

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS

2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

WILLIAM A. MULLINS

(202) 663-7823 (Direct Dial)
E-Mail: wmullins@bakerandmiller.com

November 5, 2012

233301
233303

VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

ENTERED
Office of Proceedings
November 5, 2012
Part of
Public Record

Re: *Rail Switching Services, Inc. – Operation Exemption – Line Of Pemiscot County
Port Authority In Pemiscot County, Missouri, FD 35685*

*Pioneer Railcorp – Continuation In Control Exemption - Rail Switching Services,
Inc., FD 35686*

Dear Ms. Brown:

Attached hereto is Pioneer Railcorp And Rail Switching Services, Inc.'s Joint Reply to the "Supplement to Petition to Reject and Petition to Stay Exemption" filed by the Pemiscot County Port Authority in the above-captioned proceedings. If there are any questions about this reply, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

Enclosures

cc: J. Michael Carr
Hon. Charles "Chip" Nottingham
Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

Docket No. FD 35685

**RAIL SWITCHING SERVICES, INC.
– OPERATION EXEMPTION –
LINE OF PEMISCOT COUNTY PORT AUTHORITY
IN PEMISCOT COUNTY, MISSOURI**

DOCKET NO. FD 35686

**PIONEER RAILCORP
– CONTINUATION IN CONTROL EXEMPTION –
RAIL SWITCHING SERVICES, INC.**

**REPLY OF PIONEER RAILCORP AND RAIL SWITCHING SERVICES, INC. TO
SUPPLEMENT TO PETITION TO REJECT AND PETITION TO STAY EXEMPTIONS**

**Daniel A. LaKemper, Esq.
General Counsel
Pioneer Railcorp
1318 S. Johanson Road
Peoria, Illinois 61607
Tel.: (309) 697-1400
Fax: (309) 697-8486**

**William A. Mullins
Robert A. Wimbish
BAKER & MILLER PLLC
2401 Pennsylvania Ave., NW
Suite 300
Washington, DC 20037
Tel: (202) 663-7823
Fax: (202) 663-7849**

November 5, 2012

**Attorneys for Pioneer Railcorp and Rail
Switching Services, Inc.**

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

Docket No. FD 35685

**RAIL SWITCHING SERVICES, INC.
– OPERATION EXEMPTION –
LINE OF PEMISCOT COUNTY PORT AUTHORITY
IN PEMISCOT COUNTY, MISSOURI**

DOCKET NO. FD 35686

**PIONEER RAILCORP
– CONTINUATION IN CONTROL EXEMPTION –
RAIL SWITCHING SERVICES, INC.**

**REPLY OF PIONEER RAILCORP AND RAIL SWITCHING SERVICES, INC. TO
SUPPLEMENT TO PETITION TO REJECT AND PETITION TO STAY EXEMPTIONS**

On October 15, 2012, Rail Switching Services, Inc. (“RSS”), at that time a wholly owned non-common carrier subsidiary of Pioneer Railcorp (“Pioneer”), filed a notice of exemption (“Notice”) under 49 CFR Part 1150 to operate as a rail common carrier over a line of railroad owned by the Pemiscot County Port Authority (“PCPA”). Concurrent with the Notice, Pioneer, a non-carrier holding company that owns several shortlines subject to the jurisdiction of the Surface Transportation Board (“STB” or “Board”), filed a notice of exemption (“Control Notice”) pursuant to 49 CFR Part 1180 to continue in control of RSS once RSS became a carrier pursuant to the Notice.¹ On October 26, 2012, PCPA filed a “Petition to Reject Exemptions” (“Petition”)

¹ Collectively, the Notice and the Control Notice are referred to as the “Notices.”

requesting that both Notices be rejected before they become effective. On November 1, 2012, PCPA filed a Supplement to Petition to Reject and Petition to Stay Exemption (“Petition to Stay”). By way of the present filing (the “Reply to Stay”) Pioneer and RSS hereby respond to PCPA’s Petition to Stay, and request that PCPA’s stay request be denied.

ARGUMENT

PCPA’s supplemental filing shows that, after some thought, it has occurred to PCPA that the remedy it seeks most likely entails a Board issued injunction to stay the effective date of the Notices. Evidently recognizing that this is so, PCPA now “supplements” its Petition invoking the appropriate Holiday Tours standard.² PCPA’s latest tactic tacitly acknowledges that a stay request is in keeping with the orderly management of the STB’s docket, although PCPA also, rather confusingly, seems to regard its latest “supplement” filing as seeking the same remedy as its petition to reject. The Petition to Stay merely rehashes arguments PCPA made in its earlier Petition, and RSS and Pioneer have fully addressed those arguments in their Reply to the Petition. RSS and Pioneer need not address them again here. Instead, RSS and Pioneer will focus this Reply To Stay on the applicable Holiday Tours standard.

The Holiday Tours Standard

To justify a stay under Holiday Tours, PCPA must prove: (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be stayed; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed by a stay; and (4) the public interest supports the granting of the stay. PCPA has the

² 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).

burden of persuasion on the elements required for this extraordinary relief. Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974). PCPA has failed to meet this burden.

(1) Likelihood Of Prevailing On The Merits

PCPA has raised several “merits” arguments in this proceeding, some of which are appropriately before the Board and others (relating to an underlying contract dispute) which are not, but PCPA has not shown that it is likely to prevail on any of the arguments.

PCPA’s main arguments are that the Notices were misleading, and that the matter is not appropriate for handling under the Board’s class exemption procedures. In its Petition to Stay, PCPA rehashes the details of those arguments – (1) the issue is controversial, (2) there is no agreement giving RSS the rights it claims to have, (3) contract carriers do not need authority from the Board. PCPA also adds a new twist. PCPA now claims that RSS misled the Board in claiming that “at least one customer has located on the Line and wishes to receive shipments from the BNSF interchange” (Petition To Stay at 4), which is not a misleading statement at all, but an accurate fact.

To the extent that PCPA has presented issues that are appropriate for the Board to decide, as set forth in RSS’s and Pioneer’s Reply, PCPA is unlikely to prevail. The subject transaction is not controversial, contract carriers do need authority from the Board, and there is in fact an agreement between the parties.

The linchpin of PCPA’s arguments against the Notices is the claim that there is no agreement between the parties, and that, for this reason, the Notices are false and misleading. It is abundantly clear that PCPA is wrong. There is an agreement between the parties. In fact, both parties admit that there is a valid, existing, and currently effective contract governing RSS rail

operations on PCPA's STB-regulated line of railroad. They do dispute, however, the scope of that agreement.

PCPA's Petition and Petition To Stay presumes that the Board will interpret the contract, and find that it does not provide RSS with the rights RSS claims to have. Then, PCPA expects the Board to find, based upon its interpretation of that contract, that the Notices were misleading. But as discussed at length in the Reply, this is not an issue for the Board to decide. It is for the courts to rule on whether the contract gives RSS the rights it claims to have. The Board merely gives permissive authority.

This is not a case where there is no agreement between the parties, nor a situation where the parties are still negotiating agreement terms, nor is it even a situation where one party has terminated the agreement long ago but another party has invoked the terminated agreement to obtain a Board-issued exemption. All of those situations may have justified rejection under those facts. Instead, this is a case where both parties admit there is a valid existing agreement. PCPA wants to the Board to presume that it will prevail on its contract argument and then grant a stay based upon that presumption. The Board cannot make a determination that PCPA will so prevail on its contractual argument as the Board does not rule on contracts.

In the end, because the Notices contained all of the relevant information required by the regulations and there is an agreement, the Notices were not misleading. As such, PCPA is unlikely to prevail. Furthermore, because contract carriers do need authority from the Board when they intend to provide service to shippers (as RSS intends to do) and they are not acting as the agent of the incumbent carrier (which RSS is not), PCPA is unlikely to prevail on that issue

as well. Indeed, PCPA doesn't even address the KCT³ and Effingham⁴ line of cases which militate in favor of RSS and Pioneer. As such, a stay cannot be granted.

PCPA does raise one new issue that requires addressing. PCPA claims that RSS misled the Board when it stated that "at least one customer has located on the Line and wishes to receive shipments from the BNSF interchange." PCPA offers a statement, not from a business executive of Marquis Marine Terminals, LLC ("MMT") who may have a better understanding of what MMT desires to do and not do, but rather from an MMT attorney, Mr. Donald Rayfield. PCPA also attaches an email to/from that attorney and former STB Chairman Charles D. Nottingham.⁵ PCPA claims RSS's statement, in light of Mr. Rayfield's recently drafted verified statement, was misleading. It was not. At the time the Notices were filed, it was a true statement, and remains a true statement today: MMT had located on the line and did desire to receive shipments from the BNSF. The statement did not say that MMT desired to receive services from RSS, but rather from BNSF.⁶

Now, through its attorney, MMT says it doesn't want to use RSS's services (which is contrary to a previous position taken by MMT). MMT may not have a choice. RSS believed at

³ Kansas City Transportation Company LLC – Lease And Assignment Of Lease Exemption – Kansas City Terminal Railway Company And Kaw River Railroad, Inc., STB Docket No. FD 34830 (STB served May 30, 2006 and May 23, 2007)(collectively, "KCT").

⁴ Effingham RR Co. – Pet. For Declaratory Order, 2 S.T.B. 606, 609-610 (1997), aff'd sub nom. United Transportation Union v. STB, 183 F.3d 606 (7th Cir. 1999)("Effingham").

⁵ Former Chairman Nottingham was hired by Pioneer to help facilitate negotiations between the parties. Unfortunately, as evidenced by PCPA's Petition and its Petition To Stay, PCPA has rejected efforts to reach a negotiated solution and has obviously chosen to litigate the matter.

⁶ It is important to note that the emails to/from Mr. Rayfield and Chairman Nottingham happened on the exact same day that PCPA filed its Petition. PCPA produces no emails, contracts, or other types of evidence addressing MMT's desires before the parties entered into this dispute nor does MMT. Setting aside the professional ethics issues surrounding whether it was appropriate for PCPA's attorney to put into the public record emails to/from MMT's counsel and Pioneer's counsel, RSS can show, through its own emails and documents, that MMT was interested in utilizing RSS's services.

the time it filed its Notices, and believes now, that it is the only carrier authorized by contract to provide intermediate service between shippers located on PCPA's rail line and BNSF, including switching out any "bad ordered rail car[s]" that MMT says it may have to do. But, this is an issue for the courts or a mediator to decide, not the STB.

Furthermore, even if MMT can receive unit trains directly from BNSF without utilizing RSS,⁷ that doesn't invalidate RSS's authority request. As noted, PCPA is actively marketing and soliciting customers to use the Port of Pemiscot and to locate on the PCPA line. Because RSS has the contractual right to switch cars to/from shippers on the line and BNSF (a matter which not even PCPA disputes), will hold itself out as providing that service, and will seek compensation for that service, RSS needs Board authority to conduct such service, even if MMT does not want to use RSS's services. There is no requirement in the notice of exemption procedures that there be an active shipper wanting to use the proposed services before a carrier, such as RSS, can obtain common carrier authority. As such, there was nothing misleading about the Notices, and PCPA is unlikely to prevail on its argument.

(2) PCPA Will Not Suffer Irreparable Harm

PCPA will suffer no "irreparable harm." In fact, it's fair to ask: What "irreparable harms" would PCPA suffer? Apparently, the worst harm PCPA can think of is that a grant of authority would give RSS the "appearance of being PCPA's chosen common carrier," and that

⁷ MMT's attorney contends that the proposed BNSF service would not require the use of an additional carrier. In reality, even if done in the context of a unit train, the proposed service still constitutes receiving cars to/from BNSF, which MMT cannot do. Even if a court found that MMT and BNSF could undertake this service as a matter of contract, because PCPA's line is a common carrier line subject to the STB's jurisdiction, and is not private track, BNSF, as a carrier, would need some form of STB authority to operate over PCPA's line. In most circumstances, a carrier (BNSF) cannot operate over another carriers' (PCPA) tracks without requisite STB authority. BNSF has not yet obtained that authority.

the issuance of the exemption would require PCPA to “go through a difficult, time consuming, and expensive adverse discontinuance proceeding.” Neither is true.

First, PCPA completely ignores the fact that Board authority is permissive in nature, and does not confer any legal, contractual rights on any party.⁸ Certainly a grant of permissive authority, even if giving to the uninformed observer the “appearance” of a legal right, is not an irreparable harm. The Board’s authority merely authorizes the exercise of whatever contractual rights RSS has. It does not compel a particular result. If PCPA is correct that RSS has no contractual right to operate over the line other than to store railcars, then PCPA can invoke its state law rights to enforce its contract. Indeed, assuming a court agreed with PCPA, then RSS’s authority to conduct common carrier operations would simply be of no effect. Upholding the Notices does not harm PCPA or undermine its contractual rights in any way.

Second, PCPA is wrong that it would have to undertake an adverse discontinuance proceeding if the authority is granted. This is because it takes two actions to effectuate something authorized by the Board – Board authority and a property or contractual right to undertake what the Board has authorized.⁹ If RSS doesn’t have the contractual authority to

⁸ See e.g. Saratoga and North Creek Railway, LLC – Operation Exemption – Tahawus Line, STB Docket No. FD 35631, 2012 STB LEXIS 226, * 5 (STB served June 14, 2012)(Denying petition to reject, stating that “[t]he operating authority [granted] under the class exemption is permissive, and is not determinative of any underlying state law property claims . . . Thus, rejection of [the] notice is not necessary to address these issues.”) and Gen. Ry., d/b/a Iowa N.W. R.R.—Exemption for Acquis. of R.R. Line—In Osceola & Dickinson Cntys., Iowa, STB Docket No. FD 34867, slip op. at 4 (STB served June 15, 2007)(state courts are the proper venue for resolving contract and property disputes; the Board’s grant of authority “is permissive, not mandatory, and is not dispositive of ownership of the Line”).

⁹ V&S Railway, LLC – Petition For Declaratory Order – Railroad Operations In Hutchinson, Kan., STB Docket No. FD 35459, 2012 STB LEXIS 259, *15 (STB served July 12, 2012)(“V&S Railway, LLC”)(“Board (or ICC) authority alone does not guarantee that a rail common carrier has the right to acquire and operate a line of railroad. The Board’s (or the ICC’s) grant of authority is permissive only. To exercise that authority, the carrier must complete the acquisition

undertake what it intends to undertake, then PCPA can take steps in the appropriate forum to ensure that the transaction contemplated by the Notice is not consummated in the first place. If PCPA were to seek to enforce its legal rights as it sees them and were to prevail in that forum, it would never have to undertake an adverse discontinuance proceeding against RSS.¹⁰

Finally, even if PCPA would have to undertake added expense to enforce its rights in court or to undertake an adverse discontinuance, this does constitute irreparable harm. It is well settled that when adequate compensatory or other corrective relief will be available at a later date, it weighs heavily against a claim of irreparable harm.¹¹ Injuries in terms of money, time, and energy necessarily expended in the absence of an injunction are not sufficient to show irreparable harm.¹² PCPA has simply failed to show an irretrievable loss of business, breach of contract, severe impact on employees, or, that it would go out of business absent a stay, so it has not proven the potential of any “irreparable harm.”

(3) Other Parties Will Be Harmed By Issuance Of A Stay

On the other hand, if a stay is granted, both RSS and any shipper on the line desiring to use RSS’s services could be adversely impacted. If the Board rejects the Notices now but

by obtaining the necessary rights under state property and/or contract law to initiate the proposed rail operations on the line”).

¹⁰ Nevada Pacific Railroad Corporation – Lease And Operation Exemption – Rail Lines Of Pan Western Corporation, STB Docket No. FD 34958, 2007 STB LEXIS 122, *5 (STB served Mar. 15, 2007)(“A Board grant of authority is merely permissive. Once a Board exemption has become effective, it is up to the parties to determine whether to move forward with the underlying transaction . . . There is no need, however, to formally withdraw the authority that was never used”).

¹¹ Va. Petroleum Jobbers Ass’n, 259 F.2d at 925; see also Wis. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)(recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant’s business – a standard that PCPA doesn’t even attempt meet).

¹² American Chemistry Council, The Chlorine Institute., Inc., The Fertilizer Institute, And PPG Industries, Inc. v Alabama Gulf Coast Railway And RailAmerica, Inc., STB Docket No. NOR 42129, 2012 STB LEXIS 157, *9 (STB served May 3, 2012).

PCPA's contractual claims are deemed invalid, then RSS will not be able to provide service to the shippers without first returning to the Board to renew its request for authority. In such an event, service to shippers would be delayed while authority was sought.

MMT has stated that it needs service as soon as possible. While MMT believes at this time that BNSF can provide that service without utilizing RSS, BNSF does not have legal authority to operate over PCPA's line to provide that service. Furthermore, if RSS's contract rights are validated, then, without the requisite common carrier authority in place, MMT's service is only going to be further delayed while RSS undertakes another STB proceeding. Allowing the Notices to take effect simply allows the parties to pursue their contract rights and to enter into settlement negotiations.

(4) The Public Interest Favors Denying The Stay

Allowing the permissive Notices to take effect is not only fully consistent with Board precedent, but it also best serves the public interest. This is the fastest and quickest way to ensure that service to the shippers can begin as quickly as possible without undermining or eliminating PCPA's ability to present its contractual arguments in another forum. If RSS has correctly interpreted the contract, or if the parties resolve their differences via mediation or a settlement, and assuming the Notices were allowed to take effect, then RSS's service to shippers can begin immediately without any further delay. As such, it is in the best interest of RSS, the shipping public, MMT, BNSF, and the STB from an administrative standpoint, to deny the stay and allow the Notices to take effect.

CONCLUSION

PCPA has not met the high burden to justify granting a petition to stay, and its Petition to Stay must therefore be denied. PCPA is unlikely to prevail on the merits because the matter is

neither substantially complex nor controversial. The Notices were not misleading. There is an agreement between the parties – the only dispute being what that agreement says. RSS fully intends to hold itself out as a carrier for hire, will seek compensation for that service, and is not the agent of PCPA. There is no harm to PCPA or the public interest by granting the requested permissive authorities, and indeed, the shippers, BNSF, and RSS could be harmed if the Notices were rejected, due to delay and regulatory confusion. For the foregoing reasons, as well as those presented in earlier filings, the Board should uphold the disputed Notices as extending to RSS and Pioneer permissive authority to engage in a specific transaction, and it should permit the Notices to take effect.

Respectfully submitted,

Daniel A. LaKemper, Esq.
General Counsel
Pioneer Railcorp
1318 S. Johanson Road
Peoria, Illinois 61607
Tel.: (309) 697-1400
Fax: (309) 697-8486


William A. Mullins
Robert A. Wimbish
Baker & Miller PLLC
2401 Pennsylvania Ave., NW
Suite 300
Washington, DC 20037
Tel: (202) 663-7823
Fax: (202) 663-7849

Attorneys for Pioneer Railcorp and
Rail Switching Services, Inc

November 5, 2012

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing "Reply Of Pioneer Railcorp And Rail Switching Services, Inc." to the "Supplement To Petition To Reject And Petition To Stay Exemption" filed by the Pemiscot County Port Authority in the above captioned proceedings by mailing copies of the same to all parties via prepaid first class mail to all parties of record in these proceedings or by more expeditious means of delivery.

Dated at Washington, D.C. this 5th day of November, 2012.



William A. Mullins
Attorney for Pioneer Railcorp and
Rail Switching Services, Inc.