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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.

PROTEST

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Dated: March 21, 2005.

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ADVERSE ABANDONMENT
PIONEER INDUSTRIAL RAILWAY CO.

PROTEST

On November 16, 2004, the City of Peoria and the Village of Peoria Heights, Illinois (the "Cities") filed an application for the adverse discontinuance of Pioneer Industrial Railway Co. 's ("PIRY") operation over a line of railroad from MP 1.71 (at a junction with the former Peoria & Pekin Union Railway ("P&PU"), now Tazewell & Peoria Railroad ("TZPR)) in Peoria, Peoria County, Illinois, through Peoria and Peoria Heights, to MP 10.00 (in the Pioneer Industrial Park, in Peoria, Peoria County, Illinois), a distance of approximately 8.29 miles. The line was formerly known as the "Kellar Branch" of the Chicago, Rock Island & Pacific Railroad.

That application should be denied.

As is plain from the Cities application, as well as the filings of Central Illinois Railroad Company (FD No. 34518) and the Cities' Construction Exemption (FD No. 34395), this is not an ordinary "change of operators". Rather, it is an attempt by the Cities to replace the lawful carrier (PIRY) with a temporary operator (Central Illinois Railroad Company - "CIRY"), in anticipation of the abandonment of the vast majority of the line and its conversion into a hiking/biking trail. The Cities motive is merely to facilitate that abandonment, and, if the Board permits the Cities to abuse its process in this manner, the result will be the same as in *Southern Pacific Transportation Company - Abandonment Exemption - Los Angeles County, CA* (ICC Docket No. AB-12 (Sub-No. 139X), Decided May 6, 1972). Once PIRY is removed from the line, the so-called "west

connection” will be made and the majority of the Kellar Branch will be scrapped, without an abandonment filing. The Cities application makes clear that CIRY’s contractual rights are only “temporary”; that they intend to scrap the line without filing an abandonment application; and they will then turn the right of way into a hiking/biking trail. The Board will be faced with a de facto abandonment is blatant defiance of the Board’s authority and the Interstate Commerce Act, 49 U.S.C. §10903, as amended.

Such a result is not in accord with the national transportation policy; the best interests of shippers; the mandate of the Board to “preserve and promote continued rail service,” *New York Cross Harbor Railroad v. Surface Transportation Board*, (USCA – DC Cir., No. 03-1268, Decided July 13, 2004, at page 17); or the Board’s decisions in *Salt Lake City Corporation – Adverse Abandonment – in Salt Lake City, UT*, (STB Docket No. AB-33 (Sub-No. 183), Served March 8, 2002) or *City of Venice – Abandonment Exemption – In Venice, IL and St. Louis, MO.*, (STB Docket No. AB-863X, Decided June 22, 2004).

The Cities statement in their application that PIRY’s operating agreement “expired on July 10, 2004” is plainly false. The Cities admit, in a footnote, that there is no expiration date on the agreement. In fact the agreement is quite clear. The P&PU (of which PIRY is successor in interest) was becoming the primary carrier on the line. The Cities were not, and, as to the Kellar Branch, are not, carriers. The P&PU acquired the equivalent of a railroad easement (See *City of Venice*, AB-863X, Decided June 22, 2004). The Agreement with the Cities states “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.** [emphasis added]” There has been no termination for cause. Obviously there has been no mutual consent. Under the plain language of the agreement,

it is still in force. As a rebuttal to the self-serving "Opinion of Counsel" attached to the Application as Appendix 4, PIRY attaches an "Opinion of Counsel" as "Exhibit 1".

The Cities statement that "the owners of the rail line have arranged for continuation of rail service by a new operator after the prior operator's contractual authority to operate the line has expired," (Application at Pages 8-9), is blatantly false. Not only has PIRY's authority not expired, but the Cities have arranged for only a "temporary" operator, pending the abandonment of most of the line.

The contention that the Board lacks jurisdiction to consider PIRY's contract is also without basis. The Board clearly has the right to examine a contract to see if the applicant representations are accurate. The Board can, indeed must, construe contracts in light of the Interstate Commerce Act provisions that it applies. When the plain language of the agreement is at variance with the representations of the applicant, the Board should not close its eyes to that fact. Further, the facts in this proceeding are, as in City of Venice, ones that make PIRY's status important. In City of Venice the Board found that if a line is fully abandoned, and then restored to common carrier service by a non-carrier (such as the Cities) the Railroad normally acquires the equivalent of a railroad easement, just as the original carrier did from the landowner. PIRY, therefore, has a railroad easement. It is the primary carrier. A mere landowner such as the Cities cannot arbitrarily decide to terminate that easement and enter into new agreements with competing carriers.

To make matters worse, the Cities now contend that they can proceed to abandon the Kellar Branch without filing an abandonment petition, without regard for the Operating Authority this Board granted to CIRY in FD No. 34518.

The contention that the discontinuance of PIRY's operation "would not be harmful" also flies

in the face of the facts. One of the shippers, Carver Lumber, states in its letter that PIRY's service "in all respects has been nearly flawless," (See Applicant's Appendix 6, page 4). This is largely because of the availability of TZPR terminal switching service (See Verified Statement of Catherine Busch, at Exhibit 2). If the Cities proceed with their plan, the TZPR connection to the Pioneer Park shippers will be severed, and the resulting service will be poor, at best.

The Cities' sole motivation in this proceeding is to create another hiking and biking trail by seizing the right of way and scrapping the railroad without an abandonment proceeding.

They claim that the Pioneer Park shippers can receive service via the "west connection" with the Union Pacific. This ignores the fact that the shippers would be foregoing the connection with the TZPR. Via TZPR, shippers on the Kellar Branch have direct access to eight line-haul railroads (BNSF, Union Pacific, CN, Illinois & Midland, Toledo, Peoria & Western, Norfolk Southern, Iowa Interstate and Keokuk Junction Railway). If the TZPR connection is severed, CIRY will connect only with Union Pacific, which has not provided any service for many years on the line recently acquired by the City of Peoria. More importantly, most of the cars being received by the Pioneer Park shippers arrive in Peoria via CN, not Union Pacific. Putting another Class I carrier in route, for a short haul from Peoria to CIRY, is not comparable service to that provided by the Kellar Branch. With the current state of Class I congestion and their continuing preference for long-haul business, it is a recipe for total abandonment in the near future.

Due to the connections offered by TZPR, the Kellar Branch currently has numerous marketing opportunities that could come to fruition if the threat of abandonment were removed. Indeed, Keokuk Junction Railway Co., which is filing a separate Protest, has been negotiating with PIRY to enter into a trackage rights agreement that would provide through line service (with TZPR

acting as a terminal switch carrier) from Keokuk and Fort Madison, Iowa to Pioneer Park.

Finally, it should be noted that on or about July 23, 2004, the Cities 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 Applicant's now stated intention to abandon almost all of the line, without an abandonment filing, the Board should reconsider its decision to not entertain Offers of Financial Assistance.

The Board should recognize that the Cities' statements in this proceeding are not based upon facts, but merely designed to advance their sole purpose – to abandon an operating rail line so that they can turn it into a trail.

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 Fore River R.R. Co., Tacoma Eastern Ry. Co., Jacksonville Port Authority, and Cheatham County Rail Authority proceedings all involve terminated lease agreements that result in a new carrier assuming operation as a full common carrier. The Cities, in this proceeding, have not terminated PIRY's contractual right to operate and merely desire to substitute a "temporary" or "interim" operator, preparatory to an unauthorized abandonment. This is exactly the kind of situation the Commission condemned in Southern Pacific Transportation Co. (AB-12, Sub-No. 139X, Decided May 6, 1992).

PIRY, just as Union Pacific in Salt Lake City Corporation – Adverse Abandonment – In Salt Lake City, UT, STB Docket No. AB-33 (Sub-No. 183), Decided March 6, 2002, is faced with an attempt by a municipal government to usurp the authority of the Board. In Salt Lake City Corporation, 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 superseded 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 equally false statement that CIRY is going to continue service.

This is not in accord with the public interest, or the National Transportation Policy. In 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, 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).

CONCLUSION

The Board should deny the Cities' application. It was not filed for the purpose of changing operators, as was the case with the decisions cited by the Cities. It was filed for the purpose of effecting an abandonment of the rail line without the Cities having to actually file an abandonment, and face the possibility of an Offer of Financial Assistance. The Cities are attempting to usurp the Board's authority and abandon a rail line without Board action. If the Board does not deny this Application, it will set up the same scenario that took place in Southern Pacific (AB-12, Sub-No. 139X), and thereby substantially diminish respect for the law.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Daniel A. LaKemper". The signature is fluid and cursive, with the first name "Daniel" and last name "LaKemper" clearly distinguishable.

Daniel A. LaKemper, Esq.
General Counsel
Pioneer Industrial Railway Co.
Peoria, Illinois 61607
Tel.: (309) 697-1400

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing instrument was served on March 21, 2005,
by e-mail on:

Thomas F. McFarland
Mcfarland@aol.com

And by United States Mail, first class, postage fully pre-paid, on March 21, 2005 upon:

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



Daniel A. LaKemper, Esq.
General Counsel
Pioneer Industrial Railway Co.
Peoria, Illinois 61607
Tel.: (309) 697-1400

VERIFICATION

I, Guy L. Brenkman, President of Pioneer Industrial Railway Co., declare under the penalty of perjury that to the best of my knowledge the foregoing is true and correct. Further, I certify that I am qualified to file this Verified Statement. Executed this 21st day of March, 2005.

/s/ Guy L. Brenkman

EXHIBIT 1

OPINION OF COUNSEL

As an attorney, licensed to practice in the State of Illinois for in excess of 22 years, and as counsel for Pioneer Industrial Railway Co. ("PIRY"), it is my opinion that the Agreement entered into on July 10, 1984 between the City of Peoria and the Peoria & Pekin Union Railway Company, to which PIRY is successor in interest by assignment, is the equivalent of a permanent railroad easement, and grants PIRY a right to operate the rail line known as the Kellar Branch, unless and until that right is terminated for cause or by mutual agreement of the parties, and such termination is then permitted by the Surface Transportation Board.

It is my opinion that there is no rational basis for the contention that the Agreement expired on July 10, 2004.

A handwritten signature in cursive script, appearing to read "Daniel A. LaKemper".

Daniel A. LaKemper, Esq.

EXHIBIT 2
VERIFIED STATEMENT OF CATHERINE BUSCH

My name is Catherine Busch and I am the Director of Marketing for Pioneer Industrial Railway Co. ("PIRY").

PIRY operates a line of railroad in Peoria County, Illinois that interchanges with eight line-haul carriers, BNSF Railway, Union Pacific Railroad, CN, Norfolk Southern Railway, Iowa Interstate Railroad, Illinois & Midland Railroad, Toledo, Peoria & Western Railroad and Keokuk Junction Railway (via Tazewell & Peoria Railroad, the terminal switching carrier for the Peoria area).

The vast majority of the cars, which PIRY delivers to Pioneer Park, arrive at Peoria via CN, with occasional cars arriving in Peoria via BNSF. If the TZPR connection is severed, as proposed by the City of Peoria, the Pioneer Park shippers will have only one line-haul connection (Union Pacific). Based upon my 15 years experience in railroad marketing, the loss of the other seven connections will result in materially higher rates and poor service to Pioneer Park shippers.

Union Pacific would have to be added as an additional carrier in the routing, for the very short distance from Peoria to Pioneer Park. That will substantially reduce marketing opportunities for the remaining portion of the line in Pioneer Park.

PIRY has actively, and continues to actively, market the line, but has been seriously hampered by the City of Peoria, and the negative publicity that its plan to abandon most of the railroad has created.

I believe that, if the threat of abandonment were lifted, PIRY could substantially increase its business at Pioneer Park, and add customers on the line between O'Brien Steel (near the TZPR junction) and Pioneer Park.

VERIFICATION

I, Catherine Busch, declare under the penalty of perjury that to the best of my knowledge the foregoing is true and correct. Further, I certify that I am qualified to file this Verified Statement. Executed this 21st day of March, 2005.

/s/ Catherine Busch