

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: April 11, 2008

In a decision served in this proceeding on November 19, 2007 (November 19 Decision), the Board denied an application for adverse 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 (the City) and the Village of Peoria Heights, in Peoria County, IL. As a consequence of the November 19 Decision, both PIRY and the Central Illinois Railway Company (CIRY) retained Board authorization to serve shippers on the Kellar Branch. As such, the Board directed CIRY and PIRY to negotiate joint operating protocols for the traffic on the Branch.¹ On December 3, 2007, CIRY filed a petition to modify the November 19 Decision and to hold this proceeding in abeyance. PIRY filed a reply on December 7, 2007. This decision denies the relief sought.

BACKGROUND

In its petition to modify the November 19 Decision and hold this proceeding in abeyance, CIRY argues that (1) the uncoordinated operation of two railroads on the seriously deteriorated Kellar Branch presents serious safety issues, and (2) PIRY's rights to operate over the Kellar Branch have expired by contract and PIRY has no operating rights over the western connection (connecting track built by the City between the northwest end of the Kellar Branch and former Union Pacific Railroad Company track west of the Branch). CIRY further argues that the Kellar Branch is so deteriorated that it is incapable of handling any rail traffic without substantial rehabilitation and challenges PIRY's track repair cost estimates. CIRY also maintains that the Board should hold this proceeding in abeyance to allow the City to obtain a state court ruling on PIRY's contract claim and to decide which carrier should operate the line.

¹ When the parties were subsequently unable to negotiate joint operating protocols, the Board, in a decision served December 7, 2007 (December 7 Decision), directed them to meet, in the presence of Board staff, to negotiate such protocols, unless they had worked out a mutually acceptable arrangement before December 14, 2007, and had so advised the Board. On December 13, 2007, CIRY advised the Board that the parties had voluntarily reached an agreement covering operating protocols.

In reply, PIRY maintains that CIRY's petition should be denied because CIRY has not provided a legal basis for modifying the November 19 Decision or for holding this proceeding in abeyance. According to PIRY, because petitioner is seeking to modify a decision that has already taken effect, CIRY should have filed a petition for reconsideration or for reopening, rather than a petition to modify under 49 CFR 1117.1. PIRY further alleges that petitioner's request to hold this proceeding in abeyance does not lie because there is no proceeding pending before the Board to hold in abeyance. Moreover, PIRY argues that what CIRY really seeks is a stay, a form of relief whose standards PIRY has not even discussed, much less satisfied. Finally, PIRY challenges several of CIRY's factual allegations.²

DISCUSSION AND CONCLUSIONS

CIRY filed its petition to modify and hold in abeyance pursuant to 49 CFR 1117.1, which provides an avenue for relief not otherwise provided for in the Board's rules. However, the Board has procedures that apply specifically to the type of relief CIRY seeks. To modify the November 19 Decision, which has already become effective, CIRY should have filed a petition for reconsideration under 49 CFR 1115.3 (within 20 days of the November 19 Decision) or a petition to reopen an administratively final decision under 49 CFR 1115.4. The Board's regulations require a petitioner seeking reopening or reconsideration to show that the prior decision contained material error or that new evidence or changed circumstances warrant modification of the prior order. While CIRY suggests that the Board erred in assessing PIRY's contract rights and the necessary rehabilitation of the Kellar Branch in the November 19 Decision, it does not request reconsideration or reopening of that final agency decision or attempt to meet the well-settled standards for such relief in 49 CFR 1115.3 or 1115.4. CIRY has therefore failed to justify its request that the Board modify the November 19 Decision.

In its request to hold this proceeding in abeyance, CIRY really appears to be seeking a stay of the November 19 Decision, because no administrative proceeding remains pending. The factors to be considered in addressing a petition for stay are: (1) whether there is a strong likelihood that petitioners will prevail on the merits; (2) whether petitioners would be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) (Holiday Tours); Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958). Parties seeking a stay carry the burden of persuasion on all of the elements required for a stay. See generally Canal Auth. of Fla. v.

² Specifically, PIRY clarifies that it has no plans to operate over the western connection, states that the continued validity of PIRY's contractual right to operate over the Kellar Branch is the subject of a pending state court proceeding, and maintains that the line can be operated with only limited rehabilitation.

Callaway, 489 F.2d 567, 573 (5th Cir. 1974). Here, CIRY has not made any attempt to address the Holiday Tours factors.

This situation is, as PIRY suggests, analogous to that in General Railway Corporation, d/b/a Iowa Northwestern Railroad—Exemption for Acquisition of Railroad Line—In Osceola and Dickinson Counties, IA, STB Finance Docket No. 34867 (STB served July 13, 2007) (General Railway), where the Board, in a Chairman’s Order at 2, stated that “[p]arties seeking review of a Board decision may seek reconsideration or reopening, and must show material error, new evidence or changed circumstances.” They may not, as the moving party attempted to do in General Railway, and as CIRY seeks to do here, “avoid the obligation of meeting those standards merely by assigning a different label to its request for relief.” Id.

Finally, even if the Board were to consider the merits of petitioner’s arguments, we would not grant the relief sought. CIRY’s request for relief merely reiterates arguments that have already been raised and addressed. In the November 19 Decision, the Board specifically noted the disparate estimates of rehabilitating the Kellar Branch and acknowledged the pending court proceeding regarding whether PIRY retains contractual rights to operate over the line. As to CIRY’s concerns about safety, the Board takes those concerns seriously, which is why, in our December 7 Decision, we ordered the carriers to negotiate joint operating protocols, thus giving CIRY the opportunity to raise and resolve its safety concerns in the context of those negotiations. The railroads negotiated as directed, and reported to us on December 13, 2007 that agreement had been reached, thus presumably resolving those safety issues to CIRY’s satisfaction. Of course, the railroads’ obligation to ensure that any operations on the Kellar Branch are conducted safely is an ongoing one, and they therefore should continue to consult and coordinate as closely as needed to fulfill that obligation. But given the parties’ negotiation and subsequent agreement on operating protocols, all of which took place after CIRY’s December 3 petition to modify, the petition fails to provide any basis for modifying the November 19 Decision. Accordingly, all of the relief CIRY seeks would be denied even if CIRY had filed under the proper Board procedures.

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

It is ordered:

1. CIRY’s petition to modify the November 19 Decision and hold this proceeding in abeyance is denied.

2. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey. Commissioner Buttrey commented with a separate expression.

Anne K. Quinlan
Acting Secretary

COMMISSIONER BUTTREY, concurring:

In its November 19, 2007 decision in this case, the Board reversed its earlier (August 2005) decision granting adverse discontinuance of PIRY's operating rights over the Kellar Branch. I dissented because I did not believe that the parties asking us to reverse our adverse discontinuance determination had made a convincing case on the record. I continue to hold that view.

Here, however, the issue before the Board is CIRY's request for reopening or stay of the November 19, 2007 decision. The question is whether CIRY has met the Board's standards for such relief. I agree that it has not done so, so I join the majority in this decision.