to justify their rejection.

III. BECAUSE THE BOARD'S AUTHORITY IS PERMISSIVE, ALLOWING THE NOTICES TO TAKE EFFECT DOES NOT PREJUDICE PCPA

Board precedent is abundantly clear. Board authority is permissive in nature, and does not confer any legal, contractual rights on the parties.¹⁸ It takes two actions to effectuate something authorized by the Board – Board authority and a property or contractual right to undertake what the Board has authorized.¹⁹ Allowing the Notices to take effect, which the Board should do, does not confer upon RSS any more or less authority than it has under the contract. The Board's authority merely authorizes the exercise of whatever contractual rights RSS has. It does not compel a particular result.

In this sense, it is surprising that PCPA objects so strenuously to RSS's authority request. If PCPA is correct that RSS has no contractual right to operate over the line other than to store railcars, then PCPA can invoke its state law rights to enforce its contract. Indeed, assuming a

¹⁸ See e.g. Saratoga and North Creek Railway, LLC – Operation Exemption – Tahawus Line, STB Docket No. FD 35631, 2012 STB LEXIS 226, * 5 (STB served June 14, 2012)(Denying petition to reject, stating that "[t]he operating authority [granted] under the class exemption is permissive, and is not determinative of any underlying state law property claims . . . Thus, rejection of [the] notice is not necessary to address these issues.") and Gen. Ry., d/b/a Iowa N.W. R.R.—Exemption for Acquis. of R.R. Line—In Osceola & Dickinson Cntys., Iowa, STB Docket No. FD 34867, slip op. at 4 (STB served June 15, 2007)(state courts are the proper venue for resolving contract and property disputes; the Board's grant of authority "is permissive, not mandatory, and is not dispositive of ownership of the Line").

¹⁹ V&S Railway, LLC – Petition For Declaratory Order – Railroad Operations In Hutchinson, Kan., STB Docket No. FD 35459, 2012 STB LEXIS 259, *15 (STB served July 12, 2012)("V&S Railway, LLC")("Board (or ICC) authority alone does not guarantee that a rail common carrier has the right to acquire and operate a line of railroad. The Board's (or the ICC's) grant of authority is permissive only. To exercise that authority, the carrier must complete the acquisition by obtaining the necessary rights under state property and/or contract law to initiate the proposed rail operations on the line").

court agreed with PCPA, then RSS's authority to conduct common carrier operations would simply be null and void.²⁰ Upholding the Notices does not harm PCPA or undermine its contractual rights, and, for these reasons, there is no need for the Board to reject the Notices.

On the other hand, rejecting the Notices now could harm service to the shippers. If the Board rejects the Notices now but PCPA's contractual claims are deemed invalid, then RSS will not be able to provide service without first returning to the Board again to seek renewed authority. In such an event, service to shippers would be delayed while the renewed authority was sought. Perhaps this is PCPA's goal – to delay RSS's ability to provide service in hopes of working out some other arrangement, terminating the contract, or otherwise frustrating RSS's contractual rights. The Board should not facilitate PCPA's plans by rejecting the Notices.

Allowing the permissive Notices to take effect is not only fully consistent with Board precedent, but it also best serves the public interest, because it provides the fastest and quickest way to ensure that service to the shippers can begin as quickly as possible without undermining or eliminating PCPA's ability to present its contractual arguments in another forum. If RSS has correctly interpreted the contract, or if the parties resolve their differences via mediation or a settlement, and assuming the Notices were allowed to take effect, then RSS's service to shippers can begin immediately without any further delay. As such, it is in the best interest of the shipping public, and efficient from an STB administrative standpoint, to allow the Notices to take effect.

²⁰ It is not true, as PCPA stated in its supplement and stay petition, that PCPA would have to seek an adverse discontinuance. The authority, being permissive, would simply be null and void. Nevada Pacific Railroad Corporation – Lease And Operation Exemption – Rail Lines Of Pan Western Corporation, STB Docket No. FD 34958, 2007 STB LEXIS 122, *5 (STB served Mar. 15, 2007)(“A Board grant of authority is merely permissive. Once a Board exemption has become effective, it is up to the parties to determine whether to move forward with the underlying transaction . . . There is no need, however, to formally withdraw the authority that was never used”).

IV. DUE TO THE CHANGING NATURE OF OPERATIONS ON THE LINE, RSS WAS REQUIRED TO OBTAIN BOARD AUTHORITY

PCPA's final argument seems to be that RSS does not need Board authority to conduct contract operations. PCPA is wrong. If RSS were operating over private track and was merely authorized via the contract to move cars for storage over that track, PCPA's would be correct.²¹ That is precisely what the 2008 contract provided for, and why that contract never gave rise to an STB filing. The 2012 contract contained some significant new contractual language, especially the exclusivity language under which RSS is designated as the sole carrier authorized to "retrieve from or deliver cars to the BNSF," but RSS believed at the time that the line was private track. Also, because at the time the 2012 contract was signed there were no active shippers on the line, there was no need to obtain STB authority (this belief also accounts for the language in the contract regarding the desire of the parties to treat the contract as outside of the STB's jurisdiction).

The underlying facts have changed. RSS discovered the line is not private track, but is a common carrier line of railroad subject to the STB's jurisdiction – having been constructed pursuant to STB authority. Even at that point, there was still no need to file for authority because there were no active shippers on the line. At that point, RSS was conducting car storage only, albeit over what was understood to be common carrier track. With no active shippers, RSS did not have to be concerned about an unauthorized "holding out" to provide a service to shippers for compensation. See V&S Railway, LLC, slip op. at 10 and the cases cited therein.

Once it became clear, however, that PCPA was actively marketing the line, shippers were being encouraged to locate on the line and to use PCPA's line, and MMT was intending to do precisely that by receiving and delivering cars to/from BNSF, RSS determined that it must now

²¹ V&S Railway, LLC, slip op. at 8-10.

file for STB authority. RSS understood that it – (1) would be, under the contract terms, switching cars between BNSF and MMT (and still intends to do so for MMT and for any other shippers);²² (2) would be holding itself as a carrier for hire (i.e. providing switching services on behalf of PCPA – a common carrier owning an STB-regulated line of railroad; and (3) would be receiving compensation for the rail services it provided to shippers located on PCPA’s lines now and in the future. RSS still intends to do this notwithstanding the ultimate determination with respect to whether MMT must use RSS’s services or not. Under these circumstances, RSS requires STB authority.²³

Furthermore, RSS requires STB authority even if it is merely a contract operator for PCPA. RSS is not acting as PCPA’s agent for any purposes whatsoever. The 2012 RSS-PCPA contract clearly does not form an agency relationship, nor does PCPA so argue. Instead, PCPA argues that contract operators that are not agents of a common carrier do not need independent Board authority to provide rails service to shippers. Prior to 2007, PCPA might have been correct, as there was some confusion on this point. But, after the issuance of Kansas City Transportation Company LLC – Lease And Assignment Of Lease Exemption – Kansas City

²² MMT, understandably, just wants to ship and receive cars to/from BNSF, and RSS wants to provide that service. In fact, RSS thought, under the plain language of the contract, that it would be the party to provide that service. Yet, unexplainably, PCPA told MMT it did not need to use RSS and gave MMT a contractual right to use the line in its own right – despite the exclusive language in the RSS/PCPA contract and the explicit language that only RSS can deliver cars to/from BNSF and other shippers. RSS believes PCPA had no legal right to grant MMT the right to use the line and then turn around and allow BNSF to then operate over the line, all in an effort to avoid RSS’s services. Again, these are matters for the court to decide, but the context is necessary to understand why RSS sought authority at this time.

²³ Ohio Valley; Kaw River Railroad, Inc. – Acquisition and Operation Exemption – The Kansas City Southern Railway Company, STB Docket No. FD 34509 (STB served May. 3, 2005); and Rock River Railroad, Inc. – Acquisition And Operation Exemption – Rail Lines Of Renew Energy, LLC, STB Docket No. FD 35016, et al. (STB served May 10, 2007).

Terminal Railway Company And Kaw River Railroad, Inc., STB Docket No. FD 34830 (STB served May 30, 2006 and May 23, 2007)(collectively, "KCT"), PCPA is clearly incorrect.

In KCT and its related cases, Kansas City Transportation Company ("KCTL"), a non-carrier, acquired via the notice of exemption process, authority to operate via lease or assignment 43.93 miles of track in the Kansas City Terminal District. KCTL, like PCPA, asserted that it would be the nominal common carrier on the line but that it would not provide rail service itself. Instead, KCTL proposed to contract with a third party to be the actual operator of the lines. KCTL selected Kaw River Railroad ("KRR") to be the contract operator. As PCPA argues here, KCTL and KRR took the position that KRR did not need Board authority as KCTL's contract operator. The Board rejected that argument and held that unless the contract operator is the legal agent of the common carrier, such a contract operator requires independent Board authority. See id., (citing Assoc. Of P&C Longshoremen v. The Pitts. & Conneaut, 8 I.C.C. 2d 280 (1992)("P&C Dock") and Effingham RR Co. – Pet. For Declaratory Order, 2 S.T.B. 606, 609-610 (1997), aff'd sub nom. United Transportation Union v. STB, 183 F.3d 606 (7th Cir. 1999)("Effingham").

Here, RSS is not PCPA's agent. RSS does not intend to simply transport its own cars or undertake car storage. There are now active shippers that need to interchange cars to/from BNSF, and RSS is willing and able to provide that service in accordance with its contractual obligations. RSS will be holding itself out as providing that service, i.e. switching cars between BNSF and shippers who are already located on the line or will locate on the line, and it will be compensated for that service. RSS is PCPA's exclusive contract switching operator for the line for all rail purposes, and the line represents RSS's entire line of railroad. Under the precedents set forth in KCT, P&C Dock, and Effingham, once active shippers located on the line and the

nature of RSS's services changed, RSS was required to obtain STB authority for its proposed operations, notwithstanding any language in the contract to the contrary.

CONCLUSION

PCPA's petition to reject the Notices should be denied on several grounds. PCPA has not met the high burden to justify rejection of a notice before it takes effect. The class exemption process was designed to quickly provide parties with permissive regulatory authority, removing undue regulatory burdens. The remedies for any violations of that process are to either file a stay request, (which PCPA has only recently done), or to file a petition to reject and/or revoke, which, after affording the parties their due process rights, including discovery if necessary, the Board would rule upon the request as an after-the-fact remedy. Here, PCPA seeks a remedy that provides little time for RSS and Pioneer to respond, especially given that PCPA has since "supplemented" its filing, thus requiring further response. Nonetheless, RSS and Pioneer have responded as quickly and as thoroughly as possible in a very short time frame.

Even assuming PCPA's petition is procedurally correct, PCPA has not shown, under well established ICC and STB precedent, that the petition to reject should be granted. The subject transaction is neither complex nor controversial. There are no third parties opposing RSS's request for authority, and there are no factual or legal questions of a complex nature. The Notices contained all of the relevant information and included a copy of the contract, which both parties acknowledge exists. At most, the matter involves a difference of opinion regarding the terms of that contract, but such matters are for the courts to resolve, not the STB. There is no harm to PCPA or the public interest by granting the requested permissive authorities, and indeed, the shippers could be harmed if the Notices were rejected, due to delay and regulatory confusion.

Finally, because there is now an active shipper located on the line, and more are expected, such shippers will need to interchange cars to/from BNSF. RSS has the contractual authority to provide that service, will hold itself out as providing that service, and will seek compensation for providing that service. As such, under well-established Board precedent, RSS needs regulatory authority to do so, even if RSS is merely acting as a contract carrier to PCPA. For all of these reasons, PCPA's Petition should be denied.

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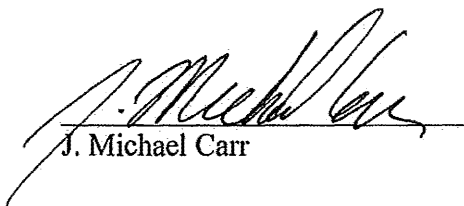
Attorneys for Pioneer Railcorp and
Rail Switching Services, Inc

November 5, 2012

VERIFICATION

STATE OF ILLINOIS)
) ss.
COUNTY OF PEORIA)

I, J. Michael Carr, being duly sworn and deposed, hereby say that I am President, Chief Executive Officer of Pioneer Railcorp and Rail Switching Services, Inc., and that I have read the foregoing Reply of Pioneer Railcorp and Rail Switching Services, Inc., know the contents thereof, and that the facts stated therein are true as stated to the best of my knowledge, information, and belief.


J. Michael Carr

Subscribed and sworn to before me this 5th day of November, 2012.


Notary Public

My Commission expires: 5-25-2015



CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Reply by mailing copies of the same to all parties via prepaid first class mail to all parties of record in these proceedings or by more expeditious means of delivery.

Dated at Washington, D.C. this 5th day of November, 2012.


William A. Mullins
Attorney for Pioneer Railcorp and
Rail Switching Services, Inc.