

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**FD 35685**

**RAIL SWITCHING SERVICES, INC.  
- OPERATION EXEMPTION -  
LINE OF PEMISCOT COUNTY PORT AUTHORITY  
IN PEMISCOT COUNTY, MISSOURI**

**FD 35686**

**PIONEER RAILCORP  
- CONTINUATION IN CONTROL EXEMPTION -  
RAIL SWITCHING SERVICES, INC.**

**PEMISCOT COUNTY PORT AUTHORITY'S  
REPLY TO MOTION TO STRIKE**

Respectfully submitted,

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Dated: November 13, 2012

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I.

**INTRODUCTION**

Pemiscot County Port Authority ("PCPA") responds to the motion to strike/reply jointly filed on November 9, 2012, by Rail Switching Services, Inc. and Pioneer Railcorp.<sup>1</sup> RSS's motion/reply represents its response to PCPA's

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<sup>1</sup> collectively referred to as "RSS".

Petition for Leave to Reply to the RSS “Joint Replies”<sup>2</sup> filed with the Surface Transportation Board (“the Board”) on November 2.<sup>3</sup> Contrary to RSS’s assertions, the November 8 Petition neither introduces new facts or new arguments. As PCPA will show, there is no way that PCPA could have anticipated and used its petition to reject and petition to stay to submit anything refuting assertions that RSS made in its November 2 Reply. The Board should deny RSS’ motion/reply and reject RSS’ exemption notices or, alternatively, stay their effectiveness and commence a proceeding.

## II.

### ARGUMENT

The gist of RSS’ 15 pages of argument is that 1) PCPA should have waited until *after* RSS’ exemptions became effective before filing its Petition to Reject, 2) RSS needs Board authority to provide service over PCPA’s line of railroad whether as a common or a contract carrier, 3) neither the opposition of PCPA nor Marquis Marine Terminals, LLC (“MMT”) are entitled to any weight,<sup>4</sup> 4) only RSS is entitled to retrieve from or deliver cars to BNSF Railway Company (“BNSF”), 5) RSS must obtain operating authority as quickly as possible as there are other potential shippers to be served on the Line, and 6) PCPA’s arguments

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<sup>2</sup> Hereafter “the November 8 Petition.”

<sup>3</sup> Hereafter “the November 2 Reply.”

<sup>4</sup> In view of BNSF’s filing, RSS appears to have dropped its assertion that no railroad opposes its exemption requests.

about the need for competitive bidding and adverse discontinuance authority are self-serving, baseless, and incorrect. PCPA will briefly address and dispose of each.

First, RSS wants the Board to believe that the November 8 Petition should be rejected because the evidence presented there is “evidence and argument that PCPA could have and should have presented in its initial Petition to Reject or its Petition to Supplement.” Motion at page 3. Apparently, RSS is referring to the sworn statements submitted by PCPA’s executive director David Madison and MMT’s President D.L. “Mark” Marquis attached to the November 8 Petition. More specifically, RSS is complaining about the fact that PCPA used its November 8 Petition to respond to incorrect certain statements first appearing in the “Joint Reply.” Matters raised by RSS including such things as the alleged lack of any opposition to RSS’s exemptions (at pages 3, 8), the holder of the right to “retrieve or deliver cars to BNSF (at pages 12, 16), and the presence of any other potential shippers on the Line (at pages 13, 15-6, and 18). PCPA is not a mind reader and there is nothing in either of RSS’ two exemption notices, the only documents RSS filed prior to submitting the Joint Reply, to put PCPA or MMT on notice of what RSS might submit with the Board. Upon seeing this incorrect matter, PCPA reacted immediately by furnishing the correct information with the November 8 Petition.

Second, PCPA is puzzled by RSS' suggestion that it should have waited to file its petition to reject (or perhaps revoke) until the exemptions became effective. Motion at pages 4 and 14.<sup>5</sup> RSS asserts that such a delay would provide the Board and the parties a more "orderly and deliberate approach to the issues." But by that time, the proverbial "genie" would be out of the bottle because the exemptions would have become effective. Moreover, once an exemption becomes effective and the transaction is consummated (and PCPA has no reason to believe that RSS would not act as quickly as possible to treat the transaction as consummated), PCPA's only remedy would be to seek an after the fact revocation. Once an exemption becomes effective, a revocation request is treated as a petition to reopen and revoke. As such, the party seeking revocation must state in detail whether reopening is supported by material error, new evidence, or substantially changed circumstances, a much higher standard. 49 CFR §1115.3(b). Otherwise, the petition fails.

Third, RSS' interpretation of the law on the extent to which carriers need Board authority to perform service under a contract with a specific shipper is confused to say the least. RSS at last concedes that the car storage services

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<sup>5</sup> At note 2 on page 4, RSS suggests that PCPA is "backing away" from its request that the Board rule on its Petition to Reject before the effective date and commence a proceeding instead. This is not true. PCPA has consistently asked the Board to reject the notices. Alternatively, it has suggested the Board could stay the effectiveness of the notices and commence a proceeding. *See*, Petitions to Reject at pages 3 and 14, Petition to Stay at pages 2 and 10, November 8 Petition at page 9.

provided on PCPA's Line do not require Board approval and that private carriers providing rail service over Board-regulated track also do not require Board authorization. Motion at pages 5 and 7. However, as BNSF has pointed out in the opposition letter it filed in this proceeding on November 8, the Board does not have jurisdiction over contract carriage performed by a railroad over carrier-owned tracks. BNSF letter at 3. Thus, *if* another shipper were to locate on the Line, it could contract with RSS to provide a noncommon service without RSS having to obtain Board authority to provide that service.

Turning to the PCPA's allegations, RSS attempts to rebut them through exercises in semantics. In the interest of brevity, PCPA will respond to each quickly.

Allegation #1: no government opposition: Once PCPA cited support for its status as a government entity under Missouri law, all that RSS could do was to belittle PCPA's opposition by claiming that PCPA was not "a disinterested party" or "acting in the public interest." RSS urges that PCPA's opposition carries no weight because it owns the subject rail line but RSS cites no law in support of that proposition. Moreover, RSS denigrates the quality of PCPA's opposition by the failure of PCPA's David Madison to explicitly state that "[PCPA's opposes] RSS getting authority."

Allegation #2: no shipper opposition: Similarly, RSS discounts MMT's opposition. RSS concedes that MMT is opposed to RSS service but castigates MMT for its failure to use RSS's "magic words," that is to say that it opposes RSS having STB authority.

Allegations #3 and #4: RSS's right to retrieve or deliver cars and serve "other shippers": While both sides would agree that contract interpretation questions (such as who gets to retrieve or deliver car) are beyond the Board's jurisdiction, PCPA wants to make clear that there are no other shippers in existence in the foreseeable future. Furthermore, RSS has identified none. Inasmuch as David Madison has testified as to this in his previous statement, nothing remains to be said. In the event that additional traffic develops and should RSS (or any other short line) be chosen to provide common carrier service over the Line, there will be ample time for that entity to secure appropriate Board operating authority.

RSS's statement that class exemption procedures do not require applicants to furnish evidence of public need and financial viability does not tell the full story. Although the class exemption procedures do not require either showing, the Board has adopted an informal policy of requiring carriers proposing more unusual or controversial transactions to file either an individual petition or a full application presenting some evidence of need and/or evidence of financial responsibility. Cf. GNP Rly Inc.—Acquis. and Operation Exemption—Redmond Spur and

Woodinville Subdivision, FD 35407 STB slip op. at 5-6, served June 15, 2011;  
Riverview Trenton Railroad Company — Acquisition and Operation Exemption —  
Crown Enterprises, Inc., FD 33980, STB slip op. at 10, served Feb. 15, 2002; and  
Ozark Mountain Railroad-Construction Exemption, FD 32204, ICC served Dec.  
15, 1994). Consistent with that precedent, RSS needs to present some evidence of  
a public need for its service.

To be charitable, RSS' filing at this early date is premature. Neither MMT  
nor BNSF desire its services, there are no other shippers waiting in the wings, RSS  
has identified none, and it may be a substantial amount of time before any locate  
on the Line. Consequently, RSS has failed to demonstrate a need for its service.

Allegation #5: PCPA is not required to seek proposals before awarding bids  
and no authority is required for RSS to terminate service if a court interprets the  
Operating Agreement in PCPA's favor: RSS claims that because PCPA awarded  
car storage rights to RSS, an industry track agreement to BNSF, and a property  
lease to MMT, it can award a grant of common carrier rights to RSS without  
compliance with applicable Missouri law. In fact, each of these parties approached  
PCPA with a specific transaction rather than the other way around.

In view of the fact that there is no customer seeking RSS's services at this  
time, there is no need for the Board to grant RSS' operating rights exemption now.  
However, PCPA anticipates that *if* RSS obtained such authority and *if* a court or

arbitrator were to find against RSS in any contract interpretation litigation, RSS would resist terminating service over the Line forcing PCPA to seek discontinuance authority. Accordingly, PCPA wishes to avoid the burden of having to obtain discontinuance authority by asking the Board to withhold awarding any operating authority to RSS at this time.

III.  
CONCLUSION

The Board should deny RSS' motion/reply and reject RSS' exemption notices or, alternatively, stay their effectiveness and commence a proceeding.

Respectfully submitted,



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Dated: November 13, 2012

CERTIFICATE OF SERVICE

I, John D. Heffner, do hereby certify that a copy of the foregoing "Pemiscot County Port Authority's Reply to Motion to Strike, to be served via email and first-class U.S. mail this 13th day of November, 2012, on the following named individuals:

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Dated: November 13, 2012