

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34518

CENTRAL ILLINOIS RAILROAD COMPANY

-OPERATION EXEMPTION-

RAIL LINE OF THE CITY OF PEORIA AND THE
VILLAGE OF PEORIA HEIGHTS

PETITION TO REJECT OR REVOKE
PETITION TO STAY

EXPEDITED HANDLING REQUESTED

PIONEER INDUSTRIAL RAILWAY CO.

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Dated: June 30, 2004.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34518

CENTRAL ILLINOIS RAILROAD COMPANY
-VERIFIED NOTICE OF EXEMPTION-
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Comes now PIONEER INDUSTRIAL RAILWAY CO. ("PIRY"), and respectfully requests that the Board reject or revoke, *ab initio*, the Verified Notice of Exemption filed by Central Illinois Railroad Company in Finance Docket No. 34518, and, in the alternative, to Stay the Exemption, pending the Board's full consideration of the pleadings in this proceeding.

On June 28, 2004, Central Illinois Railroad Company ("CIRY") filed a Verified Notice of Exemption with the Board seeking to "replace the current operator" of a line of railroad commonly known as the "Kellar Branch", extending from an interchange with the Peoria & Pekin Union Railway in Peoria, Illinois (E.P.S. 80 + 15; MP 1.71), through Peoria, and Peoria Heights, to its terminus at E.P.S. 516 + 21 (MP 10.00), in Peoria, Peoria County, Illinois ("the Line"). CIRY's Notice claims that the City of Peoria and the Village of Peoria Heights ("the Cities") own the Line (although the nature of their title is uncertain). The Notice also asserts, incorrectly, that "the operating agreement between the Cities" and PIRY expires on July 10, 2004. Finally, the Notice concedes that

“it will be necessary for the Cities to file an application for adverse discontinuance,” and that no such filing has been made.

In reality, it will be necessary for the Cities to file an adverse abandonment. PIRY’s operating agreement does not expire on July 10, 2004. PIRY’s agreement is for an indefinite period, described in the Agreement as “a *minimum* period of twenty (20) years unless and until terminated for cause as set forth above or by mutual consent [emphasis added]” (See Exhibit A, attached). PIRY is the sole authorized carrier on the Line (See FD 33549, served February 20, 1998). Under the Interstate Commerce Commission’s decision in Maine, DOT – Acq. Exemption, Me. Central R. Co., 81 I.C.C.2d 835 (1991), and the Board’s decision of just last week in City of Venice – Abandonment Exemption – in Venice, IL and St. Louis, MO, STB Docket No. AB-863X (Decided June 22, 2004), PIRY’s rights under its agreement with the Cities “are comparable to permanent easement interests,” See City of Venice (at page 4). PIRY, therefore, is the sole and primary carrier on the Line.

The Board should summarily reject the Notice on the grounds that (1) it does not describe a transaction that falls within the scope of 49 CFR §1150.41; (2) The Cities lack the ability to enter into any agreement creating another carrier where one exists; and (3) The Notice is materially false and misleading.

In the alternative, the effective date of CIRY’s exemption should be stayed, pursuant to 49 C.F.R. §1150.45(f), pending the Board’s establishing a procedural schedule in this proceeding. As set forth below, this Petition to Stay the Exemption satisfies each of the four standards used by the Board in determining the merits of a Stay Petition.

I. Background

The Line at issue in this proceeding was once part of the Chicago, Rock Island & Pacific Railroad system. It was lawfully abandoned in 1980 (See Chicago, Rock Island & Pacific Railroad Company, Debtor (William M. Gibbons, Trustee) – Abandonment – Entire System, AB-46 (Sub-No. 22), 363 I.C.C. 150, 171 (1980)).

The City of Peoria acquired its interest in the Line in 1984 (and the Village of Peoria Heights later acquired its interest from the City). No Filing was made with the Commission. Although the Cities have sometimes used the title “Peoria, Peoria Heights & Western Railroad” as their d/b/a when dealing with the railroad, no such entity was ever created, the Cities never provided any service or held themselves out as offering service. The Cities are not and have never been, a carrier.

Instead of seeking to become a carrier, the City of Peoria entered into an agreement with the Peoria & Pekin Union Railway Company (“P&PU”), an existing carrier, to provide service on the Line. The P&PU obtained Commission authority and provided service to the Line (See Peoria & Pekin Union Railway Company – Exemption From 49 U.S.C. §10901, Finance Docket No. 30545 (September 18, 1984)).

The Agreement between the P&PU and the City of Peoria (Exhibit A), like the lease agreement construed in City of Venice, provided P&PU “with full common carrier rights to provide rail service.” It gave P&PU, under the City of Venice and State of Maine line of decisions, an interest comparable to a permanent easement (just as most other railroads operate over easements originally obtained from various landowners). PIRY acquired P&PU’s permanent easement interest in the Line by assignment in 1998 (See Pioneer Industrial Railway Co. – Lease and Operation Exemption – Peoria, Peoria

Heights & Western Railroad, STB Finance Docket No. 33549 (served February 20, 1998).

PIRY is actively operating the Line, and has been for over six years. Its interest in the Line has not been terminated.

Despite these facts, CIRY's Verified Notice of Exemption claims that "An agreement has been reached for CIRY's operation of the Kellar Branch" with the City of Peoria and the Village of Peoria Heights. The Notice admits that PIRY is the authorized common carrier on the Line and that no proceeding is pending to terminate that authority. There is no allegation that PIRY is not fulfilling its common carrier obligations, and, in fact, it admits PIRY is actively operating the Line by later arguing for joint operation.

The Line at issue is approximately 8.29 miles long. It is single track, light rail, unsignaled, and traverses a primarily urban area with several major grade crossings, and also includes a lengthy, curving, steep grade up an Illinois River Bluff. The Line has an interchange at the south end (MP 1.71) with the Peoria & Pekin Union Railway (a terminal switch carrier).

II. The Verified Notice of Exemption is Defective on its Face and Should be Summarily Rejected or Revoked, *ab initio*.

A. THE NOTICE DOES NOT DESCRIBE A TRANSACTION SUBJECT TO 49 C.F.R. §1150.41.

CIRY filed its Notice pursuant to 49 C.F.R. §1150.41, which sets forth the procedures for certain exempt transactions under 49 U.S.C. §10902. The scope of the exemption covers the following types of transactions:

- (a) Acquisition by a Class III rail carrier of rail property that would be operated by a third party;
- (b) Operation by a Class III carrier of rail property acquired by a third party;
- (c) A change in operators on such a line; and
- (d) Acquisition of incidental trackage rights

CIRY's Notice claims to "replace the current operator," which, presumably would refer to subsection (c), but the Notice itself goes on to admit that it does not do that. CIRY's Notice does not replace one operator with another. Instead, it proposes to force the joint operation of the Line, and proposes doing so without offering any justification whatsoever, beyond the whim of the underlying landowners.

Indeed, 49 C.F.R. §1150.43, which describes the information to be contained in a Notice of Exemption, provides at Subsection (e)(1), that the Notice state "The name and address of the **railroad** transferring the subject property [emphasis added]". CIRY's Notice attempts to ignore this critical issue, by stating "The **owners** of the Kellar Branch who have agreed to CIRY's operation are the City of Peoriaand the Village of Peoria Heights... [emphasis added]". The use of "**owners**" in place of "**railroad**" is improper. A substitution of operators must be from one carrier to another. PIRY is the carrier. The Cities are not carriers. They are not a "**railroad**" within the meaning of the regulation..

B. THE CITIES LACK THE ABILITY TO ENTER INTO ANY AGREEMENT CREATING ANOTHER CARRIER WHERE ONE EXISTS.

The Board decided a proceeding with many similarities to this one, just last week. In City of Venice – Abandonment Exemption – In Venice, IL and St. Louis, MO, STB Docket No. AB-863X (Decided June 22, 2004), the Board held that a City that

acquired an abandoned rail line “is not a rail common,” but is merely a landowner. Just as landowners granted easements to railroads in the 1800’s, and those railroads became carriers, PIRY holds a similar interest and status.

The Cities, as mere landowners, at best, have no right to enter into any agreement that creates another carrier, where, as here, a primary, operating carrier already exists. Such a right has never been recognized, and would open a Pandora’s Box of potential problems.

As the Board is well aware, there were, as the railroads were built, hundreds of cities and towns that granted land to one railroad or another to go through their community. If every city and town that once upon a time granted a railroad operating rights over City property could, on a whim, grant operating rights to another carrier, and those carriers are allowed to begin operations without any scrutiny, seven days after filing a simple notice of exemption, Class I railroads could be faced with rogue operators suddenly appearing on high speed mainlines.

Of course, thousands of private landowners have granted railroads right of way easements as well. Do they have the right to grant multiple easements for the same right of way? The answer is obvious. No mere landowner can arbitrarily force joint operation of lines that have active, authorized carriers operating on them. The Board has procedures for joint operations, and §1150.41 is not such a procedure.

The Board should act promptly and decisively to protect the integrity of the regulatory scheme, and the national rail system.

C. THE NOTICE DOES NOT MEET THE REQUIREMENTS OF 49 C.F.R. §1150.41, AND IS MATERIALLY FALSE AND MISLEADING.

CIRY states that this “proceeding arises in the same context as Finance Docket No. 33587.” It does not. In that proceeding, the City of Rochelle was a common carrier. In this case, the Cities are not and never have been common carriers. The Cities acquired an interest in 1984 (again, of an undermined nature), in an abandoned rail line. They are, at best, mere landowners.

While in part misleading, the Notice taken in its totality, fails to meet the requirements of the Exemption. This transaction plainly is one that requires more scrutiny.

D. THE VERIFIED NOTICE OF EXEMPTION SATISFIES THE STANDARD FOR REJECTION.

The Notice, on its face, fails to describe a transaction that meets the requirements of the exemption. The Board’s predecessor granted a petition to reject a Notice of Exemption in West Side Rail Line Development Foundation, Inc. – Exemption – Purchase of a Portion of the West 30th Street Secondary Track in New York, NY, Finance Docket No. 30795 (Served April 10, 1986), not because of any false or misleading statement, but rather because the transaction failed to meet the standards of the class exemption.

The precedents are clear in this situation. The Notice should be similarly rejected.

III. The Four Criteria for Issuance of a Stay are Satisfied.

In the event the Board does not reject the Notice summarily, it should stay the effective date pursuant to 49 C.F.R. §1150.45(f).

The four standards to be considered in determining whether to grant a stay are:

- (1) that there is a strong likelihood that the movant will prevail on the merits;
- (2) that the movant will suffer irreparable harm in the absence of a stay;
- (3) that other interested parties will not be substantially harmed; and
- (4) that the public interest supports the granting of the stay.

See Bulkmatic Railroad Corporation – Acquisition and Operation Exemption – Bulkmatic Transport Company; Bulkmatic Railroad Corporation – Operation Exemption – Bulkmatic Transport Company, Finance Docket Nos. 34145 and 34179 (Served March 5, 2002).

This Petition meets those standards.

There is a strong likelihood that PIRY will prevail on the merits of this proceeding. Decisions of the Board, and its predecessor, are clear that the Cities are not carriers; that PIRY has the equivalent of a permanent easement; and that PIRY, as the sole and primary carrier, has a right and obligation to operate the Line unless and until its authority is extinguished through an abandonment proceeding.

PRY will suffer irreparable harm if the Board does not grant the stay. PIRY's relationship with its customers will be disrupted; PIRY's operations will be disrupted; and PIRY's assets and lawful business will be taken, without compensation.

Joint operation will create numerous problems, not just for PIRY, but for other carriers, shippers, car owners, and others, unless the Notice is stayed or rejected

CIRY asserts that "The Board need not be concerned about the safety of [joint] train operations," and holds up the **City of Rochelle, Illinois** situation as an example of joint operation. The reality is that joint operations at Rochelle did not work, for either of the carriers, or the customers, or the connecting railroads. The Union Pacific is still complaining about it, and told the Board in Keokuk Junction Railway Company – Feeder Railroad Development Application – Line of Toledo, Peoria & Western Rwy. Corp.

between LaHarpe and Hollis, Il., Finance Docket No. 34335 that the joint operation experience at Rochelle was “highly unsatisfactory.....required unnecessary, extra switching.....led to repeated disputes....” and that UP has “absolutely no desire to have a replayof our unhappy experience at Rochelle” (See Verified Statement of Warren C. Wilson at Page 50, Toledo, Peoria & Western Rwy. Corp. Comments in Opposition to Application Filed Under 49 C.F.R. §1151, Filed October 16, 2003 in FD 34335).

The kind of joint operation that would be forced upon PIRY in this instance, is not at all comparable to trackage rights. The fact is, joint operation of single-track, unsignaled branch lines is, and should remain, rare.

The Board should take no comfort in the fact that, thankfully, a head-on collision or other tragedy did not occur at Rochelle. The Rochelle line was short, flat, and generally unobstructed. The Kellar Branch is several miles long. It has a long, steep, and curving grade up the Illinois River Bluff; numerous obstructions to view; and several major public crossings. The Board should not ignore such risks when there is no benefit to be gained.

No interested party will be substantially harmed by granting the stay. Likewise, no cognizable harm will come to any other party because there is an authorized carrier providing service on the Line. There is no allegation that PIRY’s service is in any way deficient. CIRY service is neither necessary nor helpful.

The public interest also supports the granting of the stay. The public interest is served by promoting public safety, clarity of the regulatory process and maintaining the continuity of the rail system. Putting two competing carriers on an urban, single-track, unsignaled branch lines is inherently unsafe. The situation creates confusion, and poses

problems for connecting carriers, customers, and anyone who has to deal with the railroads. Nor is the public interest served by temporary creation of common carriers.

Since allowing this Notice to become effective would only create another carrier where an authorized carrier already provides service, it would be prudent to maintain the status quo until the Board has decided the legal issues surrounding this matter. This was the position the Board took in Union Pacific Railroad Company – Operation Exemption – In Yolo County, CA, Finance Docket No. 34252 (Served November 8, 2002), and PRY respectfully suggests the Board should follow that precedent in this case, if it determines that further proceedings are necessary.

IV. CONCLUSION

This Notice of Exemption is defective. It is an attempt to force joint operation of a Line that already has an active, authorized, common carrier, without any showing that the carrier it is not meeting its common carrier obligations. It is an abuse of the class exemption process that the Board should not permit.

The Notice should be rejected or revoked, or, at least, stayed, pending the Board's review of the matter.

Respectfully submitted,

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VERIFICATION

I, Scott Isonhart, Secretary of Pioneer Industrial Railway Co., verify under penalty of perjury that I have read the above and foregoing Petition to Reject/Revoke or Stay; that I have knowledge of the facts stated therein; and that those facts are true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file the foregoing document.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing instrument was served by electronic mail, and by sending it via UPS Next Day Air courier service, all charges paid, this 30th. Day of June, 2004, to the following:

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