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SERVICE DATE – AUGUST 10, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-878

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

Decided: August 9, 2005

This decision: (1) grants an adverse application authorizing the discontinuance of service by Pioneer Industrial Railway Company (PIRY) over an 8.29-mile rail line, known as the Kellar Branch, located in and owned by the City of Peoria (City) and the Village of Peoria Heights (Village) (jointly, the Cities or applicants), in Peoria County, IL; (2) grants the Cities' motion to reject PIRY's notice of intent to file an offer of financial assistance (OFA) under 49 U.S.C. 10904; and (3) denies a request by PIRY that the Board appoint a mediator in this proceeding.

BACKGROUND

The Kellar Branch is located between milepost 1.71 and milepost 10.00, where it previously connected with the Peoria and Pekin Union Railway Company (P&PU) and now connects with Tazewell & Peoria Railroad, Inc. (TPR).¹ The branch was abandoned by the bankrupt Chicago, Rock Island and Pacific Railroad Company (Rock Island) in 1980. See Chicago, R.I. & P.R. Co. Abandonment, 363 I.C.C. 150 (1980) (Rock Island Abandonment). In 1984, the City, a noncarrier, acquired the abandoned line from the Rock Island Trustee and entered into an agreement with P&PU for the latter to provide service to the shippers on the line. See Peoria and Pekin Union Railway Company—Exemption from 49 U.S.C. 10901, Finance Docket No. 30545 (ICC served Sept. 24, 1984). The City subsequently transferred to the Village an ownership interest in the portion of the Kellar Branch located within the Village's corporate limits. Although the Cities have used the "d/b/a" name Peoria, Peoria Heights & Western Railroad in connection with the line, the Cities have not obtained any authority from the Board, nor do they perform rail operations. P&PU assigned its rights under the agreement to PIRY in 1998, and PIRY obtained authority to operate the line. See Pioneer Industrial Railway Company—Lease and Operation Exemption—Peoria, Peoria Heights & Western Railroad, STB Finance Docket No. 33549 (STB served Feb. 20, 1998).

¹ See Tazewell & Peoria Railroad, Inc.—Lease and Operation Exemption—Peoria and Pekin Union Railway Company, STB Finance Docket No. 34544 (STB served Sept. 28, 2004).

In 2001, the City acquired track to the west of the Kellar Branch from the Union Pacific Railroad Company (UP). See City of Peoria, IL—Acquisition and Operation Exemption—Union Pacific Railroad Company, STB Finance Docket No. 34066 (STB served July 25, 2001). Subsequently, the City filed a notice of exemption to construct a connecting track from the northwest end of the Kellar Branch to the former UP track. See City of Peoria, IL, d/b/a Peoria Heights & Western Railroad—Construction of Connecting Track Exemption—in Peoria County, IL, STB Finance Docket No. 34395 (STB served Feb. 23, 2004, and Sept. 27, 2004) (Construction Exemption).

On June 29, 2004, the Cities filed a petition seeking waiver of certain regulations for the filing of an adverse discontinuance application. In their petition, the Cities stated that they had contracted with a replacement operator to provide service on the line. The Cities indicated that the agreement with the replacement carrier would be temporary, pending completion of the connecting track authorized in Construction Exemption, after which they planned to convert a portion of the right-of-way to a recreational trail. The three existing shippers will then be served either by the new connecting track or by other routings.

PIRY replied in opposition on July 22, 2004. Also, in response to the Cities' plan to convert part of the right-of-way into a recreational trail, PIRY filed a notice of intent to file an OFA to purchase the entire Kellar Branch. The Cities filed a motion to reject PIRY's notice of intent to file an OFA on July 23, 2004. PIRY replied on August 12, 2004.

By a decision served on September 10, 2004, we granted the Cities' petition for waiver. We also stated that we would resolve the dispute regarding PIRY's intent to file an OFA in the decision on the merits of the adverse application for discontinuance.

By a notice filed in Central Illinois Railroad Company—Operation Exemption—Rail Line of the City of Peoria and the Village of Peoria Heights in Peoria and Peoria Heights, Peoria County, IL, STB Finance Docket No. 34518 on June 28, 2004, and served and published in the Federal Register on July 28, 2004 (69 FR 45111), Central Illinois Railway Company (CIRY) invoked the Board's class exemption procedures at 49 CFR 1150.41 to operate the Kellar Branch at the request of the Cities. PIRY filed a petition to reject CIRY's notice of exemption or to revoke its exemption or, alternatively, to stay the effectiveness of the exemption. The Board denied the petition for stay in a decision served on July 1, 2004.

In another related proceeding, PIRY filed a petition for declaratory order in Pioneer Industrial Railway Co.—Petition for Declaratory Order, STB Finance Docket No. 34636, asking the Board to institute a proceeding to determine PIRY's status on the line. In a decision served on February 23, 2005, the Board denied: (1) PIRY's petition to reject CIRY's notice of exemption or revoke CIRY's operation exemption in STB Finance Docket No. 34518, and (2) PIRY's petition for declaratory order in STB Finance Docket No. 34636. In so doing, the Board noted that there were now two authorized common carriers on the line and that the parties should establish coordination protocols

before CIRY commenced operations. By letter received on March 15, 2005, CIRY indicated that it would not begin service until after this adverse discontinuance proceeding was concluded.

In the current proceeding, the Cities filed an adverse application for discontinuance of PIRY's operating authority on November 16, 2004. Notice was served and published in the Federal Register on February 24, 2005 (70 FR 9125-6). PIRY filed a protest on March 21, 2005, to which applicants replied on April 5, 2005. On April 29, 2005, PIRY filed a motion to supplement its protest and a request for reconsideration of the Board's statement in the February 2005 notice that "OFAs will not be entertained in this proceeding," to which the Cities replied in opposition on May 11, 2005. Also on May 11, 2005, PIRY filed a supplement to its reconsideration request.

Subsequently, PIRY provided the Board with a copy of a letter dated May 16, 2005, addressed to the Mayor, City Manager, and City Council of Peoria. The letter cites a May 14, 2005 article in the *Peoria Journal Star* stating that Mr. Don Gibson, described therein as the owner of DOT Rail Service, Inc. (DOT Rail), the parent company of CIRY, had been indicted on criminal charges. In light of that indictment, PIRY questions CIRY's ability to serve shippers on the Kellar Branch, and asks that the Cities voluntarily withdraw their adverse discontinuance application, and enter into further negotiations with PIRY regarding service to the shippers. On May 23, 2005, PIRY filed a request that the Board appoint a mediator to explore the possibility of joint rail-trail use of the line.

On May 23, 2005, the Small Railroad Business Owners Association of America (SRBOA) filed a letter commenting on this proceeding. SRBOA argues that this proceeding really involves an abandonment rather than a discontinuance, because the Cities' plan calls for most of the Kellar Branch's track to be removed and for a connection to a major railroad to be severed. Relying on statements made by PIRY marketing personnel, SRBOA contends that there are potential new shippers on the line that would lose service opportunities should the Cities' plans go forward.

The Cities replied on May 27, 2005, to the filings made by PIRY and SRBOA. Applicants state that they do not consent to mediation and that they continue to support CIRY as a replacement operator. The Cities also reiterate that they have no interest in the continuation of PIRY's service. Along with their reply, the Cities provided two letters from Mrs. Paula Mudge-Gibson. One letter, addressed to the Cities' attorney, states that she is 75% owner and president of DOT Rail and 60% owner and president of CIRY. The other letter, addressed to Mr. Steve Van Winkle, Director of Public Works for the City of Peoria, states that CIRY is ready, willing, and able to perform rail service on the Kellar Branch.

PRELIMINARY MATTER

As indicated, PIRY has requested mediation in this matter. However, the Cities do not consent to mediation and we see no indication that it would be fruitful. Therefore, we will deny PIRY's request.

POSITIONS OF THE PARTIES

In their application, the Cities contend that this proceeding is governed by a line of decisions of the Board, and its predecessor, the Interstate Commerce Commission (ICC), that granted adverse discontinuance authority where the owner of a rail line proposed to replace an operator after that operator's contractual or property right to operate over the line expired or was lawfully terminated, but where the operator refused to voluntarily give up its operating authority. The Cities cite Fore River R.R. Corp.—Discon. Exempt.—Norfolk County, MA, 8 I.C.C.2d 307 (1992) (Fore River); Cheatham County Rail Authority “Application and Petition” for Adverse Discontinuance, Docket No. AB-379X (ICC served Nov. 4, 1992) (Cheatham County); Jacksonville Port Authority—Adverse Discontinuance—in Duval County, FL, Docket No. AB-469 (STB served July 17, 1996) (Jacksonville Port); and Tacoma Eastern Railway Co.—Adverse Discontinuance of Operation Application—A Line of the City of Tacoma in Pierce, Thurston and Lewis Counties, WA, STB Docket No. AB-548 (STB served Oct. 16, 1998) (Tacoma). The Cities assert that their operating agreement with PIRY expired by its terms on July 10, 2004. Applicants add that they notified PIRY that they intended to contract with CIRY to provide service on the line. PIRY has refused to relinquish its operating authority. Because the Cities must dispossess PIRY of its rights to operate on the line if they are to realize their plan to convert a portion of the Keller Branch into a recreational trail, they must file an adverse discontinuance application.

The Cities state that their operating agreement with CIRY is intended to be temporary until the completion of construction of the connecting track authorized in Construction Exemption. After completion of the construction, the Cities state that the two active shippers on the northwestern portion of the Keller Branch, Bleyer Industries, Inc., the parent company of Peoria Plastics, and M.S. Carver Lumber (Carver Lumber), will be served by CIRY from the west. A third shipper, O'Brien Steel Service Co. (O'Brien Steel), located on the southeastern part of the branch, will continue to be served from the east. The Cities contend that this will allow the conversion of most of the line to a recreational trail.

With their application, the Cities provide letters from all three active shippers on the line. O'Brien Steel expresses approval of the change of operators and indicates dissatisfaction in the service that it has received from PIRY. Peoria Plastics and Carver Lumber do not object to a change of operators, although they indicate that they have been satisfied by the service provided by PIRY.

PIRY opposes the discontinuance application. PIRY argues that, because the operating agreement with CIRY is temporary and the Cities intend to convert most of the Keller Branch to a recreational trail, this case should be treated as an abandonment application. Further, PIRY contends that the Cities are trying to circumvent the Board's exclusive authority to license the abandonment of rail lines. Therefore, PIRY argues, the Cities' filings amount to an abuse of the Board's processes. PIRY also claims that its contractual right to operate the line has not expired and points out that the Cities have

taken no action to enforce the termination clause of the contract. Finally, PIRY maintains that the Cities' plan will result in diminished service for shippers, both active and potential, on the Kellar Branch. According to PIRY, TPR now connects with eight other carriers. As a result of the conversion of most of the line to a trail, however, PIRY claims that shippers on the northwestern end of the line will have access only to UP.

In reply, the Cities dispute PIRY's contentions. They assert that the fact that CIRY intends to operate the line on a temporary basis and that the Cities ultimately plan to convert most of the line into a recreational trail is immaterial to the proceeding at hand, because the three existing shippers on the line will continue to have rail service and CIRY must eventually seek authority to discontinue service from the Board before rail service could cease over any portion of the line. The Cities reiterate their position that abandonment authority will not be required when they convert a portion of the line to a trail, because the line was an abandoned line when they acquired it. The Cities point out, however, that, even if they are required to seek abandonment authority for this line, the time to do so would be when CIRY (or a subsequent operator) seeks authority to discontinue service, not in the current proceeding.

PIRY also seeks to file an OFA in this proceeding. PIRY characterizes its recent filing as a request for reconsideration of the language in the February 2005 notice that said, "offers of financial assistance (OFA) will not be entertained in this proceeding." However, the Board noted there that it would consider PIRY's already filed notice of intent to file an OFA and the Cities' motion to reject PIRY's filing in the decision on the merits. Thus, we resolve that matter here without the need to deem it a request for reconsideration. PIRY concedes that it is the Board's usual practice not to entertain OFAs in adverse discontinuance proceedings but, based on its position that an abandonment will result from the Cities' plan, it maintains that an OFA is appropriate to preserve rail service over the entire Kellar Branch.

DISCUSSION AND CONCLUSIONS

Appropriate Authority

The Cities have sought Board authorization for adverse discontinuance, but PIRY argues that the Cities really need abandonment authority. The argument made by PIRY and SRBOA that abandonment authority, rather than the adverse discontinuance of service authority sought by the Cities, is required in this proceeding is without merit.

Normally, a dispute between a landlord and a tenant is resolved according to the laws of the state where the dispute takes place. When these disputes affect interstate commerce, the Board's primary jurisdiction over the discontinuance of rail service deprives a landlord of customary recourse to the courts until the Board removes its primary jurisdiction. Jacksonville Port, slip op. at 5, citing 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 706 (D.C. Cir. 1994); Fore River at 310; Kansas City Pub. Ser. Frgt. Operation—Exempt.—Aban., 7 I.C.C.2d 216, 224-26 (1990).

The Cities are the owners of a rail line, and PIRY is their tenant. The Cities contend that the agreement between the parties has expired, that it has obtained a new carrier (CIRY), and that it seeks to have PIRY removed from the property. Although the Board does not undertake to interpret or enforce operating agreements or contracts, see Tacoma; The Kansas City Southern Railway Company—Adverse Discontinuance Application—A Line of Arkansas and Missouri Railroad Company, STB Docket No. AB-103 (Sub-No. 14) (STB served Mar. 26, 1999), the Cities seek to have the Board remove its primary jurisdiction with respect to PIRY’s operating authority so that they may attempt to have PIRY evicted from the Keller Branch under any applicable state law. Until the Board removes its primary jurisdiction, no state court may apply the processes of state law.

The proper way for the Board to remove its primary jurisdiction in such circumstances is through an adverse discontinuance proceeding. Jacksonville Port; Modern Handcraft, Inc.—Aband., 363 I.C.C. 969 (1981) (Modern Handcraft); Thompson v. Texas-Mexican Ry. Co., 328 U.S. 134 (1946). If the Board grants an adverse discontinuance application, the Cities can proceed to court to attempt to have PIRY evicted. At the same time, adverse discontinuance authority is permissive, which means that the operator can continue to operate until there is an adverse state court judgment against it or until it voluntarily ceases operations. Modern Handcraft at 972. Thus, if the Cities failed to evict PIRY in state court after the Board granted an adverse discontinuance application, PIRY could continue to operate on the line.

Moreover, PIRY has not shown that abandonment authority would be required at all in this case. The line acquired by the Cities had already been fully abandoned. Rock Island Abandonment. Further abandonment authority would be required only if the Cities had a common carrier obligation. Wisconsin Central Ltd. v. STB, 112 F.3d 881 (7th Cir. 1997).

Courts have held that an owner of an abandoned rail line that leases it for service does not obtain a residual common carrier obligation unless it has held itself out as a rail carrier on the line. Id. There is no evidence that the Cities have held themselves out to the public to provide common carrier rail service. Instead, the Cities have arranged for other carriers to hold the common carrier obligation. Indeed, even if adverse discontinuance is granted with respect to PIRY, CIRY retains an obligation to provide service over this line and it would have to be relieved of that obligation prior to the Cities’ planned reconfiguration. Because the Cities have not held themselves out as a common carrier, there would be no need for the Cities to obtain authorization from the Board to abandon any portion of the already-abandoned Keller Branch. Id.

Public Convenience and Necessity Analysis

The statutory standard governing discontinuance of service is whether the present or future public convenience and necessity require or permit the proposed action. 49 U.S.C. 10903(d). It is well-established that the Board may consider an adverse application – one brought by a party other than the affected rail carrier – to discontinue service, so long as that party establishes that it has a proper interest in the proceeding. See, e.g., Fore River; Cheatham; Jacksonville Port; Tacoma. In implementing this statutory standard in an adverse proceeding, we consider the relative burdens that continuation of service on the one hand, and cessation of service on the other, would have on the involved carrier, on the owner-lessor of the line, and on the public.

We find that the public convenience and necessity supports discontinuance, and we will grant the Cities' application. The Cities have developed a plan to convert part of a rail line which they own into a recreational trail for the public, while maintaining the existing level of rail service to the satisfaction of the users of that service. The Cities have contracted with a replacement carrier. Contrary to the arguments of PIRY and SRBOA, the evidence of record does not demonstrate that shippers will lose routing options or receive inferior service should PIRY's service be discontinued. No shippers object to the discontinuance of PIRY's service, the substitution of CIRY as the operator, or the plans for recreational trail use. Moreover, the Cities' contract with CIRY and the need for CIRY to seek our authority before service on this line can cease assures that granting the Cities' application will not result in a diminution of service that has a serious adverse impact on shippers or the community.

Although the Board does not interpret or enforce operating agreements between the owner of a rail line and its tenant, when an owner charges that an operator has trespassed upon its rights and asks us to act so that the owner may avail itself of the customary procedures to secure redress, we will examine those assertions and consider them in determining whether to grant an adverse discontinuance application. Jacksonville Port. The Cities assert that their operating agreement with PIRY expired by its terms on July 10, 2004, and that PIRY has refused to vacate the property.

Although we do not reach the question of whether the Cities' interpretation of the agreement is correct, the shippers on the line will have rail service no matter which way a state court would hold. If the court accepts the Cities' argument that the operating agreement has expired, PIRY may be evicted from the line. CIRY would then remain as an authorized carrier able to serve shippers. If, however, the court holds in favor of PIRY and finds that the contract still entitles it to provide service on the line, our action here does not preclude PIRY from continuing to provide that service as a second carrier. Accordingly, it is appropriate for us to grant the Cities' application and to allow a court of competent jurisdiction to adjudicate the rights and obligations of the parties to the agreement. See, e.g., Jacksonville Port.

Other Issues

Because this decision will authorize a discontinuance of service and not an abandonment, under our precedent OFAs to take over the line are not entertained. See

City of Rochelle, Illinois—Adverse Discontinuance—Rochelle Railroad Company, STB Docket No. AB-549 (STB served May 27, 1999); Tacoma. Moreover, there is no need here for an OFA, as CIRY is authorized to provide rail service over the line. Therefore, the Cities' motion to reject PIRY's notice of intent to file an OFA will be granted. Similarly, interim trail use/rail banking requests under the Trails Act, and public use requests under 49 U.S.C. 10905 are not appropriate and will not be entertained.

In approving this application, we must ensure that affected railroad employees will be adequately protected. 49 U.S.C. 10903(b)(2). We have found that the conditions imposed in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979) satisfy the statutory requirements, and we will impose those conditions here.

Finally, any concerns we might have had about CIRY due to the legal status of Mr. Gibson have been allayed. The record indicates that Mr. Gibson is no longer an owner, director or officer of CIRY (Thomas McFarland letter to Vernon Williams dated July 27, 2005). CIRY has stated that it will be able to provide adequate rail service to shippers on the Kellar Branch and the Cities agree. We find no basis on this record to conclude that the company, CIRY, will not be able to provide the rail service it has already been authorized to provide on the Kellar Branch, regardless of Mr. Gibson's legal status.

We find:

1. The present or future public convenience and necessity require or permit the discontinuance of operations by PIRY over the above-described line of railroad, subject to the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

2. Discontinuance of operations by PIRY will not result in a serious, adverse impact on rural and community development.

3. This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The Cities' adverse application for discontinuance of PIRY's service is granted.

2. The Cities' motion to reject PIRY's intent to file an OFA is granted.

3. PIRY's request for mediation is denied.
4. This decision is effective on its service date.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary