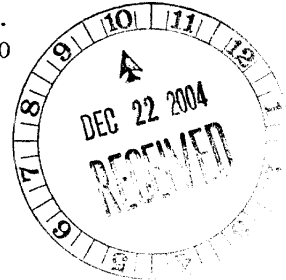


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December 21, 2004

By UPS overnight mail

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Finance Docket No. 34636, *Pioneer Industrial Railway Company* -- Petition For
Declaratory Order

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Reply In Opposition To Petition For
Declaratory Order, for filing with the Board in the above referenced matter.

ENTERED
Office of Proceedings

DEC 22 2004

Public Record

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for City of Peoria, Illinois
and Village of Peoria Heights, Illinois

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BEFORE THE
SURFACE TRANSPORTATION BOARD



PIONEER INDUSTRIAL RAILWAY)
COMPANY -- PETITION FOR) FINANCE DOCKET
DECLARATORY ORDER) NO. 34636

REPLY IN OPPOSITION TO PETITION
FOR DECLARATORY ORDER

CITY OF PEORIA, ILLINOIS
CITY HALL
419 Fulton Street
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DATE FILED: December 22, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

PIONEER INDUSTRIAL RAILWAY	)	
COMPANY -- PETITION FOR	)	FINANCE DOCKET
DECLARATORY ORDER	)	NO. 34636

**REPLY IN OPPOSITION TO PETITION
FOR DECLARATORY ORDER**

Pursuant to 49 C.F.R. § 1104.13(a), the CITY OF PEORIA, ILLINOIS ("City") and the VILLAGE OF PEORIA HEIGHTS, ILLINOIS ("Village"), referred to collectively as the Municipalities, hereby reply in opposition to a Petition for Declaratory Order ("Petition") filed by Pioneer Industrial Railway Company ("PIRY") on December 13, 2004.

STATEMENT OF POSITION

The Board should not exercise its discretion under 5 U.S.C. § 554 to institute a proceeding for issuance of a declaratory order where, as here, it is clear that the Board does not have jurisdiction to issue the order that is sought. The Petition seeks an order construing a term of an operating agreement between the Municipalities and PIRY as providing PIRY with the equivalent of a permanent easement to operate over the Kellar Branch. It is clear that the Board does not have jurisdiction to issue such an order. It is a settled principle of law that the Board does not have jurisdiction to construe the terms of private agreements, such as that operating agreement. Such jurisdiction resides in the courts.

BACKGROUND

The Kellar Branch is a 8.29-mile line of railroad located in Peoria and Peoria Heights, IL. It was formerly owned and operated by Chicago, Rock Island & Pacific Railroad Company (Rock

Island). It was abandoned by Rock Island following its bankruptcy in the 1970's.

The City of Peoria acquired the Kellar Branch from the Rock Island Trustee in 1984. On July 10, 1984, the City of Peoria entered into an agreement with Peoria and Pekin Union Railway Company (P&PU) for the latter to operate the Kellar Branch. Section 9(a) of that Agreement, headed "Term of Agreement", provides as follows:

This agreement shall remain in full force and effect for a minimum period of twenty (20) years unless and until terminated for cause as set forth above or by mutual consent.

P&PU obtained an exemption from the Interstate Commerce Commission to operate the Kellar Branch pursuant to that Agreement. *Peoria & Pekin Union Ry. Co. -- Exemption from 49 U.S.C. 10901*, 1984 ICC LEXIS 275 (F.D. No. 30545, notice of exemption served Sept. 18, 1984).

The Village of Peoria Heights became a party to the Agreement of July 10, 1984 at a later date. Ownership of the Kellar Branch by the Municipalities was commonly referred to under the "doing-business-as" designation of Peoria, Peoria Heights & Western Railroad.

On February 19, 1998, P&PU's interest in that Agreement was assigned to PIRY. PIRY obtained an exemption from the Board to operate the Kellar Branch pursuant to that assignment. *Pioneer Industrial Ry. Co. -- Lease and Oper. Exempt. -- Peoria, Peoria Heights & Western Railroad*, 1998 STB LEXIS 1417 (F.D. No. 33649, notice of exemption served Feb. 20, 1998).

The Municipalities believe that it is clearly provided by Section 9(a) of the Agreement of July 10, 1984 quoted above that the Agreement has a 20-year term that expired on July 10, 2004. As that date was approaching, the Municipalities notified PIRY that upon expiration of that Agreement, they intended to enter into an agreement with a different entity for continued operation of the Kellar Branch. PIRY responded that in its opinion, the Agreement of July 10,

1984 has an indefinite term, such that it would not expire on July 10, 2004, or on any other date certain. PIRY made it clear that it would not voluntarily cease operations and vacate the Kellar Branch on that date or any other date certain.

On November 16, 2004, in view of the position taken by PIRY, the Municipalities filed an application under 49 U.S.C. § 10903 for adverse (involuntary) discontinuance of PIRY's authority to operate over the Kellar Branch. STB Docket No. AB-878, *City of Peoria, et al. -- Adverse Discontinuance -- Pioneer Industrial Railway Company*.

On December 13, 2004, PIRY filed a petition in the subject proceeding seeking a Board order construing Section 9(a) of the Agreement of July 10, 1984 as providing PIRY with the equivalent of a permanent easement to operate over the Kellar Branch. (Petition, Conclusion at 6).

BASIS FOR OPPOSITION

It is settled legal principle that the Board does not have jurisdiction to interpret or construe private contracts. *The Kansas City Southern Ry. Co. -- Adverse Discon. Applic. -- A Line of Arkansas & Missouri R. Co.*, 1999 STB LEXIS 179 (Docket No. AB-103 [Sub-No. 14], decided March 23, 1999), at *16 ("we reiterate here, as we have stated in the past, that the Board will not undertake to interpret or enforce operating agreements or contracts."); *Coal Trading Corp., et al. v. B&O Railroad Co., et al.*, 6 I.C.C.2d 361, 365 (1990) ("The Commission has no jurisdiction to provide such interpretation [of contract provisions] or to determine the rights of the parties under these contracts."); *Railroad Transportation Contracts*, 3 I.C.C.2d 219, 230, n.6 (1986) ("It is settled law that, beyond administering § 10713, the ICC has no jurisdiction to resolve or intrude upon contract law disputes between the contracting parties [citations

omitted].)"; *Brotherhood of Locomotive Engineers v. C&NW Transp. Co.*, 366 I.C.C. 857, 858 (1983); and *Chicago & NW Transp. Co. v. Peoria & Pekin*, 360 I.C.C. 168, 181 (1979).

Where, as here, the owner of a rail line seeks to replace the operator of the line upon expiration of the term of their operating agreement, but the operator takes the position that the agreement has not expired and refuses to vacate the rail line, the owner must obtain a Board determination under 49 U.S.C. § 10903 that public convenience and necessity permits discontinuance of the operator's federal operating authority, and must obtain a state court order of ejectment if the operator continues to refuse to leave the premises. In an adverse discontinuance proceeding under 49 U.S.C. § 10903, the Board does not consider nor decide whether the operator of the rail line has a continuing property right or contractual right to operate the line. *The Kansas City Southern Ry. Co. -- Adverse Discon. Applic. -- A Line of the Arkansas & Missouri R. Co.*, *supra*. That is for a court to decide. The Board determines only whether the line is required by the public for rail operations and, if so, whether the Board's primary jurisdiction would shield the rail line operator from ejectment under state law. As recently stated by the Board in *Western Stock Show Assn. -- Aban. Exemption -- in Denver, CO*, 1 S.T.B. 113 (1996), at 133:

Discontinuance authority is permissive. Our action in granting WSSA's application would not by itself compel DTRC, BN or UP to leave the line. But our finding that the public convenience and necessity requires or permits the discontinuance of operations would remove our primary jurisdiction. That now bars WSSA from evicting DTRC, notwithstanding that their agreement has expired.

Here, as acknowledged by PIRY, the Municipalities have applied to the Board for adverse discontinuance of PIRY's federal authority to operate over the Kellar Branch. If that application

were to be granted and if PIRY then continued to refuse to vacate the Branch, the Municipalities would bring an action under State law to eject PIRY from the Branch on the ground that its contractual authority to operate the Branch has expired. At that point, PIRY could defend that action on the ground that in its view that contractual authority has not expired.

The overriding point for present purpose is that the Board does not have jurisdiction to determine whether PIRY's contractual right to operate the Branch has expired (i.e., whether PIRY has a permanent easement to operate over the Branch). That being the case, there would be no justification for the Board to institute a proceeding to consider whether or not the Board should make such a determination. Consequently, PIRY's Petition for Declaratory Order should be denied.

There is nothing in PIRY's Petition to the contrary. The Petition does not point to any instance in which the Board or its predecessor issued a declaratory order construing the terms of a private agreement. Neither of the decisions cited at page 4 of the Petition -- *Maine, DOT -- Acq. Exemption, ME Central R. Co.*, 8 I.C.C.2d 835 (1991) ("*Maine DOT*"), and *City of Venice -- Aband. Exempt. -- in Venice, IL and St. Louis, MO*, 1999 STB LEXIS 381 (Docket No. AB-863X, decided June 22, 2004) ("*City of Venice*") -- stands for the proposition that the Board has jurisdiction to construe the terms of private agreements.

In *Maine DOT*, the Board's predecessor found that the State of Maine's Department of Transportation did not require agency authority or an exemption for its acquisition of the physical assets of a rail line where the prior owner of those assets retained a permanent easement to conduct common carrier freight operations over that line (8 I.C.C.2d at 836-837). The agreement between the State and the prior owner expressly reserved such a "permanent easement". (*Id.* at

835). There was no occasion for the agency to construe that term of the agreement, and the agency did not do so.

In *City of Venice*, the Board dismissed a notice of exemption whereby the City of Venice sought to abandon a rail line as a prelude to conveying the line for railbanking and interim trail use under the National Trails System Act. (1999 STB LEXIS 381 at *15-16). The Board found that the City had not acquired a rail common carrier obligation that could be the subject of abandonment by virtue of a prior transaction whereby Illinois Terminal Railroad Company (IT) sold the rail line to the City, and then leased the line back from the City for an initial period of 50 years and for successive 50-year periods. (*Id.* at *8-14, *3). The Board stated in *dicta* that IT's rights under that lease agreement are comparable to the permanent easement interests in *Maine DOT*. (*Id.* at *13). That was an informal observation by the Board that an agreement with an initial 50-year term and successive 50-year terms is comparable to a permanent easement. It did not constitute an official Board interpretation of the legal effect of the term provision in the lease agreement in that case.^{1/} The Board had not been officially requested to construe that provision, and did not purport to do so.

^{1/} In any event, the term of that agreement is radically different from the term provision in the subject agreement.

CONCLUSION AND REQUESTED RELIEF

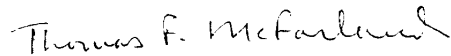
WHEREFORE, for the reasons stated, the Board should decline to institute the requested declaratory order proceeding.

Respectfully submitted,

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Attorney for Replicants

DATE FILED: December 22, 2004

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2004, I served the foregoing document, Reply In Opposition To Petition For Declaratory Order, on Daniel LaKemper, Esq., Pioneer Industrial Railway Co., 1318 South Johanson Road, Peoria, IL 61607, by UPS overnight mail.

Thomas F. McFarland

Thomas F. McFarland