

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: November 16, 2007

This decision denies 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 (the Village) (collectively, the Cities), in Peoria County, IL.

BACKGROUND

The Kellar Branch is located between milepost 1.71—where it connects with a line formerly owned by the Peoria and Pekin Union Railway Company (P&PU) and now owned by the Tazewell & Peoria Railroad, Inc. (TZPR)¹—and milepost 10.00. The City acquired the branch after it had been abandoned² and entered into an agreement with P&PU for the latter to provide service to the shippers on the line.³ P&PU assigned its rights under the agreement to PIRY in 1998, and PIRY obtained authority to lease and operate the line.⁴ The Cities have never obtained any operating authority from the Board, nor has either of them held itself out as a common carrier. See Wisconsin Department of Transportation—Petition for Declaratory Order, STB Finance Docket No. 34623 (STB served Dec. 23, 2004).

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).

² The branch was abandoned by the bankrupt Chicago, Rock Island and Pacific Railroad Company in 1980. Chicago, RI & P.R. Co. Abandonment, 363 I.C.C. 150 (1980).

³ See Peoria and Pekin Union Railway Company—Exemption from 49 U.S.C. 10901, Finance Docket No. 30545 (ICC served Sept. 24, 1984).

⁴ See Pioneer Industrial Railway Company—Lease and Operation Exemption—Peoria, Peoria Heights & Western Railroad, STB Finance Docket No. 33549 (STB served Feb. 20, 1998).

As relevant here, the Cities began efforts in 2001 to reconfigure rail service in the Peoria area and to convert a portion of the Kellar Branch right-of-way into a recreational trail. To this end, the City acquired from the Union Pacific Railroad Company (UP) track leading toward the Kellar Branch from the west.⁵ The City also filed a notice of exemption under 49 CFR 1150.36 to obtain authority to construct a connecting track from the northwest end of the Kellar Branch to the former UP track.⁶

Maintaining that their operating agreement with PIRY had expired by its terms on July 10, 2004, the Cities contracted with Central Illinois Railway Company (CIRY) to provide service over the Kellar Branch in lieu of PIRY until the completion of the connecting track authorized in Construction Exemption.⁷ According to the Cities' explanation at the time, the existing shippers on the Kellar Branch would then be served either by the new "western connection" or by other routings. A major portion of the Kellar Branch would subsequently be converted into a recreational trail.⁸

On November 16, 2004, the Cities filed this "adverse discontinuance" application under 49 U.S.C. 10903, asking the Board to declare that the public convenience and necessity (PC&N) no longer require the operations of PIRY on the Kellar Branch. Notice was served and published in the Federal Register on February 24, 2005 (70 FR 9125-26). PIRY opposed the application. By a decision served on August 10, 2005 (August 2005 Decision), the Board granted the Cities'

⁵ See City of Peoria, IL—Acquisition and Operation Exemption—Union Pacific Railroad Company, STB Finance Docket No. 34066 (STB served July 25, 2001).

⁶ 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).

⁷ CIRY invoked the notice of exemption procedures at 49 CFR 1150.41 for authority to operate the Kellar Branch. 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 July 28, 2004).

⁸ CIRY also invoked the notice of exemption procedures for authority to operate the western connection. See Central Illinois Railroad Company—Operation Exemption—Rail Line of the City of Peoria, IL, STB Finance Docket No. 34753 (STB served Oct. 6, 2005). PIRY's petition to reject or revoke CIRY's operation exemption was denied in a decision served June 27, 2007.

application, thereby allowing the Cities to proceed with efforts to remove PIRY from the line under any applicable state law.⁹ See August 2005 Decision at 5-6.

CIRY then filed a petition in September 2005, for exemption authority to discontinue its service over the 6.29-mile segment of the Kellar Branch extending from milepost 8.5 to milepost 2.21. CIRY explained that the CIRY discontinuance authority was also necessary to enable the Cities to go forward with the plans to convert that portion of the right-of-way into a recreational trail. CIRY stated that in the future that segment would not be needed because the existing shippers would receive service from the north or south of the segment. CIRY noted that there had been no local traffic on the segment for more than 2 years and that overhead traffic could and would be rerouted. In Central Illinois Railroad Company—Discontinuance Exemption—in Peoria County, IL, STB Docket No. AB-1066X (STB served Dec. 23, 2005) (CIRY Discontinuance), the Board granted that request, and the exemption was scheduled to become effective on January 22, 2006.

On January 4, 2006, Carver Lumber Company (Carver Lumber), the sole remaining shipper served over the portion of the Kellar Branch where the trail would be placed, availed itself of the opportunity afforded by these related proceedings to ask the Board to reconsider the grant of discontinuance authority to CIRY. Carver Lumber complained that it had not yet received service via the new western connection. On January 9, 2006, PIRY filed a petition for stay pending reconsideration and/or appeal of CIRY Discontinuance. By order served on January 20, 2006, the effectiveness of the exemption in CIRY Discontinuance was stayed pending further order of the Board, to allow time for the parties to provide additional information. On January 24, 2006, PIRY filed a petition to reopen the August 2005 Decision in this proceeding.

In April 2006, the Board held both proceedings in abeyance pending further development of the record. CIRY was given 90 days to make good on its representation to provide adequate rail service to Carver Lumber and to allow that shipper to evaluate its rail service options. The parties were directed to file comments regarding rail service at the end of the 90-day period.

In July 2006, PIRY filed a petition seeking an order authorizing it to provide interim alternative rail service over the Kellar Branch pursuant to 49 U.S.C. 11123 and 49 CFR 1146.¹⁰ In December 2006, CIRY, notwithstanding the Cities' previously announced trail use plans,

⁹ Litigation regarding PIRY's rights under the operating agreement it had entered into with the Cities remains pending in state court. See Pioneer Industrial Railway Co. v. D.O.T. Rail Services, Inc., et al., Tazewell County, Illinois Circuit Court No. 06-L-27.

¹⁰ STB Finance Docket No. 34917, Pioneer Industrial Railway Co.—Alternative Rail Service—Central Illinois Railroad Company.

requested permission to withdraw its petition for authority to discontinue service over the 6.29-mile segment of the Kellar Branch in CIRY Discontinuance, citing new potential business opportunities on the line.

In January 2007, the Board denied PIRY's request to provide interim alternative rail service and granted CIRY's request for permission to withdraw its petition for discontinuance authority, which was unopposed. In that decision, the Board also reopened the August 2005 Decision in this proceeding based on changed circumstances. The Board found that new evidence that Carver Lumber complained about the Cities' plans and also complained about CIRY's service had cast doubt on the Cities' representations that their plan would maintain the existing level of service to the satisfaction of the users of that service—representations upon which the Board had specifically predicated its August 2005 Decision. Therefore, the Board directed the parties to submit additional evidence regarding the relative benefits and burdens that either the continuation of PIRY's service on the Kellar Branch or the cessation of PIRY's service would have on that carrier, on the owner-lessor of the line, and on the public.

SUBSEQUENT PLEADINGS

On February 22, 2007, the City¹¹ and CIRY filed statements in response to the Board's January 2007 Decision. The City continues to seek discontinuance of PIRY's authority to operate the Kellar Branch. It also continues to support reconfiguration of rail service so that Carver Lumber is served via the western connection, O'Brien Steel Service Co. (O'Brien Steel)¹² is served from the south, and the segment in between is converted to trail use. The City argues that this plan is consistent with the PC&N and that there is substantial public support for trail use over the Branch, as evidenced by petitions attached to the City's statement signed by hundreds of residents of the area. The City also maintains that it should have the right to select the operator of the Branch and that the adverse discontinuance authority it seeks would further that right.

CIRY supports the City's request for discontinuance of PIRY's operating authority and states that it wishes to remain the exclusive operator of the Branch. CIRY maintains that, since current management acquired the company on August 18, 2006, it has provided service via the western connection that "equals or exceeds that provided by similarly situated railroads under similar operating conditions." CIRY claims, however, that \$466,000 in track repairs is needed before it would be willing to operate over the entire Kellar Branch. Finally, CIRY maintains that Carver Lumber will continue to have access to rail service, and that CIRY is working with both

¹¹ Although the Village was initially included in this statement, the City filed a letter on February 23 indicating that the Village does not join in the statement and has not taken a position in the reopened proceeding.

¹² O'Brien Steel is a shipper located near the southern end of the Kellar Branch.

Carver Lumber and UP to provide a level of service that is feasible and makes economic and operational sense for all parties.

PIRY filed a reply on March 15, 2007, arguing that the City has failed to meet its burden of showing that the PC&N justifies permitting discontinuance of PIRY's authority to operate over the line. PIRY states that it is ready, willing, and able to restore service to Carver Lumber via the Kellar Branch and that at least two other businesses have expressed an interest in shipping over the Branch if PIRY's service is restored. PIRY estimates that the cost to rehabilitate the Branch to the Federal Railroad Administration's "excepted" track status would be \$9,496—a cost that PIRY states it is willing to assume. PIRY argues that a grant of the requested adverse discontinuance authority would result in diminished rail service to Carver Lumber, as well as increased costs and reduced routing options. PIRY also maintains that the City has not shown that the need for a trail outweighs Carver Lumber's need for direct and economical rail service.

By letter filed March 16, 2007, Carver Lumber states that, due to the unreliability of delivery by rail via the western connection, it is taking delivery by truck (transloaded from rail) at additional expense. The shipper complains that this situation threatens the long-term viability of its business. Carver Lumber maintains that it cannot receive rail service via the western connection that is comparable to the rail service it previously received via the Kellar Branch and that PIRY is the only carrier ready, willing, and able to provide it with reliable and cost efficient service via the Kellar Branch.

On March 20, 2007, the Illinois Prairie Railroad Foundation filed a letter describing a proposed economic development program to run a trolley alongside the track on the Kellar Branch.

The Friends of the Rock Island Trail, Inc. (Friends) filed a letter on March 28, 2007, in support of recreational trail use on the Kellar Branch. PIRY filed a motion to strike the Friends' letter on March 29, 2007, arguing that it is untimely, factually misleading, redundant, and in violation of the Board's rules.¹³

On April 4, 2007, the City and CIRY jointly sought leave to file a response to the PIRY and Carver Lumber filings. PIRY opposes that request.¹⁴

¹³ PIRY's motion to strike will be denied in the interest of ensuring a complete record. PIRY's request goes more to the weight to be accorded the objected-to information than to its admissibility.

¹⁴ We will accept the reply of the City and CIRY and PIRY's response in opposition to ensure a complete record.

On April 6, 2007, the Village filed a letter stating that freight has not been delivered by rail in the Village for many years and that there is no interest in any freight deliveries there by rail in the future. The Village asks the Board to issue a decision that would allow the Cities to proceed with the proposed hiking/biking trail.

DISCUSSION AND CONCLUSIONS

The statutory standard governing any application for discontinuance of service is whether the present or future PC&N requires or permits the proposed discontinuance. 49 U.S.C. 10903(d). In implementing this statutory standard in the context of a request to grant discontinuance authority over the objection of the carrier involved, we consider the competing benefits and burdens of the cessation of service on the involved carrier, on the owner-lessor of the line, and on the public.¹⁵ In our January 12, 2007 decision, we directed the parties to submit additional evidence to permit us to undertake this balancing test. In evaluating that evidence, we have weighed the burden on Carver Lumber (and other potential shippers) of the cessation of PIRY's service against the benefit to the Cities of the cessation of that service. Based on all of the evidence, including the evidence provided on reopening, we cannot find that the PC&N justifies the adverse discontinuance.

Often, a line owner seeking an adverse discontinuance wishes to dispossess a tenant because the tenant has breached an obligation to the line owner,¹⁶ has failed to provide adequate service to the public,¹⁷ or both.¹⁸ None of those types of circumstances has been demonstrated to

¹⁵ See 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).

¹⁶ See Jacksonville Port Authority—Adverse Discontinuance—In Duval County, FL, STB Docket No. AB-469 (STB served July 17, 1996) (“protestant . . . has been unable to make monthly payments since August 1995.”).

¹⁷ See Tacoma Eastern Railway Company—Adverse Discontinuance of Operations Exemption—A Line of City of Tacoma, in Pierce, Thurston, and Lewis Counties, WA, STB Docket No. AB-548 (STB served Oct. 16, 1998) (“Of the four shippers on the line, three support the replacement of [Tacoma Eastern] by the Belt Line.”).

¹⁸ See Fore River R.R. Corp.—Discontinuance of Service Exemption—Norfolk county, MA, 8 I.C.C. 2d 307, 311 (ICC served Mar. 10, 1992) (“ . . . a consistent pattern of the [the carrier] failing to meet its obligations to its shippers, its employees and its lessor.”); Cheatham County Rail Authority “Application and Petition” For Adverse Abandonment, Docket No.

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exist here. The issue of whether PIRY's contract with the Cities has expired remains pending in state court, which is the proper forum to adjudicate that claim. The only existing shipper that would be affected by the proposed discontinuance, Carver Lumber, has repeatedly complained about CIRY's service and wants PIRY's rail service on the Kellar Branch to be restored.¹⁹ PIRY states that it is willing and able to provide that service, and the record suggests that there may be new potential shippers.

On reopening, the City takes the position that "[t]he Cities saved the Branch from dismantling more than 20 years ago by acquiring and rehabilitating it when no rail carrier or shipper was willing to do so. Having done so, the Cities should have the right to select the operator of the Branch The Cities have selected CIRY as operator of the Branch. The Board should honor the Cities' selection of operator. Discontinuance of PIRY's operating authority is in furtherance of the Cities' right to select the operator of the Branch."²⁰

The fact that the Cities made it possible to continue rail operations on the Branch, and that PIRY is not their preferred operator, does not mean that we should now authorize the adverse discontinuance in order to permit the Cities to go to state court to seek to have PIRY evicted in the event that the parties' governing contract, as interpreted by the court, would permit PIRY to remain on the line. As the court stated in Cross Harbor, 374 F.3d at 1184, citing Salt Lake City Corporation—Adverse Abandonment—in Salt Lake City, UT, STB Docket No. AB-33 (Sub-No. 183) (STB served Mar. 8, 2002), "The STB does not, and cannot, simply accede to a public entity's wishes in an abandonment proceeding; instead it weighs that interest as 'only one factor in [its] analysis.'"

We reopened this proceeding to take additional evidence on the relative benefits and burdens of continued rail service by PIRY over the Kellar Branch. The Board had originally granted the adverse discontinuance in this proceeding based in large part on representations by the Cities that service to shippers would not be impaired. When the accuracy of those representations was questioned by Carver Lumber, we reopened to provide the Cities with the opportunity to confirm that PIRY's service on the Kellar Branch is not needed. In doing so, we expected CIRY and the Cities to provide evidence to back up their previous claim that Carver

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AB-379X (ICC served Nov. 4, 1992) (" . . . participating shippers either support or are neutral about MACO's discontinuing service. All CCRA board members want MACO removed.").

¹⁹ O'Brien Steel, located near the southern end of the Kellar Branch, would continue to receive service whether or not the application were to be granted. O'Brien Steel has expressed a preference for the service provided by CIRY.

²⁰ Statement of the City, filed February 23, 2007, at 2-3.

Lumber's service needs could be fully met by CIRY over the western connection. Instead, CIRY withdrew its request for authority to discontinue service over a portion of the Kellar Branch, thereby offering the potential of two carriers providing rail service on that line and suggesting that CIRY and the Cities no longer see eye to eye. Moreover, the record on reopening makes it clear that PIRY is willing to provide the rail service on the Kellar Branch that Carver Lumber wants and that CIRY does not necessarily regard as economically justified.

As for the benefits of removing our regulatory shield so that the Cities would be able to seek to evict PIRY in court, the Cities reiterate that they wish to convert part of the Kellar Branch into a recreational trail. But they provide no evidence or explanation to show that there is no longer public benefit in keeping the Kellar Branch as an active rail line. The Cities' assertion that the Board authority held by PIRY stands in the way of their realizing that public purpose ignores the fact that CIRY, the operator supported by the Cities, itself retains authority to operate over the entire Kellar Branch.

As the applicants here, the Cities bear the burden of proof. Reopening afforded the Cities and the rail carrier they support, CIRY, an opportunity to reconcile the anomalous situation created by CIRY's decision to remain on the entire Kellar Branch and the Cities' continued desire to establish a recreational trail on a portion of the same line. However, neither the applicants nor CIRY presented evidence to resolve this apparent conflict. Indeed, in their statement on reopening, the applicants argue, inconsistently, in support of both CIRY's continued rail operations and a recreational trail in lieu of PIRY's service on the Kellar Branch. In its filing in response to our reopening order, CIRY asserted only that it "wishes to remain the exclusive operator of the Kellar Branch."

Because CIRY would remain as the operator on the line even if we granted the Cities' request for adverse discontinuance of PIRY's authority, the Cities do not appear to be in a position to implement the proposed trail. The Cities could proceed with their planned public use of the property only if CIRY, as well as PIRY, is authorized to discontinue at least part of its operations. The record also suggests the potential for the development of new rail traffic on the Kellar Branch in the future. Specifically, PIRY has indicated that at least two other businesses have expressed an interest in shipping over the Branch if PIRY's service is restored, and CIRY has conceded that at least one new shipper is interested in rail service via the Branch.²¹ In these circumstances, we cannot find that the record presented on reopening supports withdrawing our protective jurisdiction over this property so as to defer to local interests at this time.²²

²¹ Joint Reply of CIRY and the Cities, filed Apr. 4, 2007, Verified Statement of John A. Darling, at 3-4.

²² See Cross Harbor; Waterloo Railway Company—Adverse Abandonment—Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine, STB Docket No. AB-124 (Sub-No. 2), et al. (STB served May 3, 2004); The

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Finally, our January 2007 decision denying PIRY's request to provide interim alternative rail service to Carver Lumber does not conflict with our decision in this adverse discontinuance proceeding. We apply different criteria to an analysis of the two related but separate regulatory processes. In considering the interim alternative service request, we found that PIRY could not show, as to Carver Lumber, "a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent rail carrier," as required by 49 CFR 1146.1(a). In our analysis, we explained that the alleged increase in rates to Carver Lumber for CIRY's service over the western connection was not a basis for ordering interim alternative rail service, and we further found that the increased delivery time required for service over the new western connection did not create the type of emergency situation that the interim alternative rail service provisions were designed to address.

In the context of this adverse discontinuance proceeding under 49 U.S.C. 10903, however, the service issues Carver Lumber faces are weighed as part of the balancing of competing benefits and burdens of the cessation of PIRY's service over the Kellar Branch on PIRY, the Cities, and the shipping public. Thus, it is appropriate in this proceeding for us to base our decision on, among other things, concerns about the cost, frequency, and reliability of CIRY's service to Carver Lumber; the service available to the shipper via transloading; and PIRY's willingness to reinstate its prior satisfactory service over the Kellar Branch.

This case differs from many applications for adverse discontinuance or adverse abandonment because the Cities have provided an option for rail service by CIRY to Carver Lumber, the only existing shipper that opposes adverse discontinuance. Carver Lumber has, however, been dissatisfied with the service it has received from CIRY. As we noted in our January 2007 decision, rail service need not always continue at the same level as in the past. Here, however, the price and service options for CIRY's existing rail service over the western connection evidently have not been sufficiently attractive to retain Carver Lumber's business. Carver Lumber states that it has stopped using rail service completely for its inbound deliveries; on the other hand, PIRY claims that it would restore service to Carver Lumber on the Kellar Branch.

In sum, the record before us and even the parties' positions have changed significantly since we issued our August 2005 decision permitting adverse discontinuance. Based on the record now before us, we find that the Cities have failed to meet their burden of establishing that the PC&N requires or permits the adverse discontinuance of PIRY's operations. The City has not shown that the benefits of removing our primary jurisdiction would outweigh the harm to

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Western Stock Show Association—Abandonment Exemption—in Denver, CO, Docket No. AB-452 (STB served June 12, 1996).

Carver Lumber, PIRY, and interstate commerce in general. The adverse discontinuance application will therefore be denied.

As a consequence of this decision, both CIRY and PIRY remain authorized carriers able to serve shippers on the Kellar Branch.²³ Given the modest traffic levels on the Branch, PIRY's and CIRY's operations should not interfere with one another. The parties are directed to negotiate joint operating protocols.

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

It is ordered:

1. PIRY's motion to strike Friends' letter is denied.
2. The joint petition of the City and CIRY filed April 4, 2007, for leave to file their reply is granted, and the reply is accepted into the record.
3. The Cities' application for adverse discontinuance of PIRY's operating authority is denied.
4. This decision is effective on its service date.

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

Vernon A. Williams
Secretary

²³ If the court rules in favor of the Cities' argument that the operating agreement with PIRY has expired, the parties would be free to seek reopening of this decision and ask the Board to consider whether any additional action is appropriate.

VICE CHAIRMAN BUTTREY, dissenting:

The majority is undoing the Board's August 2005 decision granting adverse discontinuance of PIRY's service over the Kellar Branch because Carver Lumber is unhappy with CIRY's rates and service over the Western Connection. But CIRY states on the record that it stands ready, willing and able to provide adequate service to Carver Lumber (CIRY Supplemental Evidence and Comments filed February 22, 2007, at pages 7-9). Carver Lumber has a reasonable transportation alternative and is clearly not captive under Board precedent, since it has been transloading and trucking its inbound lumber shipments. And Carver Lumber has not brought its rate and service complaints to the Board under our processes for addressing rate and service issues.

The City spent approximately \$2 million to provide the Western Connection to allow Carver Lumber to be served from the west (Verified Statement of City Public Works Director Stephen Van Winkle at page 5, part of the City's Statement filed February 22, 2007). The City of Peoria has been subsidizing continuation of rail service over the Kellar Branch for many years (*id.* at pages 1-2). The Board knew when it authorized construction of the Western Connection in 2004 that this expensive project was part of a larger plan by the City to reconfigure and provide service to Carver Lumber through this new route in order to free up the underutilized Kellar Branch and turn it into a pedestrian trail through downtown Peoria. I see no reason on this record to disturb the Board's earlier determination.

I respectfully dissent.