

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35685

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

**FD 35686
PIONEER RAILCORP
- CONTINUATION IN CONTROL EXEMPTION -
RAIL SWITCHING SERVICES, INC.**

**PEMISCOT COUNTY PORT AUTHORITY'S
SUPPLEMENT TO PETITION TO REJECT
AND PETITION TO STAY EXEMPTIONS**

Respectfully submitted,

John D. Heffner
Strasburger & Price, LLP
1700 K Street, N.W.
Suite 640
Washington, D.C. 20006
(202) 742-8607

Dated: November 1, 2012

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**I.
INTRODUCTION**

Pemiscot County Port Authority ("PCPA") is a political subdivision in the State of Missouri and the owner of a line of railroad licensed for construction by the Surface Transportation Board ("the Board"). It files this supplement to its previously submitted Petition to Reject and this Petition for Stay of the above-captioned exemption proceedings initiated by Pioneer Rail Corporation subsidiary Rail Switching Services, Inc. (collectively identified as "RSS"). PCPA requests that the Board either reject out of hand these two exemption notices or stay their effectiveness pending initiation of a proceeding.

II. BACKGROUND FACTS

Inasmuch as PCPA's previously filed Petition to Reject contains a detailed recitation of the pertinent facts, they will only be repeated to the extent necessary for the Board's understanding of this proceeding. PCPA originally sought and received authority¹ from the Board in 2003 to construct and own approximately 5 miles of new railroad ("the Line") extending from milepost 213.32 at the junction with BNSF Railway Company's ("BNSF's") mainline at Hayti to the end of the line at milepost 217.22 at Caruthersville, Pemiscot County, MO. In 2008 PCPA signed an initial agreement with RSS allowing it to store out of service rail cars on the Line. The parties continued that arrangement by entering into a new two year agreement dated Feb. 29, 2012, the Rail Line Operating Agreement ("the Agreement"), attached to its Petition to Reject. The Agreement specifically limits RSS to providing "non-common carrier contract switching service over said line." Nowhere does it grant RSS a right to provide common carrier railroad service.

On October 31, 2012, Board published and posted on its website two verified notices of exemption filed by RSS and its corporate parent on October 12 and 15, respectively. On October 26, 2012, just before Hurricane Sandy hit the East Coast closing the Federal Government for two business days, PCPA had filed

¹ Pemiscot County Port Authority--Construction Exemption--Pemiscot County, MO, FD 34117, STB served Aug. 26, 2003.

its Petition to Reject these two notices well within the 20-day response time provided under the Board's Rules of Practice. In view of the government closure, PCPA surmises that the Board did not have an opportunity to consider its Petition before publishing and posting the RSS notices.

III. RSS'S NOTICES SHOULD BE REJECTED

Upon review of the operation exemption notice served in FD 35685, PCPA noticed the statement,

“according to RSS, at least one customer has located on the Line and wishes to receive shipments from the BNSF interchange. RSS now seeks an operation exemption for authority to operate over the Line.”

Since the only customer currently located on the Line is Marquis Marine Terminals, LLC (“MMT”), PCPA surmises the customer reference in RSS' notice of exemption and the Board's notice must be to MMT. If indeed that is the case, the notice is patently false and must be rejected *ab initio*.

PCPA submits with this pleading a verified statement from MMT's counsel Donald Rayfield who refutes any notion that his company seeks any rail service from RSS. It does not need or want RSS' service. Inasmuch as BNSF Railway will deliver the cargo right to a siding on the Line where the contents of the tank cars will be pumped out, there is no rail service for RSS or any other short line rail carrier to perform for MMT.

Furthermore, PCPA does not want or need common carrier service from RSS at this time. PCPA's agreement with RSS is limited to car storage and any related switching services and PCPA is satisfied with that arrangement. To the extent that RSS believes that it has some sort of a contract right to perform common carrier service as a result of any contract ambiguity, that is a matter for resolution outside the Board's jurisdiction. Section 14 of the Agreement provides a specific mechanism for resolving contract interpretation questions.

There is ample Board precedent for rejecting a notice of exemption after it has been published. *See, e.g., Utah Southern Railroad Company, LLC-Change in Operators Exemption-Iron Bull Railroad Company, LLC*, FD 35558, slip op. at 4, STB served Sept. 21, 2012 (cited as *Utah Southern*, rejection decision issued 11 months after notice was published); *Winamac S. Ry.—Trackage Rights Exemption—A. & R. Line, Inc.*, FD 35208, slip op. at 2, STB served Jan. 9, 2009 (notice published on Dec. 24, 2008, rejection decision served Jan. 9, 2009); *ABC & D Recycling, Inc. Lease and Operation Exemption-A Line of Railroad in Ware, Mass*, FD 35397, STB served Jan. 20, 2011 (notice published Aug. 12, 2010, petition to reject filed Aug. 17, 2010, and rejection decision served Jan. 20, 2011); and *Saratoga and North Creek Railway, LLC-Operation Exemption-Tahawus Line*, FD 35559, STB served November 23, 2011 (notice published Nov. 10, letter seeking rejection filed Nov. 14, 2011, and decision rejecting exemption

served Nov. 23, 2011).² The fact is that the Board has rejected previously published notices of exemption, even months after publication, when opponents have shown that the notice contains false and misleading information, is controversial, or it is otherwise defective. The Board should do so here because RSS's notices imply that MMT has a need for common carrier railroad service that RSS can meet and RSS has an agreement with PCPA to provide common carrier railroad service over the Line. Neither is the case.

IV.
ALTERNATIVELY THE BOARD SHOULD
STAY THESE PROCEEDINGS

Should the Board believe that it cannot reject these notices before their effective date, it should stay their effectiveness pending initiation and resolution of a Board proceeding. In deciding whether or not to grant a stay, the Board applies the "*Holiday Tours*" standard customarily employed by the federal courts. *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958); and *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Under that test a party seeking a stay must show that (1) there is a strong likelihood that it will prevail on the merits of its challenge to the action sought to

² After the Board found that the applicant railroad had justified the need for its service, it invited the railroad to file a new notice of exemption which it promptly granted and denied further protestant requests for rejection or revocation.

be stayed; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed; and (4) the public interest supports the granting of the stay, cited in Railroad Salvage & Restoration, Inc. and G.F. Weideman International, Inc. – Petition for Investigation and Emergency Relief, Docket No. 42107, STB slip op. at 2-5, served June 30, 2008.

PCPA asserts that standard has been met here. First, as it relates in detail in its Petition to Reject, the Board would likely reject RSS's notices on three grounds. Most notably, the Board will reject as void *ab initio* a notice containing false or misleading information. Significantly, where a notice is misleading, it is void *ab initio* and will be rejected. U S Rail Corp.—Lease & Operation Exemption—Shannon G., FD 35042, slip op. at 3-4, STB served Oct. 8, 2008; and *San Francisco Bay Railroad*. As noted above, RSS's operation notice is misleading because it falsely suggests that MMT has a need for its service and that PCPA has agreed to grant it common carrier authority to run over the Line. Moreover, the Board has found on many occasions that an applicant's misrepresentation as to the lack of an agreement or its mischaracterization of an agreement covering its access rights to a rail line have been found to constitute a material misrepresentation rendering the exemption void *ab initio* and the basis for rejection or revocation. *San Francisco Bay Railroad, supra*, and *Utah Southern*, slip op. at 4, STB served Sept. 21, 2012 (where the Board again held that it would view as false and

misleading an incorrect representation as to the status (or lack thereof) of an agreement giving a railroad applicant any right to purchase or access a line and will reject any notice of exemption containing a false representation.

Additionally, the Board has ruled that the class exemption procedure is not appropriate for cases that involve unresolved, controversial, complicated, or nonroutine issues. Riverview Trenton Railroad Company — Acquisition and Operation Exemption — Crown Enterprises, Inc., FD 33980, STB served Feb. 15, 2002 (cited as *Riverview*) and Steel River Infrastructure Partners, LP-Control Exemption-Patriot Rail Corp, Et Al, FD 35622, slip op., cases cited at footnotes 4 and 5 at pages 2-3, STB served June 15, 2012. Such is the case here. The fact that RSS's notice involves a seldom made request for "contract carrier" authority makes it unusual by itself. This matter is controversial insofar as it may involve the conversion of RSS's existing private carriage into a full fledged common carrier service over the objection of a public agency [PCPA]. There are unresolved, complicated issues in terms of how RSS's service would affect BNSF's service and PCPA's future satisfaction of its common carrier service obligation. The case law suggests the reason for the Board's policy of requiring unusual, complicated, or controversial cases to be filed using an individual petition or a full application is that the tight deadlines associated with class exemption notices do not afford the agency sufficient time to obtain and analyze public

comment, develop a proper record, and issue a decision. *Riverview, supra*. Such is the case here.

Regarding the second and third criteria, PCPA will be adversely affected by a failure to grant this stay request. Allowing RSS access to the Line as a common carrier will have the practical impact of giving it at least the appearance of being PCPA's chosen common carrier in violation of PCPA's statutory obligation to select an operator pursuant to a Request for Proposal process. Should PCPA need to remove RSS as a common carrier operator, it would have to go through a difficult, time consuming, and expensive adverse discontinuance proceeding. It is possible that any conflicts between BNSF's operations over the Line and those of RSS might require assistance by either the Board, the Federal Railroad Administrative, or both. Conversely, RSS will suffer no harm as a result of granting a stay. The status quo that has existed since 2008 when PCPA first granted RSS access to the Line for car storage will continue. PCPA is satisfied with that arrangement and happy to continue with it until the end of the contact term in 2014.

Finally, the public interest warrants granting a stay. As the owner of the Line, landlord for MMT, and leading agency for industrial development for this part of Missouri, PCPA believes that it represents the public interest. Granting a

stay request will be consistent with establish Board precedent which by itself represents the public interest.

V.
CONCLUSION

The Pioneer/RSS notices raise more questions than they answer. They present issues that are unresolved, complicated, controversial, and nonroutine. Accordingly, the Pioneer/RSS exemption requests do not meet the Board's requirements for consideration as class exemption notices. The Board should reject or dismiss them out of hand. Should the Board deem otherwise, it should stay the effectiveness of the exemptions and initiate a full blown proceeding in order that it may have an adequate record upon which to render a proper decision.

Respectfully submitted,



John D. Heffner

Strasburger & Price, LLP
1700 K Street, N.W.
Suite 640
Washington, D.C. 20006
(202) 742-8607

Dated: November 1, 2012

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that I have sent a copy of Pemiscot County Port Authority's Supplement to Petition to Reject and Petition to Stay Exemptions to the following individuals by electronic mail and first class U.S. Mail, this 1st day of November 2012.

Daniel LaKemper, Esq.
Pioneer Rail Corporation
1318 South Johanson Road
Peoria, IL 61607

Charles Nottingham, Esquire
Williams Mullen
1666 K Street, N.W.
Suite 1200
Washington, DC 20006



John D. Heffner

**VERIFIED STATEMENT
OF DONALD R. RAYFIELD**

My name is Donald R. Rayfield. I am an attorney for Marquis Marine Terminal, LLC ("Marquis"), located at 11953 Prairie Industrial Parkway, Hennepin, Illinois. Marquis has constructed a facility near Hayti, Missouri, on its own property and on property leased from Pemiscot County Port Authority ("PCPA") for transferring crude oil coming by rail from the Bakken Oil Fields in North Dakota to barge for shipment down the Mississippi River. This traffic originates at locations served by BNSF Railway Company and moves to Marquis' facility in BNSF unit trains. BNSF bring these trains right to a siding located along PCPA's rail line where the fuel is pumped out into pipelines leading to waiting barges.

Marquis does not need the services of RSS to obtain rail service. BNSF will bring the trains right to PCPA's siding for unloading where the fuels will be piped the rest of the way. No additional carrier is required for this transportation. In fact, the only additional railroad-related work that might be required would be switching out the occasional bad-ordered rail car. Marquis' arrangements with BNSF and PCPA permit it to do that work and its crews are now FRA-qualified. Marquis fears that the interposition of an additional carrier between the siding and the BNSF mainline will merely increase its costs without any concomitant benefit

in service. In fact, RSS has requested the opportunity to provide services to Marquis which Marquis has declined. I am attaching to this statement an email between myself and RSS outside counsel Charles Nottingham declining RSS' offer of service.

Dated: November 1, 2012

Donald R. Rayfield

VERIFICATION

STATE OF ILLINOIS)
) ss
CITY OF PRINCETON)

Donald R. Rayfield, being duly sworn according to law, hereby deposes and states that he is holds the position of attorney for Marquis Marine Terminal, LLC, is authorized to make this Verification, has read the foregoing document, and knows the facts asserted therein are true an accurate as stated, to the best of his knowledge, information, and belief.

Donald R. Rayfield

Subscribed to and sworn to before me, a Notary Public, in and for the City of Princeton in the State of Illinois, this 1st day of November, 2012.

Diana K. Wallace
Notary Public

My commission expires:



Heffner, John D.

From: Don Rayfield [don@rayfieldlaw.com]
Sent: Wednesday, October 31, 2012 11:54 AM
To: Heffner, John D.
Subject: Fwd: Pioneer/RSSI

Donald R. Rayfield
Attorney at Law
720 S. Pleasant Street
Princeton, Illinois 61356
815-875-4474
don@rayfieldlaw.com

----- Forwarded message -----

From: Don Rayfield <don@rayfieldlaw.com>
Date: Fri, Oct 26, 2012 at 4:42 PM
Subject: Pioneer/RSSI
To: "Nottingham, Charles" <cnottingham@williamsmullen.com>
Cc: Mark Marquis <markmarquis@marquisenergy.com>, Norm Anderson
<normanderson@marquisenergy.com>, Dana Gustafson <danagustafson@marquismanage.com>

Chip,

Marquis does not need any services from Pioneer/RSSI at this time.

Thanks,

Donald R. Rayfield
Attorney at Law
720 S. Pleasant Street
Princeton, Illinois 61356
[815-875-4474](tel:815-875-4474)
don@rayfieldlaw.com

10/31/2012