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SERVICE DATE - SEPTEMBER 10, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-878

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

Decided: September 9, 2004

The city of Peoria (the City) and the village of Peoria Heights (the Village) (together “the Cities”) on June 29, 2004, filed a petition seeking waiver of certain regulations for the filing of a third party or “adverse” discontinuance application. On July 13, 2004, the Cities filed a letter requesting expedited action on their waiver petition. Pioneer Industrial Railway Company (PIRY), the operator that is the subject of this adverse discontinuance proceeding, filed replies in opposition to the expedited action and waiver requests on July 13 and 22, 2004, respectively. The Cities’ request for waiver will be granted to the extent discussed in this decision.

BACKGROUND

The Cities state that they intend to ask the Board to find that the public convenience and necessity permit the discontinuance of operations by PIRY over the Kellar Branch (Branch), an 8.29-mile rail line between milepost 1.71 and the connection with the Peoria and Pekin Union Railway Company (P&PU) at milepost 10.00, in Peoria and Peoria Heights, Peoria County, IL. They claim that the agreement governing PIRY’s operation of the Kellar Branch was due to expire on July 10, 2004, but that PIRY has refused to relinquish operating authority. The Cities state that they selected Central Illinois Railroad Company (CIRY) to succeed PIRY and that CIRY subsequently sought authority to commence substitute operations. See 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 (STB served and published at 69 FR 45111 on July 28, 2004) (Central Illinois).

The Kellar 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). In 1984, the City, a noncarrier, acquired the abandoned Branch from the Rock Island Trustee and entered into an agreement with P&PU for the latter to provide service to the shippers on the Branch. 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 Branch located within the Village’s corporate limits, and PIRY acquired by assignment P&PU’s interest in, and obtained authority to operate, the Branch. See Pioneer Industrial Railway Company–Lease and Operation

Exemption–Peoria, Peoria Heights & Western Railroad, STB Finance Docket No. 33549 (STB served Feb. 20, 1998).

The Cities state that the segment of the Kellar Branch on which no shippers are located is likely to be converted into a recreational trail. Because they acquired trackage rights west of the Branch, City of Peoria, IL–Acquisition and Operation Exemption–Union Pacific Railroad Company, STB Finance Docket No. 34066 (STB served July 25, 2001), and are in the process of obtaining authority to construct a connection between the trackage rights trackage and the Kellar Branch, City of Peoria, IL d/b/a Peoria, Peoria Heights & Western Railroad Construction of Connecting Track Exemption Peoria County, Illinois, STB Finance Docket No. 34395 (STB served Mar. 9, 2004), the Cities state that “the trackage that is likely to be converted to a trail would not be required for the provision of rail service to shippers.” Cities’ petition for partial waiver at 1, n.1.<sup>1</sup>

PIRY filed a petition to reject or revoke and a petition to stay the exemption issued in Central Illinois. The stay request was denied in a decision served on July 1, 2004. The Board stated that CIRY may commence operations over the Kellar Branch once its exemption becomes effective and it certifies that coordination protocols for dual operations are in place. On July 6, 2004, CIRY filed a letter of certification, and PIRY responded stating that no coordination protocols are in place and no discussions on establishing protocols had taken place. PIRY filed a petition for permission to supplement and a supplement to its petition to reject or revoke on August 3, 2004, and the Cities filed a reply on August 18, 2004.

The Cities seek waiver of all filing requirements to permit them to file an adverse discontinuance application containing only the following information:

- (1) the name and address of the applicant;
- (2) the name and address of counsel;
- (3) a detailed map of the facilities involved;
- (4) total carloads broken out for each of the shippers currently using the line;
- (5) summary of the principal commodities handled;

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<sup>1</sup> The Cities further state that “[c]onversion of that trackage to a trail would not require Board authority or an exemption because that trackage had been abandoned when the City of Peoria acquired it.” While the Cities would not need Board authority to convert a portion of the Kellar Branch into a trail, the carrier operating the Branch would first need to obtain Board authority before it could cease operations.

- (6) summary operating plan for the operations of the substitute carrier;
- (7) certification that the substitute carrier's current or proposed operations comply or will comply, with all federal and state safety requirements;
- (8) opinion of counsel that the prior agreement with PIRY for operation of the Kellar Branch expired in accordance with its terms;
- (9) documentation from the Cities that authorizes the operations of the substituted service;
- (10) a statement on behalf of the Cities of the reasons for the application and the benefits that will be obtained if the application is approved; and
- (11) supporting statements from shippers.

The Cities also request waiver of all notice and publication requirements, except the following:

- (1) The instant petition for waiver would be served on the shippers on the Branch, PIRY, and all connecting carriers. The Cities ask that the petition for waiver serve as the notice of intent to discontinue service required under 49 CFR 1152.20.
- (2) A copy of the application would be served on each of the aforementioned "relevant parties" and on the Illinois Commerce Commission.

Finally, the Cities request waiver of the Board's environmental and historic regulations.

#### DISCUSSION AND CONCLUSIONS

PIRY contends that the waiver request is inappropriate and should be denied. Citing City of Venice—Abandonment Exemption—in Venice, IL and St. Louis, MO, STB Docket No. AB-863 (STB served June 22, 2004), PIRY claims that this proceeding is in fact an adverse abandonment filed by a noncarrier and not an adverse discontinuance tied to a change of operators. According to PIRY, the Cities' plan to abandon almost all of the Kellar Branch and turn the abandoned portion into a recreational trail would be disadvantageous to the shippers on the Branch and contrary to the Congressional intent to preserve rail service wherever possible. Moreover, PIRY contends that the Cities' claims, that CIRY is merely a replacement operator and that rail service "to shippers on the Kellar Branch would not cease," Cities' petition for partial waiver at 1, are misleading. That is because CIRY will only provide interim rail service until the center portion of the Branch can be converted into a trail.

PIRY states that it is currently operating, and for the last 6 years has actively operated, the Kellar Branch; that the agreement for the operation of the Branch that the City and PP&U entered into and subsequently assigned to PIRY contains no expiration date; that its interest in the Branch has not terminated; and that it has been fulfilling its common carrier obligations with respect to the Branch and Cities have made no allegations to the contrary. Additionally, PIRY claims that the Cities do not have authority to consent to trail use and that PIRY, in any event, would make an offer of financial assistance (OFA) to acquire the Branch if this proceeding were to go forward.

On July 23, 2004, PIRY filed a notice of intent to file an OFA to purchase the Kellar Branch and requested that the Cities provide the information set forth in 49 CFR 1152.27(a) and the data necessary to determine net liquidation value, and the Cities filed a motion to reject. Citing Tacoma Eastern Railway Company–Adverse Discontinuance of Operations Application–a Line of City of Tacoma, in Pierce, Thurston and Lewis Counties, WA, STB Docket No. AB-548 (STB served Oct. 16, 1998), the Cities contend that OFAs to purchase are not entertained in discontinuance proceedings. PIRY filed a reply on August 12, 2004. The Cities’ motion to reject the notice of intent will be addressed in a separate decision.

The Cities’ request for partial waiver will be granted. Any material beyond what the Cities propose to provide would not be relevant to either an adverse abandonment or adverse discontinuance proposal. Similar requests have previously been granted by the Board or its predecessor. See, e.g., Chelsea Property Owners–Abandonment–Portions of the Consolidated Rail Corporation’s West 30th Street Track in New York, NY, Docket No. AB-167 (Sub-No. 1094) (ICC served July 19, 1989); City of Rochelle, Illinois–Adverse Discontinuance–Rochelle Railroad Company, STB Docket No. AB-549 (STB served June 5, 1998); and Seminole Gulf Railway, L.P.–Adverse Abandonment–in Lee County, FL, STB Docket No. AB-400 (Sub-No. 4) (STB served June 9, 2004). PIRY’s objections go to the merits of the Cities’ application, not to their petition for waiver. These arguments will be addressed in the decision on the merits.

The Cities are required to serve a copy of this decision on all current shippers on, and all shippers with sidings on, the Kellar Branch, on all carriers that connect with PIRY, and on the Illinois Commerce Commission.

The waiver of environmental regulations is justified because the Cities propose to file their application as a request to substitute operators, a transaction excepted from environmental documentation under 49 CFR 1105.6(c)(2)(ii). The Cities would not need to file an historic report because that proposed action would not come within the scope of 49 CFR 1105.8(a). In light of the issue raised regarding whether the anticipated filing should be for adverse abandonment or adverse discontinuance, however, the Cities should be aware that they run the risk of delaying a Board ruling on their application if the Board concludes that the Cities’ application should be one for abandonment rather than discontinuance (as might be the case if

there is no successor, or remaining, operator), because compliance with the Board's environmental and historic regulations might then be necessary.

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' petition for partial waiver is granted as discussed above.
2. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams  
Secretary