

**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
PETITION FOR LEAVE TO REPLY**

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ENTERED
Office of Proceedings
November 8, 2012
Part of
Public Record

Respectfully submitted,

John D. Heffner
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Dated: November 8, 2012

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**I.
INTRODUCTION**

Pursuant to 49 CFR §1117.1, Pemiscot County Port Authority (“PCPA”) files this Petition for Leave to Reply to the “Joint Replies” submitted on Nov. 2, 2012, by Pioneer Railcorp and its subsidiary Rail Switching Services, Inc.,¹ to PCPA’s Petition to Reject and the related supplement and Petition to Stay. PCPA is justified in filing this Petition for the purpose of clarification, to correct certain incorrect assertions made by RSS. In support of this Petition, PCPA submits two short sworn statements, one from PCPA’s Executive Director and one from the sole shipper on the subject line, Marquis Marine Terminal, LLC (“MMT”).

¹ Hereafter cited as “RSS.”

Consideration of this Petition will not broaden the issues or unduly delay this proceeding.

II. ARGUMENT

As a general rule, the Board's Rules of Practice prohibit the filing of a "reply to a reply." 49 CFR §1104.13(c). However, the Board has the discretion to accept otherwise impermissible filings where it would be appropriate to do so. Because PCPA's tendered evidence provides a more complete record, clarifies and corrects inaccurate evidence tendered by RSS, focuses the arguments, does not prejudice any party, and will not unduly prolong this proceeding, granting PCPA's request would be consistent with Board precedent. *See, BNSF Railway Company-Discontinuance of Trackage Rights Exemption-In Peoria and Tazewell Counties, ILL, et al*, FD 35404, STB slip op. at 5, footnote 9, served April 26, 2011.

RSS's filings implicate two issues requiring the Board's attention. First, RSS muddies the distinction between operations by a noncommon carrier "contract operator" with the contracting out of operations by one railroad common carrier to another common carrier. While an entity performing noncommon carrier railroad operations under a contract (usually to a shipper) has been held not to require Board authorization,² the "subcontracting" out of operations by one railroad

² V&S Railway, LLC-Petition for Declaratory Order-Railroad Operations in Hutchinson, KAN, FD 35459, slip op. at 10-11, STB served July 12, 2012 (cited as *V&S*).

common carrier to another railroad common carrier has always required agency approval. *See*, 49 U.S.C. §11323(a) (2) (“a purchase, lease, or contract to operate property of another rail carrier by any number of rail carriers”) and Kansas City Transportation Company LLC- Lease and Assignment of Lease Exemption-Kansas City Terminal Railway Company and Kaw River Railroad, Inc., FD 34830, slip op. at 3-4, STB served May 23, 2007 (cited as *Kansas City*). If one is to accept at face value RSS’s operating intentions as shown in its notice of exemption filed in FD 35685, RSS seeks authority “as a contract operator for PCPA.” Notice at pages 3-4. When read in the context of RSS’s description of its rights under the Operating Agreement with PCPA as a “contract switcher” providing “noncommon carrier switching service,” it is obvious that it is seeking to provide service as other than a common carrier. Notice at page 3 and attached Operating Agreement at page 1. Yet, RSS goes to great lengths to argue in its Joint Reply that it is seeking authority to operate as one carrier operating the property of another rail carrier [PCPA being that rail carrier] and, as such, Board authority is required under precedent such as *Kansas City, supra*.

Second and related is the issue of whether an entity providing a noncommon carrier railroad service over a regulated “line of railroad” must get Board approval to conduct those operations. In arguing that it must have Board approval to use the Line under the existing contract which limits its activities to “noncommon carrier

switching service” including car storage, RSS seems to be misreading precedent such as *V&S* and S.D. Warren Co. d/b/a Sappi Fine Paper N.A.—Acquis. & Operation Exemption—Maine Cent. R.R., FD 34133, slip op. at 2, STB served Sept. 30, 2002 (finding private carriage not to be the operations of a “rail carrier” under the current definition in 49 U.S.C. §10102, and therefore, outside the Board’s jurisdiction). In fact, *V&S* explicitly states that a private carrier can provide noncommon carrier services over a regulated line of railroad without having to obtain Board operating authority. *Id.* at 10, 11, and 13. There is no question that car storage and related switching activities do not constitute common carrier rail service.

Turning to RSS’s specific allegations, PCPA presents them in the following format so the Board can easily evaluate the truthfulness of each assertion:

Assertion #1:

No **shipper, community, state or local government** has opposed the Notices (Reply to Petition to Reject at 3 and 8).

Response:

False. PCPA is a governmental entity established under Missouri law³ that opposes the Notices. MMT is a shipper that opposes the Notices. *See*, statements of David Madison (PCPA)(“Madison Statement” and D.L. Marquis of MMT

³ Section 68.205 RSMo

("Marquis Statement"), attached hereto. BNSF Railway filed a letter in opposition today as well.

Assertion #2:

There are now shipper(s) seeking service and any delay in granting RSS's exemption request could delay service, adversely affecting shipper(s) (Reply to Petition to Reject at p. 4, 15). MMT is unlikely to remain the only shipper to locate on the line and PCPA is actively pursuing other customers (Reply to Petition to Reject at 13, 16, 18), Reply to Petition for Stay at 9, 10).

Response:

There are no shippers other than MMT and no industrial concerns located adjacent to PCPA's railroad except for MMT. PCPA currently has no other active negotiations with any other potential railroad shippers. RSS's statement that MMT is unlikely to remain the only shipper is speculative. RSS's statement that PCPA is actively pursuing other customers is exaggerated. Madison Statement.

Any Board action resulting in either a delay in granting RSS's exemption request or its rejection would not adversely affect rail service to MMT. Marquis Statement at 2.

Assertion #3:

RSS was given the exclusive right to "retrieve from or deliver cars to the BNSF."

Response:

This statement was taken out of context. What it really says is that "customers will not be allowed to retrieve from or deliver cars to the BNSF," meaning that MMT cannot operate over the Line to Hayti to get the train from BNSF (or return it to BNSF). Madison Statement.

Assertion #4:

“RSS understood that it – (1) would be, under the contract terms, switching cars between BNSF and MMT...(2) would be holding itself as a carrier for hire..., and (3) would be receiving compensation for the rail services it provided to shippers....” Reply to Petition to Reject at 17, Reply to Petition for Stay at 7.

Response:

Unfortunately, RSS has experienced a serious misunderstanding of the facts. Despite various communications between RSS and MMT or its representatives, MMT has not engaged RSS’s services for compensation. In fact, MMT specifically chose to locate its facility on PCPA’s property because it could be served directly by BNSF Railway without any short line railroad seeking to collect intermediate switching charges that would raise that company’s cost of transportation. Marquis Statement at 2.

Assertion #5:

PCPA will not suffer irreparable harm as a result of a grant of authority as giving RSS the “appearance of being PCPA’s chosen common carrier.” Issuance of the exemption to RSS would not require the initiation of an adverse discontinuance proceeding to remove RSS. Reply to Petition for Stay at 7-8.

Response:

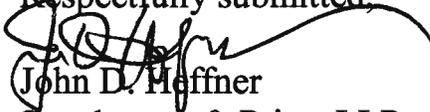
Because RSS is a public agency any award of common carrier operating rights over the Line - should that ever come to pass – would require that it go through a procurement process with bid solicitation. Madison Statement.

In addition, RSS is wrong in suggesting that RSS’ “removal” from the Line would not require some form of Board authorization. *See, Sierra Northern Railway-Lease and Operation Exemption-Union Pacific Railroad Company, FD 35331, STB served March 37, 2012 (indicating that once a railroad lessee or contract operator consummates its entry authority it must seek discontinuance authority to terminate operations over the line). Although Board operating authority is merely permissive and does not compel a putative short line to initiate operations over a line of railroad, once the short line does consummate that authority any subsequent termination of operations requires Board approval under 49 U.S.C. §10903. PCPA has no doubt that once RSS obtains an exemption and that exemption becomes effective, RSS will rush to consummate its newly gotten authority.*

III.
CONCLUSION

PCPA requests that the Board issue a decision rejecting RSS' notices as void *ab initio* insofar as they contain false and misleading information regarding PCPA's line of railroad and the transportation needs of Marquis Marine Terminal, LLC, and because they present issues that are unresolved, complicated, controversial, and nonroutine. Should the Board deem otherwise, PCPA requests that the Board stay the effectiveness of these notices and commence a proceeding in order that it may have an adequate record upon which to render a proper decision.

Respectfully submitted,


John D. Meffner
Strasburger & Price, LLP
1700 K Street, N.W.
Suite 640
Washington, D.C. 20006
(202) 742-8607

Dated: November 8, 2012

**VERIFIED STATEMENT
OF D. L. MARQUIS**

My name is D. L. Marquis. I am President of Marquis - Missouri Terminal, LLC (“MMT”), located at 11953 Prairie Industrial Parkway, Hennepin, Illinois.

I have read RSS’ two filing at the Surface Transportation Board (“STB”) as well as the sworn statement previously submitted to the STB by MMT’s attorney, Donald R. Rayfield (“Rayfield”). Rayfield’s statement is an accurate statement of the facts and of MMT’s position. I endorse Rayfield’s remarks and adopt them as my own.

I wish to correct certain inaccurate assertions made to the STB by RSS. Contrary to RSS’ assertions, MMT is a rail shipper, which is now receiving at its facility on PCPA’s property unit trains of crude oil from the Bakken fields in North Dakota for further shipment by barge down the Mississippi River. The BNSF brings these trains on to the PCPA property where they are spotted on a siding and unloaded into a pipeline for loading onto barges. MMT is an active shipper that is well pleased with the BNSF’s direct service.

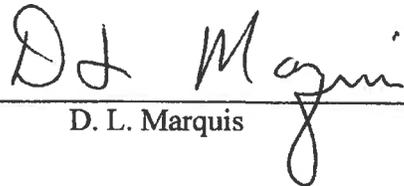
On October 17 Chip Nottingham, attorney for RSS, contacted me by email asking to discuss MMT’s freight rail transportation needs. On October 17 I directed Rayfield to contact attorney Nottingham to inquire as to what services RSS was proposing to offer and at what rates. Thereafter Rayfield advised me that he had spoken with attorney Nottingham by phone and that attorney Nottingham did not know what services RSS was proposing to provide or at what rates, but that he would provide that information to Rayfield within 24 hours. Thereafter on October 18 attorney Nottingham emailed Rayfield inquiring whether MMT had need of any special services. On October 18 at my direction Rayfield advised attorney Nottingham by email that MMT had no special service needs. No information was forthcoming from RSS regarding the services it

proposed to offer or the rates for those services. On October 26 at my direction Rayfield advised attorney Nottingham by email that MMT did not need any services from RSS. MMT has had no contact with RSS since that time.

One of the significant reasons that MMT chose to locate its crude oil facility at the PCPA is the fact that MMT could be directly served by the BNSF without a short line railroad seeking to collect any intermediate switching charges that would raise MMT's overall transportation costs.

MMT does not believe that its rail service would be delayed or that it would be in any way adversely affected as a result of an STB decision to stay or reject the notices or institute any sort of a proceeding.

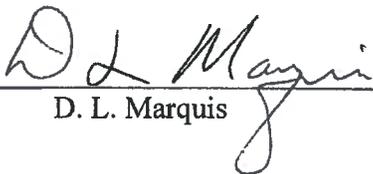
Dated: November 08, 2012


D. L. Marquis

VERIFICATION

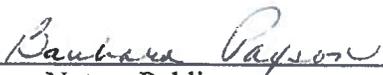
STATE OF ILLINOIS)
)
COUNTY OF PUTNAM) ss

D. L. Marquis, being duly sworn according to law, hereby deposes and states that he holds the position of President with Marquis - Missouri Terminal, LLC, is authorized to make this Verification, has read the foregoing document, and knows the facts asserted therein are true and accurate as stated, to the best of his knowledge, information, and belief.



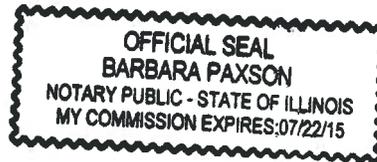
D. L. Marquis

Subscribed to and sworn to before me, a Notary Public, in and for the City of Princeton in the State of Illinois, this 8 day of November, 2012.



Notary Public

My commission expires:



PEMISCOT COUNTY PORT AUTHORITY

111 East 3rd Street
Caruthersville, MO 63830
(573) 333-4125
November 08, 2012

My name is David Madison, Executive Director of the Pemiscot County Port Authority (PCPA), the office for which is located at 111 East 3rd Street, Caruthersville, Missouri. I have been employed in this capacity since 1999. My duties include management and oversight of all administrative and economic development activities for PCPA.

The pleadings of Rail Switching Services (RSS) before the STB contain several incorrect assertions about PCPAP which require a response. Among other assertions, RSS claims that no shipper, **community, state or local government** has opposed the Notices. That is false because PCPA is a governmental entity established under Missouri law (*citation*) which opposes the Notices.

RSS then claims that there are now shipper(s) seeking service and that any delay in granting RSS's exemption request could delay service, adversely affecting shipper(s). There are no shippers other than MMT which is submitting its own statement. Indeed, there are no industrial concerns located adjacent to the Pemiscot County Port Authority railroad except for Marquis Missouri Terminal.

Moreover, Pemiscot County Port Authority has no other active negotiations with any other potential railroad shipper. [JH, call me to discuss this.]

Also, RSS's statements that Marquis Missouri Terminal (MMT) is unlikely to remain the only shipper to locate on the line is speculative and that PCPA is actively pursuing other customers is exaggerated. Pemiscot County Port Authority has never had a shipper on our railroad until the BNSF Railway delivered the first train to Marquis Missouri Terminal in October 2012. Our economic development recruitment activities consist largely of responding to inquiries generated from our website or direct contact, whether such inquiries involve industrial sites, barge transport, or rail service.

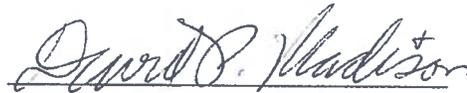
RSS's statement at page 12 of the Reply to the Reject Statement "RSS was given the exclusive right to retrieve from or deliver cars to the BNSF" was taken out of context. What it really says is that "customers will not be allowed to retrieve from or deliver cars to the BNSF," meaning that MMT cannot go to Hayti to retrieve the train from BNSF.

If or when the Pemiscot County Port Authority has need of a short line operator, as a public entity, it must solicit proposals from several potential railroad operators. When Pemiscot County Port Authority does issue such a request for proposals, Rail Switching Services would be eligible to submit a proposal for consideration.

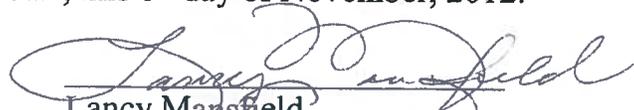
VERIFICATION

STATE OF MISSOURI)
)
CITY OF CARUTHERSVILLE) SS

David P. Madison, being duly sworn according to law, hereby deposes and states that he holds the position of Executive Director with the Pemiscot County Port Authority, is authorized to make this Verification, has read the foregoing document, and knows the facts asserted therein are true and accurate as stated, to the best of his knowledge, information, and belief.


David P. Madison

Subscribed to and sworn to before me, a Notary Public, in and for the City of Caruthersville in the State of Missouri, this 8th day of November, 2012.


Lancy Mansfield
Notary Public

My commission expires: July 6, 2014



CERTIFICATE OF SERVICE

I, John D. Heffner, do hereby certify that a copy of the foregoing "Pemiscot County Port Authority's Petition for Leave to Reply" was served via email and first-class U.S. mail this 8th day of November, 2012, on the following named individuals:

Daniel A. LaKemper, Esq.
General Counsel
Rail Switching Services, Inc.
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Peoria, Illinois 61607

Charles Nottingham, Esq.
Williams Mullen
1666 K Street, NW
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Washington, D.C. 20037


John D. Heffner

Dated: November 8, 2012