

BEFORE THE SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-878

CITY OF PEORIA, ILLINOIS AND VILLAGE OF PEORIA HEIGHTS, ILLINOIS

ADVERSE DISCONTINUANCE
PIONEER INDUSTRIAL RAILWAY CO.

RESPONSE TO MOTION FOR REJECTION OF
NOTICE OF INTENT TO FILE
OFFER OF FINANCIAL ASSISTANANCE

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Dated: August 12, 2004.

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-878

ADVERSE ABANDONMENT OF A LINE OF RAILROAD
IN PEORIA COUNTY, ILLINOIS

RESPONSE TO MOTION FOR REJECTION OF
NOTICE OF INTENT TO FILE
OFFER OF FINANCIAL ASSISTANCE

On July 22, 2004, Pioneer Industrial Railway Co. (“PIRY”) filed a Notice of Intent to File an Offer of Financial Assistance to purchase the line of railroad formerly known as the “Kellar Branch,” in Peoria County, Illinois, that the purported property owners, the City of Peoria and the Village of Peoria Heights, Illinois, have told the Board they intend to abandon (the vast majority of) and then turn the right of way over to an entity that would convert it into a biking trail (See FD No. 34395).

On or about July 23, 2004 by the City of Peoria and the Village of Peoria Heights, Illinois (hereinafter the “City”), filed a Motion for Rejection of Notice of Intent to File Offer of Financial Assistance, arguing that “rail service over the line would be continued by another carrier following the proposed discontinuance.” Given the Petitioner’s stated intention to abandon almost all of the line, and the fact that the alleged other carrier is to provide such service only on an “interim” basis, this statement is misleading at best (See “Kellar Branch Interim Trackage Rights” Agreement attached to PIRY’s Supplement to Petition to Reject or Revoke the Operation Exemption of Central Illinois Railroad Company (FD No. 34518), filed on or about August 3, 2004).

The Board’s predecessor reviewed similar interim agreements in Southern Pacific Transportation Company – Abandonment Exemption – Los Angeles Co., CA, Docket No. AB-12

(Sub-No. 139X), 496 I.C.C.2d 495 (Decided May 6, 1992), and found the “agreements place so many restrictions on SP’s right to continue to provide freight service over the” lines that they “substantially reduce SP’s ability to carry out its common carrier obligation,” *Id* at 508. The Commission found that SP did not retain the sole common carrier obligation on the lines in question. Similarly, Central Illinois Railroad Company (“CIRY”) is not intended to be a bona fide common carrier. PIRY service is not being replaced, as the City contends.

Since it is clear that the City does not intend any carrier to provide continued service over the line, the proceedings cited in support of the Motion are clearly distinguishable from this one. The *Tacoma Eastern Ry. Co.*, *Jacksonville Port Authority*, and *Cheatham County Rail Authority* proceedings all involve common carrier entities that terminated the lease agreements of the carrier being discontinued. The City in this proceeding is not a carrier. It has not terminated PIRY’s lease agreement. The allegation that it expired is false. PIRY has what amounts to a permanent easement (See *City of Venice – Abandonment Exemption – In Venice, IL and St. Louis, MO*, STB Docket No. AB-863X, Decided June 22, 2004).

PIRY, therefore, is the primary carrier, just as Union Pacific was in *Salt Lake City Corporation – Adverse Abandonment – In Salt Lake City, UT*, STB Docket No. AB-33 (Sub-No. 183), Decided March 6, 2002. In that proceeding, the City of Salt Lake City attempted to terminate the Union Pacific’s franchise agreement. The Board rejected the City’s argument that its franchise agreement trumped the Interstate Commerce Act, holding that “the City could not enforce the Franchise Agreement requiring UP to remove its tracks from the Line, because such enforcement would be an attempt to regulate the abandonment of a line of railroad, which is exclusively within our jurisdiction.”

In the current proceeding, the City has not even attempted to terminate PIRY's agreement. It simply made the false statement that the agreement expired, and the misleading statement that CIRY is going to continue service.

The City's argument that entertaining an OFA would frustrate the Board's authorization of abandonment is deceptively appealing. In reality, all OFA's frustrate the Board's authorization of abandonment. That is the intent of the statute (See 1411 Corporation – Abandonment Exemption – In Lancaster Co., PA; Middletown & Hummelstown Railroad Company – Abandonment Exemption – In Lancaster Co., PA, STB Docket No. AB-581X and AB-529X, served September 6, 2001, in which the Board stated that it "is well settled that an OFA should take priority over a trail use proposal because of the strong Congressional intent to preserve rail service wherever possible").

It is also well settled that "the impediments to State and local government projects, although entitled to some weight, are nevertheless required to give way to our statutory duty to preserve and promote rail service, where the carrier has expressed a desire to continue operations and has taken steps to acquire traffic," Chelsea Property Owners – Aban. – The Consolidated Rail Corp., 8 I.C.C.2d 773, 779 (1992), and See also Wisconsin Dept. of Transportation- Abandonment Exemption ICC Finance Docket No. 31303 (not printed), served December 5, 1988; City of Colorado Springs and Metex Metropolitan Dist. – Petition for Declar. Order, ICC Finance Docket No. 31271 (not printed), served March 31, 1989; and New York Cross Harbor Railroad v. STB, 374 F.3d 1177 (D.C. Cir. 2004).

Finally, a decision to reject an OFA is premature at this time. No OFA has been made. PIRY merely filed a Notice of Intent to File an OFA. Allowing the process to go forward at this time does not prejudice the City, or any other entity, and might well produce relevant evidence upon which the

Board could base a future decision on whether to permit an OFA. With material facts in dispute, and the process in a very early stage, the Board lacks a sufficient basis to make a decision on this issue.

Conclusion

The Board's duty to preserve and promote rail service, and the intended purpose of the OFA process to provide for the continued operation of lines threatened with abandonment, make the rejection of an OFA an act the Board takes only reluctantly and very rarely. In this proceeding, such a finding would be premature, at best. The Board should reject the Motion and permit the process to go forward.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing instrument was served on August 12, 2004, by e-mail on:

Thomas F. McFarland
Mcfarland@aol.com

And by United States Mail, first class, postage fully pre-paid, on July 22, 2004 upon:

Thomas F. McFarland
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208 S. LaSalle St., Suite 1890
Chicago, Illinois 60604

Mr. Wayne Kessler
Peoria Plastics
9000 North University
Peoria, IL 61615

Burlington Northern & Santa Fe Rwy. Co.
2650 Lou Menk Drive, 2nd. Fl.
P.O. Box 96157
Fort Worth, Texas 76761

Canadian National Railway Company
935 de La Gauchetiere St. West
Montreal, QC H3B 2M9

Peoria & Pekin Union Railway Company
301 Wesley Road
Creve Coeur, IL 61610

Union Pacific Railroad Company
Union Pacific Bldg.
1416 Dodge Street
Omaha, NE 68179

Director, Bureau of Railroads
Illinois Department of Transportation
2300 South Dirksen Parkway
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Mr. Rob Happach
Carver Lumber Company
8700 North University
Peoria, IL 61615

Mr. J.P. O'Brien
O'Brien Steel Co.
1700 Northeast Adams
Peoria, IL 61603

Iowa Interstate Railroad Company
800 Webster Street
Iowa City, IA 52240

Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510-2191

Toledo, Peoria & Western Railway Corp.
1990 East Washington Street
East Peoria, IL 61611

Illinois & Midland Railroad, Inc.
1500 North Grand Ave.
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/s/ Daniel LaKemper