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SERVICE DATE – LATE RELEASE APRIL 16, 2010

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE

Docket No. AB 1056X

PIONEER INDUSTRIAL RAILWAY CO.—DISCONTINUANCE OF SERVICE
EXEMPTION—LINE IN PEORIA COUNTY, ILL.

Docket No. AB 1066 (Sub-No. 1X)

CENTRAL ILLINOIS RAILROAD COMPANY—DISCONTINUANCE OF SERVICE
EXEMPTION—LINE IN PEORIA COUNTY, ILL.

Decided: April 16, 2010

By joint petition filed on December 29, 2009, Pioneer Industrial Railway Company (PIRY) and Central Illinois Railroad Company (CIRY), seek an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 for: (1) PIRY to discontinue service over 8.29 miles of rail line known as the Kellar Branch, between mileposts 1.71 and 10.0, located in and owned by the City of Peoria and the Village of Peoria Heights, Ill. (jointly, the Cities), and (2) CIRY to discontinue service over a 5.72-mile portion of the Kellar Branch, between mileposts 2.78 and 8.50. Petitioners also seek exemptions from the offer of financial assistance (OFA) provisions of 49 U.S.C. § 10904 and the public use provisions of 49 U.S.C. § 10905. Notice of the exemption was served and published in the Federal Register on January 15, 2010 (75 FR 2580-1).

Also on December 29, 2009, PIRY filed a related notice of exemption in Pioneer Industrial Railway Co.—Trackage Rights Exemption—Central Illinois Railroad Company, FD 35341, under 49 C.F.R. § 1180.2(d)(7) wherein PIRY sought to acquire from CIRY non-exclusive local trackage rights over approximately 4.81 miles of rail line in the City of Peoria as follows: (1) the southern segment of the Kellar Branch, between mileposts 1.71 and 2.78, (2) the northern segment of the Kellar Branch, between mileposts 8.50 and 10.0, and (3) the western connection, between milepost 71.5 to the end of track (a short distance west of University Avenue), and including 1,800 feet of connecting track linking the end of the western connection with the northern segment (collectively, the western connection).¹ Notice of the exemption was

¹ The western connection establishes a link between the northern portion of the Kellar Branch and a main line route of the Union Pacific Railroad Company (UP).

served on January 14, 2010, and published in the Federal Register on January 15, 2010 (75 FR 2592-3). The exemption became effective on January 28, 2010.

On February 18, 2010, the Cities filed comments and submitted a statement of willingness on behalf of The Pleasure Driveway and Park District of Peoria, Ill. (Peoria Park District or proponent) for the issuance of a notice of interim trail use (NITU) for the 5.72-mile portion of the Kellar Branch between mileposts 2.78 and 8.50 (the middle segment).

We are granting the exemptions subject to standard employee protective conditions and trail use conditions. We are also granting exemptions from 49 U.S.C. §§ 10904-5. The petitions filed in December and the agreements among the carriers, the shippers and the Cities that those petitions reflect, lay to rest a controversy over the future of the Kellar Branch that has persisted for several years. The Board is pleased to approve a resolution of this controversy that satisfies the interests of all affected parties.

BACKGROUND

PIRY was authorized to lease and operate the 8.29 miles of the Kellar Branch in Pioneer Industrial Railway Co.—Lease and Operation Exemption—Peoria, Peoria Heights & Western Railroad, FD 33549 (STB served Feb. 20, 1998). CIRY was authorized to operate over the Kellar Branch in Central Illinois Railroad Company—Operation Exemption—Rail Line of The City of Peoria and The Village of Peoria Heights in Peoria and Peoria Heights, Peoria County, Ill., FD 34518 (STB served July 28, 2004).²

In its petition, PIRY seeks to discontinue its lease operations over the entire 8.29-mile rail line and CIRY seeks to discontinue its operations over the 5.72-mile middle segment of the line. Petitioners state that the two shippers located on the line, O'Brien Steel Company (O'Brien) and Carver Lumber Company (Carver), will continue to receive rail service from CIRY, O'Brien at the south end of the line and Carver at the north end. Petitioners further state that the discontinuances will facilitate the plans of the Cities to convert a portion of the line, the middle segment, into a recreational trail.

Petitioners indicate that, following commencement of PIRY's local trackage rights operations, petitioners will continue to be able to provide service over the remaining portions of the Kellar Branch--the 1.07-mile southern segment between mileposts 1.71 and 2.78, and the 1.5-mile northern segment between mileposts 8.50 and 10.0 (collectively, the Kellar Remnants). CIRY will serve as the primary operator of the Kellar Remnants pursuant to lease arrangements with the City; PIRY, on the other hand, will relinquish its leasehold interest in the entire Kellar

² For an exhaustive discussion of the history and background of this matter, see City of Peoria and The Village of Peoria Heights, Ill.—Adverse Discontinuance—Pioneer Industrial Railway Company, AB 878 (STB served Nov. 19, 2007).

Branch in exchange for CIRY's grant of local trackage rights over the Kellar Remnants and the western connection in FD 35341, pursuant to an agreement among PIRY, CIRY and the Cities.

According to petitioners, shippers located along the northern segment (currently, Carver) will receive PIRY and CIRY service via the western connection, which provides for direct interchange with line-haul carrier UP. Shippers located along the southern segment (currently, O'Brien) will obtain access to line-haul service via petitioners' connection with Tazewell & Peoria Railroad, Inc., at the south end of the southern segment. Petitioners further state that CIRY's grant of local trackage rights will preserve PIRY's ability to provide competitive common carrier service to Carver, O'Brien, and any other shippers that may choose to locate on the remaining portions of the Kellar Branch. Both current shippers have filed letters stating that they do not object to the proposal.³

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10903, a rail line may not be abandoned or service discontinued without our prior approval. Under 49 U.S.C. § 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. § 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will expedite regulatory action and reduce regulatory barriers to exit, in accord with 49 U.S.C. §§ 10101(2) and (7). An exemption also will foster sound economic conditions and encourage efficient management by relieving petitioners of the costs of continuing to maintain and operate all or portions of the line, consistent with 49 U.S.C. §§ 10101(5) and (9). Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. The two remaining shippers on the line, Carver and O'Brien, will continue to receive direct rail service after the service discontinuances here and neither objects to the proposal. To ensure that the shippers are informed of our action, however, we will require petitioners to serve a copy of this decision on the shippers within 5 days of its service date and to certify to the Board that they have done so. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

³ Letters dated July 15, 2009 from O'Brien and Carver appended to petitioners' January 25, 2010 letter to the Board.

OFA's, Public Use, Trail Use

In the notice of exemption served and published in this proceeding on January 15, 2010, the Board provided an opportunity for the filing of offers of financial assistance (OFAs) under 49 U.S.C. § 10904 to subsidize continued rail service. It was also noted there, however, that petitioners were seeking an exemption from the OFA procedures. The record before us justifies granting such an exemption in the circumstances presented here.

We have granted exemptions from the OFA provisions of 49 U.S.C. § 10904 in discontinuance proceedings from time to time. See, e.g., Norfolk Southern Railway Company—Discontinuance Exemption—In Hudson County, N.J., et al., AB 290 (Sub-No. 212) (STB served Jan. 28, 2002). Because only discontinuance authority is sought here, Section 10904 provides that, a person may make an offer of financial assistance only to subsidize the line, and may offer to provide the subsidy for only one year. The one-year subsidy provision allows a shipper on the line who has been receiving rail service to retain it for 12 months while it makes other arrangements, thus providing a transition to trucking or some other alternative to rail service.

In this case, the record indicates that there are no shippers located on the middle segment and there have not been any shippers on that segment in the past several years. Nor is there evidence that any shippers desire to locate on that segment in the future. The planned recreational trail for the middle segment has been well publicized and is supported by all area governments, rail carriers, and shippers. In addition, the record here shows that the only other rail shippers on the remaining portions of the Kellar Branch will continue to receive direct rail service from the north and south, as appropriate. Moreover, no one has objected to granting this exemption request in response to the notice about it in the Federal Register. Based on the record before us, there does not seem to be anything to subsidize or anyone interested in subsidizing. Thus, in the particular circumstances here, we find that an exemption from the OFA provisions is appropriate.

The evidence of record also establishes that the proposed exemption from 49 U.S.C. § 10904 meets the criteria of 49 U.S.C. § 10502. Applying OFA provisions in this instance is not necessary to carry out the rail transportation policy. Allowing the discontinuance exemption to become effective expeditiously, without first being subject to these provisions, will minimize the need for Federal regulatory control over the rail transportation system, expedite the regulatory decision, and reduce regulatory barriers to exit, consistent with 49 U.S.C. §§ 10101(2) and (7). And it has already been determined that regulation is not necessary to protect shippers from an abuse of market power. Accordingly, we will exempt the proposed discontinuances from the OFA requirements of 49 U.S.C. § 10904.

Petitioners have also requested an exemption from the public use requirements of 49 U.S.C. § 10905. For the same reasons discussed above with respect to OFAs, we will grant an exemption here from 49 U.S.C. § 10905.

Citing Board precedent,⁴ the Cities argue that a trail use/rail banking condition is appropriate in the particular circumstances here where discontinuance authority is the only authority necessary to abandon a line. The line in question was fully abandoned when the Cities acquired it in 1984. See Peoria and Pekin Union Railway Company—Exemption from 49 U.S.C. § 10901, FD 30545 (ICC served Sept. 24, 1984). This fact, coupled with the fact that the Cities have never held themselves out as common carriers, means that only discontinuance authority is necessary here to remove agency jurisdiction.⁵ The Cities are correct that, in this situation, trail use requests may be accepted and considered. Consequently, we will consider the request by Peoria Park District for issuance of a NITU between mileposts 2.78 and 8.50 under the National Trails System Act, 16 U.S.C. § 1247(d) to negotiate with the Cities for acquisition of the right-of-way for use as a recreational trail.

Proponent also submitted a statement of willingness to assume financial responsibility for the management of; for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability); and for payment of any and all taxes that may be levied or assessed against, the right-of-way, as required at 49 C.F.R. § 1152.29. Proponent has also acknowledged that the use of the right-of-way for trail purposes is subject to possible future reactivation for rail service. The Cities have indicated their willingness to negotiate with proponent for interim trail use.

Because proponent's request complies with the requirements of 49 C.F.R. § 1152.29 and the Cities are willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement during the 180-day period. If the parties reach a mutually acceptable final agreement, no further Board action is necessary. If no agreement is reached within 180 days from the effective date of the discontinuances, the Cities may terminate the trails use process. See 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to any future use of the property for restoration of railroad operations.

⁴ Chillicothe-Brunswick Rail Maintenance Authority—Discontinuance Exemption—In Livingston, Linn, and Chariton Counties, Mo., AB 1001X, et al. (STB served Jan. 15, 2008); State of Vermont and Vermont Railway, Inc.—Discontinuance of Service Exemption in Chittenden County, Vt., AB 265 (Sub-No. 1X) (ICC served Feb. 7, 1986), and Vermont and Vt. Ry.—Discontinuance—Chittenden Co., Vt., 3 I.C.C.2d 903 (1987), aff'd Presault v. ICC, 853 F.2d 145 (2d Cir. 1988), aff'd 494 U.S. 1 (1990).

⁵ See, e.g., Central Illinois Railroad Company—Discontinuance of Service Exemption—In Peoria County, Ill., AB 1066X (STB served Nov. 21, 2005), citing Chicago, R.I. & P.R. Co., Abandonment, 363 I.C.C. 150 (1984); City of Peoria and the Village of Peoria Heights, Ill.—Adverse Discontinuance—Pioneer Industrial Railway Co., AB 878 (STB served Aug. 10, 2005).

LABOR PROTECTION

Under 49 U.S.C. § 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. § 10502, the Board exempts from the requirements of 49 U.S.C. §§ 10903-05 the above discussed discontinuances of service, subject to the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and subject to the issuance of a NITU between mileposts 2.78 and 8.50 permitting negotiations for interim trail use/rail banking as set forth below, for a period of 180 days commencing from the service date of this decision and notice (until October 13, 2010).
2. Petitioners are directed to serve a copy of this decision and notice on Carver and O'Brien within 5 days of the service date of this decision and to certify to the Board that they have done so.
3. The exemption will become effective on May 6, 2010, subject to the trail use/rail banking provisions discussed below.
4. If an interim trail use/rail banking agreement for the segment between mileposts 2.78 and 8.50 is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for payment of any and all taxes that may be levied or assessed against, the right-of-way.
5. Interim trail use/rail banking for the segment between mileposts 2.78 and 8.50 is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.
6. If interim trail use for the segment between mileposts 2.78 and 8.50 is implemented and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.
7. If an agreement for interim trail use/rail banking for the segment between mileposts 2.78 and 8.50 is reached by October 13, 2010, interim trail use may be implemented.

8. This decision and notice is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.