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December 7, 2007

VIA ELECTRONIC FILING

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

RE: STB Docket No. AB-878
City of Peoria and the Village of Peoria Heights, IL – Adverse Discontinuance –
Pioneer Industrial Railway Company

Dear Secretary Williams:

I am filing herewith on behalf of Pioneer Industrial Railway Company (“PIRY”), a Reply in Opposition to the “Petition To Modify And Hold Proceeding In Abeyance Of Central Illinois Railroad Company” which Central Illinois Railroad Company filed on December 3. Carver Lumber Company also joins in PIRY’s Reply in Opposition and has authorized PIRY to so inform the Board. Copies of this Reply in Opposition are being served on all parties of record in accordance with the Board’s regulations. If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: wmullins@bakerandmiller.com.

Respectfully submitted,



William A. Mullins
Attorney for Pioneer Industrial Railway Company

Enclosures

cc: All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-878

**CITY OF PEORIA AND THE VILLAGE OF PEORIA HEIGHTS, IL
—ADVERSE DISCONTINUANCE—
PIONEER INDUSTRIAL RAILWAY COMPANY**

**REPLY IN OPPOSITION TO PETITION TO MODIFY AND HOLD IN ABEYANCE
FILED BY CENTRAL ILLINOIS RAILROAD COMPANY**

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**Attorneys for Pioneer Industrial Railway
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Dated: December 7, 2007

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-878

**CITY OF PEORIA AND THE VILLAGE OF PEORIA HEIGHTS, IL
—ADVERSE DISCONTINUANCE—
PIONEER INDUSTRIAL RAILWAY COMPANY**

By decision served November 19, 2007 (“November 19 Decision”), the Surface Transportation Board (“STB” or “Board”) denied an adverse discontinuance application filed by the City of Peoria (“City”) and the Village of Peoria Heights (“Village”)(collectively, “Cities”) seeking to terminate the common carrier service provided by Pioneer Industrial Railway Co. (“PIRY”) over a line of railroad known as the Kellar Branch. On December 3, 2007, Central Illinois Railroad Company (“CIRY”) filed what it entitled a “Petition To Modify And Hold Proceeding In Abeyance” (“Petition”), rather than a request to stay the November 19 Decision. CIRY’s Petition should be denied. CIRY has not provided the Board with a legal basis to grant the requested relief, having failed to cite even a single case in support of its extraordinary relief request, and even if a legal basis existed, which it does not, the merits do not justify the requested relief. In denying CIRY’s petition, the Board should make clear that CIRY must cease and desist from preventing PIRY from performing its common carrier obligation.

As an initial matter, it is telling that the Cities, who are the actual owners of the Kellar Branch and who filed the adverse discontinuance in the first place, have not filed a request for stay, a petition to reopen, or joined in CIRY’s Petition. One would presume that, if the Cities continued to object to having PIRY on the line, they would be the ones taking legal action, but they have not done so. Indeed, the city council for the City on November 27 voted 6-4 to reject a

motion for continued legal adversity against PIRY. The majority of the city council indicated a willingness to negotiate with PIRY, CIRY, and others to resolve the outstanding issues.

Granting the Petition would simply undermine the city council's desire to negotiate a settlement rather than to litigate.¹

I. THERE IS NO LEGAL BASIS ON WHICH TO GRANT THE PETITION

Turning to the Petition itself, CIRY seeks to stay the effectiveness of the November 19 Decision and to modify that decision. CIRY has failed to cite any legal precedent for the extraordinary relief it requests, and it does not establish, or even address, the criteria for obtaining such relief. As such, the Board has no legal basis to grant the Petition. In addition, even if CIRY could at this phase properly request that an administratively final proceeding be "held in abeyance" (rather than ask for a stay or petition for reconsideration), there is no legal basis for holding the matter in abeyance in the face of opposition.

CIRY wants the Board to stay its November 19 Decision, without calling the requested remedy a "stay" or requiring CIRY to make the showings required by Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) ("Holiday Tours"). Yet, in trying to postpone the effectiveness of a final Board decision, CIRY clearly wants (and is required to seek) a stay:

- The Board should "hold its decision in abeyance." Petition at 1, 4.
- "Absent a delay in the effective date. . ." Petition at 5.
- The Board should delay the "effectiveness of its November 19 decision." Petition at 6.
- The "effective date of the November 19 decision should be delayed. . ." Petition at 7.

¹ Indeed, the Board's decision provided the catalyst for changing the nature of the debate from one of litigation and adversity to one where the parties (at least the majority of the parties) desire to resolve the issues through negotiation rather than litigation. Granting the petition would undo that progress.

The Board has never held in abeyance a decision pursuant to a request filed under 49 CFR 1117.1, but it can stay a decision if the request is made in a timely fashion and the appropriate Holiday Tours showings are made.² CIRY has failed to meet these two requirements. CIRY cannot and does not call its Petition a “stay” because CIRY has missed the deadlines for seeking a stay subject to administrative reconsideration pursuant to 49 CFR 1115.3(f), or for a stay pending judicial review under 49 CFR 1115.5. Nevertheless, that is precisely what CIRY’s request is – a request for a stay – and it should be handled accordingly. See Ashley Creek Phosphate Company v. Chevron Pipe Line Company, et al., No. 40131 (Sub-No. 1) (ICC decided Oct. 18, 1990), 1990 MCC LEXIS 154 (“Ashley Creek”) (a party’s request to hold a proceeding in abeyance pending reconsideration of the agency’s decision “amounts to a request [to] stay [the] proceeding pending consideration of the petition for reconsideration” and thus must meet the Holiday Tours standards).

CIRY realizes that it cannot meet any of the standards articulated in the Holiday Tours test, has therefore chosen not to try, and has instead attempted this blatant end-run of the correct procedures. The Board should not take the bait and, consistent with Ashley Creek, should reject CIRY’s request to stay the effective date of the decision due to CIRY’s failure to discuss, much less meet, the standards for a stay. In short, CIRY’s request to hold this matter in abeyance is procedurally and substantively improper.

² A party seeking a stay must establish that: (1) there is a strong likelihood that it will prevail on the merits of any challenge to the action sought to be stayed; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed; and (4) the public interest supports the granting of the stay. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Holiday Tours; Virginia Petroleum Jobbers Ass’n v. Fed. Power Comm’n, 259 F.2d 921, 925 (D.C. Cir. 1958). On a motion for stay, “it is the movant’s obligation to justify the . . . exercise of such an extraordinary remedy.” Cuomo v. United States Nuclear Regulatory Comm’n, 772 F.2d 972, 978 (D.C. Cir. 1985). The parties seeking a stay carry the burden of persuasion on all of the elements required for such extraordinary relief. Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

Furthermore, even if viewed for what the Petition is called, such abeyance requests have never been accepted when there is no “proceeding” before the Board to hold in abeyance. PIRY’s examination of precedent reflects that the Board consistently holds pending matters in abeyance, not concluded matters, such as here. The subject adverse discontinuance proceeding was reopened (based on new evidence) and the Board’s prior action (granting the adverse discontinuance) has been reversed. The record is closed and the proceeding concluded. At this point, CIRY should have availed itself of the sorts of processes that interested parties take in connection with administratively final actions (such as a petition for stay, for reconsideration, or for reopening), but it did not do so. PIRY has found no instance where the agency ever granted a request to hold a matter in abeyance following the issuance of a final decision on the merits.

In light of precedent such as Ashley Creek (and other agency decisions discussed above) and the status of this matter, CIRY’s request for “abeyance” under Part 1117.1, is contrary to Board procedures, makes no sense, and, most importantly, runs counter Ashley Creek. Moreover, CIRY cites no precedent in support of the extraordinary relief it requests, nor could it have. PIRY has made abundantly clear that it objects to CIRY’s request that the Board “hold in abeyance” (or otherwise stay the effectiveness of) its November 19 Decision. CIRY, having recognized that its request would be unacceptable to PIRY, has not broached the subject in advance to PIRY. Rather, CIRY filed its request on the understanding that PIRY would not concur, and insists that “common sense” (not precedent or proper procedure) warrants staying the matter indefinitely. A common sense assessment of agency decisions, however, reflects that, while matters awaiting a final decision from the Board (unlike the matter at hand) may be held in

abeyance where the parties concur in the request,³ request to hold in abeyance are not granted when they are objected to by a main party to the proceeding.⁴

In several places in the Petition, CIRY requests that the Board's decision not only be held in abeyance but that it also be "modified." Of course modifying decisions that have already taken effect, such as the one here, requires that a party seeking such modification file a petition for reconsideration under 49 CFR 1115.3 (if filed within 20 days of a Board decision) or a petition for reopening under 49 CFR 1115.4.⁵ Either standard requires a party seeking such a

³ In practice, requests to hold an agency matter in abeyance typically are granted when main parties in an active proceeding concur in the request, particularly where time is sought to permit a negotiated resolution of a matter. See, e.g., Bay Colony Railroad Corporation – Petition for Declaratory Order, STB Finance Docket No. 34698 (STB served Jul. 11, 2006) (noting that the Board had granted requests by the parties to hold the proceedings in abeyance to enable them to explore settlement); WTL Rail Corporation – Petition for Declaratory Relief, STB Docket No. 42090 (STB served Oct. 3, 2005) (proceeding held in abeyance in accordance with request of the parties); BP Amoco Chemical Company v. Norfolk Southern Railway Company, STB Docket No. 42093 (STB served Jun. 6, 2005) (proceeding held in abeyance due to mutual concurrence of the parties to explore a resolution via voluntary mediation).

⁴ See, e.g., PYCO Industries, Inc. v. South Plains Switching, Ltd. Co., STB Finance Docket No. 34870 (STB served Jun. 6, 2007); The Township of Woodbridge, NJ, et al. v. Consolidated Rail Corporation, Inc., STB Docket No. 42053 (STB served Dec. 1, 2000); Pennsylvania Power and Light Company v. Consolidated Rail Corporation, No. 38186S (ICC decided Aug. 31, 1984), 1984 ICC LEXIS 327 (agency declined to hold proceeding in abeyance in light of the objection of one of the principal parties where both parties effectively acknowledged that they knew of no decisions where a proceeding had been held in abeyance over the objections of a complainant or other main party to a proceeding). In fact, counsel for CIRY is no stranger to opposed (and subsequently denied) requests to hold a pending proceeding in abeyance. See The Chicago, Lake Shore and South Bend Railway Company – Acquisition and Operation Exemption – Norfolk Southern Railway Company, STB Finance Docket No. 34893 (STB served Aug. 24, 2006) (the Board denied an opposed request to hold a matter in abeyance, noting that the request entailed indefinite delay, and did not comport with the considerable public interest focused on the proceeding).

⁵ See General Railway Corporation, d/b/a Iowa Northwestern Railroad – Exemption for Acquisition of Railroad Line – In Osceola and Dickenson Counties, IA, STB Finance Docket No. 34867 (STB served Jul. 13, 2007) ("General Railway") ("[p]arties seeking review of a Board decision may seek reconsideration or reopening, and must show material error, new evidence or changed circumstances. [A party] may not avoid the obligation of meeting those standards merely by assigning a different label to its request for relief").

modification to show that the prior decision contained material error or that new evidence or changed circumstances warrant modification of the prior decision. Again, CIRY likely realizing that it could not meet this test as well, has tried to avoid its application by filing under the “catch-all” provisions at 49 CFR 1117.1. The Board should reject this legal charade. Part 1117.1 is not a “get out of jail free” card for parties such as CIRY who do not abide by the appropriate procedures in seeking relief. Failing to establish that its requested relief for modification fits under the proper procedural standards for reconsideration or reopening, the Board should require CIRY to meet those standards or else reject the requested relief.

In the end, CIRY has not provided any legal basis for the Board to grant the requested relief. Rather, it has filed a stay petition without calling it a “stay,” and it has filed a request for modification without seeking reconsideration or reopening. Having failed to file under the appropriate criteria or to cite a single precedent in support of such relief, the Board has no legal basis to grant the requested relief and CIRY’s Petition should be denied.

II. EVEN IF LEGAL BASES EXIST TO GRANT CIRY’S REQUESTS, WHICH THERE IS NOT, THE PETITION SHOULD BE REJECTED ON ITS MERITS

As shown above, CIRY has not provided the Board with a legal basis on which the Board could grant the requested relief. As such, the Board would be fully justified in denying the Petition without even addressing the merits of the underlying arguments. But even if one were to consider the underlying arguments, CIRY has not shown that the November 19 Decision should be held in abeyance. This is because there are several allegations and statements made in the Petition that are untrue,⁶ misleading, or otherwise do not support CIRY’s abeyance-as-a-stay request.

⁶ There are several troubling falsifications in CIRY’s Petition. Among them, CIRY suggests that PIRY plans on operating over the Western Connection. PIRY has no such plans and has no

A. Relations With Carver Lumber

As an initial matter, CIRY's Petition lacks shipper support. CIRY describes its efforts to provide a rate and service package to Carver Lumber ("Carver"), and implies that Carver's new transportation manager supports CIRY's efforts.⁷ But no documented evidence of such support is offered – in stark contrast to the numerous statements that Carver has provided in support of PIRY. Indeed, as noted by Mr. Stolarczyk in his Affidavit attached to CIRY's Petition, Carver continues to rebuff CIRY's efforts to provide it with service.⁸

While CIRY may want to provide Carver⁹ with service and while Carver may be prepared to do business with CIRY if it makes business sense to do so, a close reading of the Petition and the Stolarczyk statement proves once again what PIRY has said throughout this proceeding – the Western Connection is an ineffective service replacement for PIRY's former service over the Kellar Branch and cannot and will not ever make "business sense." As Mr. Stolarczyk notes, CIRY still cannot provide service that makes business sense because it cannot get UP to reduce its rates via the Western Connection, despite CIRY's best efforts.¹⁰ The record

interest in doing so. CIRY also says that PIRY inherited the line and then subsequently drove away 14 customers over six years of operation. That is patently untrue. The portion of the line in question had only four customers. In addition, O'Brien Steel, which CIRY depicts as a vociferous opponent of PIRY, had previously informed PIRY that its difficulties with PIRY service pertained to demurrage issues, not service issues.

⁷ "While Carver Lumber's previous management expressed support for PIRY, that situation has changed." Petition at 9. CIRY does not back-up this statement with any letter, statement, evidence, or other indication that Carver Lumber no longer supports PIRY.

⁸ As it is, Carver has an exclusive 10-year service contract with PIRY, and PIRY is willing and ready to fulfill its service obligations to Carver under that contract.

⁹ One wonders how CIRY would provide service to Carver Lumber via the Western Connection when CIRY admits that it is using the Western Connection to store 75 cars of hazardous materials for BP Amoco.

¹⁰ "CIRY went so far to solicit rates from the Union Pacific on Craver [sic] Lumber's behalf to no avail for a cheaper rate from UP." Stolarczyk Affidavit at 2. As the Board may recall, traffic to/from Carver Lumber via the proposed Western Connection must be interchanged to UP at the

is clear that the only way Carver can, and did, get effective rail service is via the Kellar Branch via PIRY.

All that CIRY has done here is to describe its unsuccessful efforts to provide service to Carver Lumber, detail Carver's refusals to accept CIRY's service proposals, and confirm that UP's rates remain too high to support service via the Western Connection.¹¹ CIRY has simply confirmed the underlying basis of the Board's decision – CIRY's service to Carver via the Western Connection has not been, and cannot be, an effective replacement for the service previously provided over the Kellar Branch by PIRY. As such, the Board cannot grant an adverse discontinuance when doing so would deprive a shipper of its rail service options without a corresponding benefit to the public interest or a practicable alternative means of rail transportation.

B. Issues Involving The Parties' Contract Rights

CIRY implies that it is the only railroad having a contract with the City to operate over the line and that PIRY's contract to operate the line has expired. Neither assertion is true. Indeed, PIRY understands, based on various public statements, press articles, and conversations with City officials, that the City believes that its interim agreement with CIRY (which initially granted CIRY authority to operate over the Kellar Branch) has expired. Accordingly, the City is taking the position that neither CIRY nor PIRY has a contract to operate over the Kellar Branch.

south end of Peoria (where UP connects with the various connecting carriers serving Peoria), and transported over UP's heavily congested main line on the west side of Peoria, and then interchanged to CIRY for ultimate delivery by CIRY over the Western Connection.

¹¹ Carver has, in the past, threatened to sue CIRY for CIRY's refusal to deliver cars over the Kellar Branch and for CIRY's failure to abide by its common carrier obligation to provide service via the Kellar Branch. CIRY's comments that (1) Carver has never requested service from CIRY; (2) that CIRY has never refused to provide service to Carver; and (3) Carver Lumber is not dissatisfied with CIRY service appear designed to protect CIRY from such a complaint rather than go to heart of the issue in this proceeding.

See attached article, John Sharp, *Rail carriers fighting over Kellar*, Peoria Journal Star, December 6, 2007.¹² Effectively confirming this state of affairs, CIRY's Petition states that it is "currently negotiating a long term lease for the line." Petition at 2.¹³

CIRY is also wrong to assert, as it does at numerous places in the Petition, that the contract by which PIRY had operated the line has expired and is no longer valid. Given the expiration of PIRY's contract rights, CIRY claims the Board committed material error in denying the adverse discontinuance where a tenant railroad no longer has a contract right to operate over the line. There are several problems with CIRY's assertions.

To begin with, there is no legal ruling that PIRY's contract rights have expired or have been legally terminated. While CIRY may see things differently and the City may believe otherwise, there has been no such legal finding. The continued validity of PIRY's contract has been the subject of various filings in state court, and must be presumed valid until a court definitively addresses the matter. Accordingly, CIRY's assertions about the contract amount to nothing more than CIRY's opinion on the matter. Likewise, given that the Board does not interpret contracts, the Board properly declined to interpret or rule upon the contract, deferring to the courts on that issue.¹⁴

¹² Attached to the article is a copy of the actual e-mail from the City Manager for the City. This e-mail was the basis for some of the statements made in the article.

¹³ Curiously, although PIRY has repeatedly highlighted the impracticality of operations over the Western Connection (over which PIRY acknowledges it has no contract rights to operate), and although PIRY consistently has indicated that it would serve shippers such as Carver via the Kellar Branch only, CIRY seems to think that PIRY would, and intends to, use the Western Connection. CIRY is badly mistaken. PIRY will serve its customers via a Keller Branch and not via the Western Connection. Besides, CIRY has effectively blocked the use of the Western Connection anyway, having chosen to use the Western Connection as storage tracks for hazardous commodities.

¹⁴ CIRY seems to be arguing out of both sides of its mouth. On the one hand, it wants the Board to assume that the contract has expired, and thus insists that the Board materially erred by not granting the adverse discontinuance on that basis. On the other hand, in support of its request to

C. The Legal Basis For Granting An Adverse Discontinuance

Even if the contract has expired, it was not material error for the Board to deny an adverse discontinuance in the face of an expired contract. CIRY would have the Board to believe that Thompson v. Texas Mexican Railway, 328 U.S. 134 (1945) (“Thompson v. Tex Mex”) stands for the proposition that the Board must grant an adverse discontinuance where the tenant’s contract right to use a rail line has expired. But CIRY’s position is entirely contrary to the holding in Thompson v. Tex Mex. That case and its progeny stand for the proposition that a carrier has a continuing obligation to provide common carrier service over a line even when a contract expires and even in the face of opposition from the landlord.¹⁵ Those cases also stand for the proposition that the Board has the exclusive authority to establish new terms and conditions for continued operations.¹⁶ Under those cases, a tenant can continue to operate until the STB has granted a discontinuance.

Furthermore, while a landlord does have a right to seek an adverse discontinuance, the Board’s test in determining whether to grant such a request is not simply whether the contract has expired, as asserted by CIRY, but rather, the Board undertakes a balancing test whereby it

“hold the matter in abeyance” CIRY argues that whether or not the contract is expired is a matter for the courts and not the Board and thus the decisions should be held in abeyance pending resolution of that issue.

¹⁵ See, e.g., Canadian National Railway Company – Trackage Rights Exemption – Bangor and Aroostook Railroad Company and Van Buren Bridge Company, Waterloo Railway Company – Acquisition Exemption – Bangor and Aroostook Railroad Company and Van Buren Bridge Company, STB Finance Docket No. 34014 and STB Finance Docket No. 34015 (STB served Jun. 25, 2002); Union Pacific Railroad Company – Petition for Declaratory Order, STB Finance Docket No. 34090 (STB served Nov. 9, 2001); Paducah & Louisville Railway, Inc. – Control Exemption – Paducah & Illinois Railroad Company, STB Finance Docket No. 33362 (STB served Jul. 9, 1999).

¹⁶ See, e.g., Mexrail, Inc. v. Union Pacific Railroad Company and Missouri Pacific Railroad Company, 4 S.T.B. 954 (2000); Arkansas and Missouri Railroad Company v. Missouri Pacific Railroad Company, 6 I.C.C. 2d 619 (1990).

balances the benefits and burdens of the tenant, landlord, and the public. New York Cross Harbor R.R. v. STB, 374 F.3d 1177, 1180 (D.C. Cir. 2004) (Cross Harbor); Chelsea Property Owners—Aban.—The Consol. R. Corp., 8 I.C.C.2d 773, 778 (1992), aff'd sub nom. Consolidated Rail Corp. v. ICC, 29 F.3d 704 (D.C. Cir. 1994); Modern Handcraft, Inc.—Aband., 363 I.C.C. 969 (1981).

D. Safety And Operating Issues

CIRY claims that an abeyance-as-a-stay is needed to prevent PIRY from operating over the line until such time as joint operating protocols can be negotiated. The Board should reject this request for what it is – a delaying tactic designed to prevent PIRY from operating over the line indefinitely. Granting such an abeyance-as-a-stay would mean that CIRY would have absolutely no incentive to negotiate, and would simply reinforce CIRY's recalcitrance. Indeed, shortly after the November 19 Decision, PIRY's President repeatedly called CIRY (and sent e-mails) to request a meeting to discuss the terms for joint operations. Those e-mails and calls were at first ignored. Then CIRY's STB counsel called and informed PIRY's in-house counsel that CIRY would not agree to any discussions until PIRY had a contract with the Cities..

PIRY eventually called the Board's Office of Compliance and Consumer Assistance ("OCCA") to request its intervention, and OCCA became involved. That involvement apparently prompted this "abeyance" filing. Although the helpful intervention of OCCA staff has convinced CIRY to discuss the implementation of a temporary joint operating protocol, CIRY continues to embrace the view that it has exclusive right to operate over the line and it will grant PIRY the right to operate when, if, and in such manner as CIRY sees fit to do so.¹⁷

¹⁷ PIRY is frustrated by CIRY's stance that simple matters such as an operating protocol should entail the involvement of attorneys. PIRY maintains that operating protocols such as the one that

Granting an abeyance would simply frustrate and delay these efforts to resolve these issues outside of formal Board intervention.

Likewise, even if the parties cannot come to an immediate agreement, there is no need for the Board to issue an abeyance and “modify” its order to direct PIRY to not operate until an agreement can be reached. PIRY has just as much right to operate over the line as CIRY. Both parties have equal rights. Preventing PIRY from operating over the line would frustrate private negotiations, infringe on PIRY’s operating rights, and simply further delay service to Carver and potentially others.

More importantly, PIRY and CIRY can jointly operate over the line even without a detailed operating protocol. There are existing FRA rules that govern operations over joint track and excepted track.¹⁸ As long as both parties follow those rules, and given the very limited amount of traffic on the line, operations can and will be done safely. While PIRY is committed to following those rules, CIRY has, unfortunately, not made a similar commitment. Indeed, PIRY had obeyed all FRA rules when it was conducting its recent hi-rail trip, including having appropriate flagmen at crossings and other locations. CIRY completely ignored PIRY’s flagman and the FRA rules when it refused to stop its hi-rail vehicle. Thus, if anyone is “shooting from the hip” when it comes to safety, it is CIRY, not PIRY. Regardless, given the positive intervention of the Board’s staff, the very limited traffic at issue to be shipped, and the existence of existing FRA rules governing joint operations, there is no need for the Board to issue an abeyance-as-a-stay.

would govern operations here are simple matters within the province and expertise of operating employees and not outside lawyers. This is but another of CIRY’s dilatory tactics.

¹⁸ See, e.g., 49 CFR 225.23, 240.221, 240.229, and 49 CFR 213.7.

The line can also be operated with limited rehabilitation and there is no need to hold the proceeding in abeyance until that rehabilitation is done. According to CIRY, the middle five miles of the Kellar Branch is in deteriorated condition and is incapable of handling rail traffic. CIRY also claims that it would be unsafe to operate locomotives and trains over the line. PIRY does not agree with those statements. PIRY has been assessing the condition of the line, and continues to take issue (as it did in the reopened adverse discontinuance proceeding) with CIRY's gloomy assessment of track conditions and bloated cost estimates to restore the line to operating condition. While it is true that the line could need a few thousand dollars of rehabilitation to restore service to Carver via the Kellar Branch,¹⁹ it does not need anywhere near the hundreds of thousands of dollars that CIRY claims would be needed. PIRY would maintain the line to FRA excepted track specifications, consistent with its past operation of the line. Given current service needs, CIRY is wrong to insist that the line must be maintained to FRA Class I conditions, which is the assumption built in to CIRY's reference to a 2006 FRA track inspection. If CIRY wants to upgrade the track to Class I conditions that is its prerogative, but it cannot hold others to a purposely unrealistic track maintenance standard, nor can it bind PIRY to share in such patently unnecessary costs. Rather, PIRY will share in the reasonable costs of operating and maintaining the track to adequate excepted track standards (consistent with its past operation of the line).

While complaining that the traffic is low, the line is in poor condition, and that it doesn't make economic sense for PIRY or CIRY to operate over the line, CIRY informs the Board that it

¹⁹ In its March 15 Reply to the reopened adverse discontinuance proceeding, PIRY offered the expert testimony of Roger Stice to establish that the track could be returned to operating condition for \$9,496.11. PIRY stands behind that cost estimate and maintains that its rehabilitation estimate remains within proximity of that estimate. If, in fact, CIRY has already engaged in \$100,000 worth of track rehabilitation, then perhaps little, if any further rehabilitation would need to be made, depending upon what sorts of things CIRY spent its money.

has spent \$100,000 just to operate a hi-rail vehicle over the line. One wonders why CIRY would be willing to spend \$100,000 to permit it to operate a hi-rail vehicle over the line when CIRY claims that such an expenditure “vastly exceeds the gross amount of revenues that CIRY would likely earn.” Perhaps CIRY answers this question when it admits that it is using the line for the storage of carload quantities of hazardous materials. Could it be that CIRY is not really in the business of providing common carrier service but rather in the business of storing hazardous rail cars? Could it be that CIRY is using its status as a rail carrier to take advantage of STB preemption so as to prevent the City of Peoria and the State of Illinois from interfering with what is apparently a lucrative business, i.e. storing hazardous materials in rail cars? One doubts that CIRY is truly concerned about safety over the line when it is using the line for the storage of dangerous and hazardous materials. PIRY has no such plans and intends to do what it always did – operate a line of railroad for local customers.

CONCLUSION

As the Board’s recent General Railway decision put it, a party may not avoid the obligation of meeting the Board’s procedural standards merely by assigning a different label to its request for relief. But that is precisely what CIRY has done here. Knowing that it has missed the deadlines to request a stay (and knowing further that it could not satisfy the stay standards anyway), it merely gives its stay request a different name – a request to hold the matter in abeyance. Of course, CIRY’s is not really a request to hold matters in abeyance, as PIRY has clearly established above. Moreover, although CIRY seeks “modification” of the November 19 Decision, it has neither requested reopening of the Board’s decision nor did it file a timely petition for reconsideration. In short, and as has been thoroughly demonstrated above, CIRY lacks any legal basis for the relief it seeks and is merely attempting here to bypass proper agency

procedure. The Board must not let CIRY make a mockery of correct Board processes, and it should therefore deny CIRY's Petition for these reasons.

But even if the Board were to address the merits of CIRY's Petition, it has not made a case for any of the relief it seeks. Rather, CIRY engages in the typical attempts to smear PIRY, makes false and irrelevant allegations, and otherwise does its utmost to dig in its heels in an effort to deprive PIRY of access to the line and to block PIRY from fulfilling its common carrier obligations to Carver and to any other shippers that may wish to use the line. For all of these reasons, as discussed more fully above, CIRY's Petition should be denied, and the Board should make clear that CIRY must not block or attempt to impose delay on PIRY's ongoing efforts to restore rail service on this line.

Respectfully submitted,

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Dated: December 7, 2007

CERTIFICATE OF SERVICE

I, William A. Mullins, hereby certify that on December 7, 2007, I caused a copy of the foregoing Reply in Opposition to the” Petition To Modify And Hold Proceeding In Abeyance Of Central Illinois Railroad Company” to be served by first class mail, postage prepaid, or by more expeditious service upon all parties of record in STB Docket No. AB-878.



William A. Mullins

Rail carriers fighting over Kellar

Central Illinois, Pioneer railways employees have altercation while inspecting tracks

Thursday, December 6, 2007

BY JOHN SHARP
OF THE JOURNAL STAR

PEORIA - Two rail carriers who recently won federal approval to remain on the controversial Kellar Branch rail line through Peoria and Peoria Heights had an altercation Wednesday morning that prompted a call to police.

Employees with Central Illinois Railway Co. and Pioneer Industrial Railway encountered one another at 8 a.m. while both carriers allegedly were inspecting the rail line in road-rail trucks near Pioneer Parkway. According to Peoria police reports, CIRY wanted to make a trespassing report on Pioneer.

City Manager Randy Oliver, in an e-mail to the City Council and Mayor Jim Ardis, said his office advised police that neither rail carrier had authority from City Hall to operate on the line and that both "derived any authority from the U.S. Surface Transportation Board (STB)." Since the matter involved the federal STB, Oliver said the city did not have jurisdiction to pursue trespassing charges.

"The STB ruling directed the two of them to develop an operating protocol between them," Oliver said, referring to last month's ruling by the STB - which holds exclusive domain of the country's railroads - denying a request from Peoria and Peoria Heights to keep Pioneer off the eight-mile line and awarding Pioneer and CIRY access to the Kellar Branch. "The STB created this mess, and the STB is going to have to unscramble it."

Pioneer CEO and President Mike Carr accused the CIRY employee of ignoring a flag man his company had in place and that the CIRY driver proceeded to "charge" down the railroad at Pioneer's vehicle.

CIRY Chief Operating Officer Jack Stolarczyk, when contacted Wednesday, said he "was not in a position to provide information" and said someone would contact the newspaper for comment. No one did.

"I would expect something like this after the STB ruling," Ardis said of Wednesday's altercation. "Basically, (the STB) is allowing them the opportunity (to both use the rail line), and this is what happened."

The argument comes just three days after CIRY filed a petition with the STB to hold its Nov. 19 ruling in "abeyance," or as undetermined, so that the parties involved can resolve issues relating to the rail line's rehabilitation and so that Peoria can determine which carrier should operate on the Kellar Branch.

"We hope to bring service here," Carr added. "We believe with a limited amount of work, we can run a locomotive on it with cars. We're only going 7 miles per hour. That's why we are on the line to inspect the condition. We've run the line for 10 years."

Stolarczyk, in an affidavit filed with the STB, claims that as recently as "six years ago," there were at least 16 different customers on the Kellar Branch and that today, there are only two and that the business "disappeared" under Pioneer's "stewardship."

Carr said the claim is untrue.

"The reason we are on the line right now is because they haven't provided service for two years," Carr said about CIRY. "Now they want (the STB) to change their minds again. It's a stalling tactic."

Carr said Pioneer will file a response to CIRY's petition on Friday. He pointed out CIRY has hazardous materials on the Kellar Branch, to which Stolarczyk, in his affidavit, admits 75 cars are on the line - for BP Amoco on the western connection - and inspections are routinely conducted.

"I am very concerned the presence of two railroads operating simultaneously on the Kellar Branch without any sort of signals will increase the likelihood of an accident," Carr said.

The battle between these two rail companies comes about one week after the City Council voted unanimously to convene a meeting of all parties involved in the Kellar Branch saga to discuss building a proposed recreational trail, even if it means having it co-exist with the rail line.

Government bodies in Peoria and Peoria Heights have been pushing for more than a decade to build a trail where the Kellar Branch sits.

Peoria Heights officials want both railroad companies to pay rent for using their portion of the line. They are asking \$79,200 a year.

John Sharp can be reached at 686-3282 or jsharp@pjstar.com. Leslie Fark contributed to this report.



Have a thought on this issue? Share it by leaving a message at (309) 687-8439 or e-mailing yopage@pjstar.com. Comments may appear in the Journal Star's YOUPage on Friday.

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lakemper@mtco.com
12/07/2007 11:15 AM

To wnullins@bakerandmiller.com
cc
bcc
Subject [Fwd: Kellar Branch Line]

----- Original Message -----
Subject: Kellar Branch Line
From: "Randy Oliver" <ROliver@ci.peoria.il.us>
Date: Wed, December 5, 2007 9:09 am

Dear Mayor and Council:

We just received a call that both Pioneer and Central Illinois Rail were attempting to access the Kellar Branch line this morning. One of the Rail Carriers wants the other attested for trespass. We advised the Officer responding that neither Carrier had authority to operate from the City of Peoria, however, both derived any authority from the Surface Transportation Board (STB). Consequently, neither should be charged with trespass and the STB would need to resolve the issue.

We just wanted you to be aware of the situation.

Randy



untitled-[2.2]