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BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34636

PIONEER INDUSTRIAL RAILWAY CO. TRANSPORTATION

FILED
DECEMBER 10 2004
SURFACE TRANSPORTATION BOARD

PETITION FOR DECLARATORY ORDER

ENTERED
Office of Proceedings
DEC 10 2004
Part of
Public Record

EXPEDITED HANDLING REQUESTED

PIONEER INDUSTRIAL RAILWAY CO.

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

Dated: December 10, 2004.

FILED
DECEMBER 10 2004
SURFACE TRANSPORTATION BOARD

BEFORE THE
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FINANCE DOCKET NO. 34636

PIONEER INDUSTRIAL RAILWAY CO.

PETITION FOR DECLARATORY ORDER

Comes now PIONEER INDUSTRIAL RAILWAY CO. ("PIRY"), and respectfully requests that the Board institute a Declaratory Order proceeding, pursuant to 49 C.F.R. §1117, on the issue of the status of PIRY and the purported underlying landowners, the City of Peoria and the Village of Peoria Heights (the "Cities").

This Proceeding is necessary and proper to resolve outstanding issues between the parties, and proceedings pending before the Board. The Cities have alleged that the agreement between the Cities and PIRY expired on July 10, 2004. The Cities also entered into a new agreement with Central Illinois Railroad Company, which filed for an operation exemption in FD 34518. Finally, the Cities filed an Adverse Discontinuance action against PIRY in AB-878. The status of PIRY is a critical element of both of these proceedings.

I. Background

The Line at issue in this proceeding is approximately 8.29 miles, from a connection with the Tazewell & Peoria Railroad (formerly Peoria & Pekin Union Railway) at MP 1.71, through Peoria and Peoria Heights, to a terminus at Mile Post 10.00. The Line was once part of the Chicago, Rock Island & Pacific Railroad system. It was lawfully abandoned in 1980 (See Chicago, Rock Island & Pacific Railroad

Company, Debtor (William M. Gibbons, Trustee) – Abandonment – Entire System, AB-46 (Sub-No. 22), 363 I.C.C. 150, 171 (1980).

The City of Peoria acquired its interest in the Line in 1984 (and the Village of Peoria Heights later acquired its interest from the City). No Filing was made with the Commission. The Cities never provided any service or held themselves out as offering service. The Cities are not and have never been a carrier, as to the Kellar Branch..

Instead of seeking to become a carrier, the City of Peoria entered into an agreement with the Peoria & Pekin Union Railway Company (“P&PU”), an existing carrier, to provide service on the Line. The P&PU obtained Commission authority and provided service to the Line (See Peoria & Pekin Union Railway Company – Exemption From 49 U.S.C. §10901, Finance Docket No. 30545 (September 18, 1984).

P&PU assigned its agreement to PIRY in 1998, and PIRY assumed operation of the rail line as a Class III carrier (See Pioneer Industrial Railway Co. – Lease and Operation Exemption – Peoria, Peoria Heights & Western Railroad, STB Finance Docket No. 33549 (served February 20, 1998)).

A copy of the agreement, and the assignment, is attached as Exhibit A.

II. THE DISPUTE

The Cities have alleged that PIRY’s operating agreement expired on July 10, 2004. The agreement, however, contains no expiration date. In fact, the agreement is for an indefinite period, described in the Agreement as “a *minimum* period of twenty (20) years unless and until terminated for cause as set forth above or by mutual consent [emphasis added]” (See Exhibit A, attached).

PIRY has actively operated the line since obtaining its operating exemption in 1998. There has been no allegation of inadequate service.

Under the Interstate Commerce Commission's decision in Maine, DOT – Acq. Exemption, Me. Central R. Co., 81 I.C.C.2d 835 (1991), and the Board's recent decision in City of Venice – Abandonment Exemption – in Venice, IL and St. Louis, MO, STB Docket No. AB-863X (Decided June 22, 2004), PIRY's rights under its agreement with the Cities "are comparable to permanent easement interests," See City of Venice (at page 4).

The Agreement between the P&PU and the City of Peoria (Exhibit A), like the lease agreement construed in City of Venice, provided P&PU "with full common carrier rights to provide rail service." The indefinite duration is indicative of an easement, rather than a definitive term of years. Under the City of Venice and State of Maine line of decisions, it gave P&PU an interest comparable to a permanent easement. PIRY acquired P&PU's permanent easement interest in the Line by assignment in 1998 (See Pioneer Industrial Railway Co. – Lease and Operation Exemption – Peoria, Peoria Heights & Western Railroad, STB Finance Docket No. 33549 (served February 20, 1998).

The Board also held in City of Venice – Abandonment Exemption – In Venice, IL and St. Louis, MO, STB Docket No. AB-863X (Decided June 22, 2004), that when a City acquires an abandoned rail line it does not become "a rail common carrier" but is merely a landowner. Just as landowners granted easements to railroads in the 1800's, and early 1900's, and those railroads became carriers, PIRY holds a similar interest and status.

The Cities, in furtherance of their goal to abandon the majority of the Line and turn it into a trail, have entered into a new agreement with Central Illinois Railroad Company ("CIRC"), to operate the line, until a new connection can be made with the

Union Pacific Railroad. CIRC, has filed an Operation Exemption, pursuant to the Cities' "Interim Trackage Rights Agreement" (See FD 34518).

The Cities have also filed an adverse discontinuance proceeding against PIRY (See AB-878), and, within the past week, have taken the position that City contractors have the right to enter upon the right of way, tear up and replace ties, track and switches, and that PIRY should turn train dispatching over to the City's contractor (See Letter dated December 2, 2004, attached as "Exhibit B").

III. THE IMPORTANCE OF THE ISSUE

The Cities, at best mere landowners, have no right to revoke an easement and thereby, essentially usurp the Board's statutory authority to regulate common carrier rail service, and the authorized carrier's rights and obligations to provide common carrier service to shippers on the Line. Such power has never been recognized, and would open a Pandora's Box of potential problems.

As the Board is well aware, there were, as the railroads were built, hundreds of cities and towns granted land to railroads to come into their community. If every city and town that once upon a time granted a railroad operating rights over City property could, on a whim, revoke that authority and grant operating rights to another carrier, and those carriers are allowed to begin operations without any scrutiny, seven days after filing a simple notice of exemption, chaos could ensue.

The Interstate Commerce Commission Termination Act specifically strengthened federal preemption to avoid the kind of disruptions to interstate commerce that piecemeal local regulation almost guarantee.

What's more, thousands of private landowners have granted railroads right of way easements as well. What rights do they have if the Cities' position prevails?

It is important to carriers, shippers, and the national economy as a whole, that the Board's regulatory policy remain consistent. PIRY's position relies on the Board's holding in City of Venice, which was well-reasoned and consistent with prior precedent. The Cities position is totally based on the desired political outcome, without regard to the national rail system.

IV. CONCLUSION

The issue of PIRY's status is critical to the proceedings before the Board, and the relationship of PIRY and the Cities. If that issue is determined in separate actions, or left unresolved, the integrity and consistency of the Board's process could be compromised. In order to resolve this important issue between the parties, provide shippers with some level of comfort as to the continuity of their service, and maintain the consistency of regulatory policy, PIRY respectfully requests that the Board institute a declaratory order proceeding that will construe PIRY's agreement with the Cities as the equivalent of a permanent easement, which the Cities cannot unilaterally revoke or ignore, merely because they seek to "substitute" another operator to further their political goals.

Respectfully submitted,



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

VERIFICATION

I, Scott Isonhart, Secretary of Pioneer Industrial Railway Co., verify under penalty of perjury that I have read the above and foregoing Petition for Declaratory Order; that I have knowledge of the facts stated therein; and that those facts are true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file the foregoing document.

/s/ Scott Isonhart

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing instrument was served by electronic mail, and by sending it via UPS Next Day Air courier service, all charges paid, this 10th. Day of December, 2004, to the following:

Thomas F. McFarland, Esq.
Thomas F. McFarland, P.C.
208 South LaSalle Street,
Suite 1890
Chicago, Illinois 60604



EXHIBIT A

AGREEMENT

This Agreement entered into this 10th day of July, 1984, by and between the CITY OF PEORIA, an Illinois Municipal Corporation, hereinafter referred to as "CITY", and the PEORIA AND PEKIN UNION RAILWAY COMPANY, an Illinois Corporation, hereinafter referred to as the "P&PU".

W I T N E S S E T H:

WHEREAS, the CITY has purchased the segment of track (8.9 miles plus industrial tracks) formerly known as the Keller Branch line of the now bankrupt Chicago, Rock Island and Pacific Railroad, as shown on the map attached hereto as Exhibit "A" and legal description attached hereto as Exhibit "B" both incorporated herein; and,

WHEREAS, the CITY is not a railroad operator; and,

WHEREAS, industries now located on and adjacent to the Keller Branch track desire railroad service; and,

WHEREAS, the P&PU desires to provide railroad services to industries located on said track; and,

WHEREAS, the CITY is willing to enter into an agreement to grant trackage rights to the P&PU upon, and subject to, the terms and conditions herein set forth;

NOW, THEREFORE, IN CONSIDERATION OF THE PROMISES AND THE MUTUAL AND DEPENDENT COVENANTS HEREINAFTER SET FORTH, THE PARTIES AGREE AS FOLLOWS:

1. DEFINITIONS.

Whenever used in this Agreement, the following words shall have the following meanings:

- (a) "Right-of-Way" shall mean all that property owned by the CITY as described in Exhibit "B";
- (b) "Roadbed" shall mean all that property and appurtenances located within ten (10) feet of the center line of the track;

2. PUBLIC AUTHORITY APPROVAL.

The parties, or either as may be appropriate, shall make application to the Interstate Commerce Commission and any other public body for any necessary authority to carry out the transaction hereinafter described and the agreements herein are contingent upon the procurement of such public authority.

3. GRANT OF TRACKAGE RIGHTS.

- (a) The CITY hereby grants unto the P&PU the right to

operate its engines, cars and trains over said Kellar Branch, side tracks, and industry tracks.

(b) The P&PU shall have the right under the foregoing grant to serve all existing industries now located on or adjacent to said track and industries and any industries which may in the future be located adjacent to or connected to the track.

4. OWNERSHIP, OPERATION AND MAINTENANCE.

(a) Ownership of said track shall remain in the CITY. However, the CITY may transfer ownership of the track located within the corporate limits of the Village of Peoria Heights to said Village subject to the Village agreeing to abide by all terms and conditions of this Agreement for the track transferred to it.

(b) The P&PU agrees for the term of this Agreement to serve the industries on an "as needed" basis up to three (3) times per week.

(c) The mode of operation over said track shall be under the sole control of the P&PU.

(d) The CITY shall assume the responsibility for maintenance of highway and street crossings (excluding rails, ties and signal devices), and financial responsibility for maintenance of the right-of-way (including weed and brush control) except for the roadbed and track as set forth in Paragraph 4(e) below. The CITY also assumes responsibility for structural maintenance of the bridges over War Memorial Drive at Harvard Street.

(e) The CITY shall be responsible, at its discretion, for performance of weed and brush control not on the roadbed which does not affect rail operations or safety. Unexpected and abnormal maintenance after January 1, 1986 which is over and beyond expected problems which would be rectified by normal preventive maintenance, and which is caused by unforeseen casualty other than railroad accidents, shall be repaired by the P&PU at the cost of the City not to exceed \$10,000 in any calendar year. Prior to repairing any such damage, the P&PU shall consult with the CITY as to its plan to remedy the situation and the cost thereof.

(f) The P&PU shall assume the responsibility for all maintenance of tracks, crossing protection, and roadbed including weed, brush, snow and ice control thereon, and normal yearly drainage control maintenance.

(g) The movement of engines, cars and trains of the P&PU on said tracks shall be performed pursuant to federal, state and local government laws and regulations.

(h) Any and all cars handled by the P&PU over said tracks will remain in the account of the P&PU.

5. STANDARD OF CARE, INDEMNIFICATION AND HOLD HARMLESS.

(a) In maintaining the right-of-ways outlined above, the CITY shall be bound only to the standard of care as set forth in Section 3-102 of Chapter 85 of the Illinois Revised Statutes (1983). Anything herein to the contrary notwithstanding, the P&PU shall not, by reason of any defect or by reason of the failure of the CITY to repair such defect, have or make against the CITY its agents,

employees or assigns, any claim or demand for any loss, damage, destruction, injury or death whatsoever, arising from such defect, neglect or failure; and the P&PU expressly releases the CITY, its agents, employees and assigns, from any and all claims or demands on account of such loss, damage, destruction, injury or death suffered or incurred directly by the P&PU arising out of such defect, neglect or failure.

(b) Anything here to the contrary notwithstanding, the P&PU agrees to and does hereby assume the entire risk and responsibility for its trains, engines and cars and contents thereof and for its officers, agents and employees at all times while on or about said tracks. The P&PU hereby agrees to indemnify and save the CITY, its agents, employees and assigns harmless from any and all claims, demands, lawsuits and liability by reason of loss of or damage to P&PU trains, engines and cars in custody of the P&PU, and the contents thereof, and for injury to or death of P&PU officers, agents and employees arising or growing out of the presence of any such property, or of any such persons, on or about said tracks or out of the P&PU's use of said tracks or operations of its trains, cars or engines thereof, from any cause whatsoever regardless of the negligence of the CITY, its agents, employees or assigns.

(c) The P&PU hereby agrees to indemnify and save the CITY, its agents, employees and assigns harmless from and against loss of or damage to property, and injury to or death of persons whomsoever, arising or growing out of any act or omission of the officers, agents or employees of the P&PU in its use of or operation on or over said tracks.

(d) The P&PU agrees to name the CITY (and if partial ownership is transferred to the Village of Peoria Heights, the Village also) as additional insured(s) on all liability policies covering the P&PU's operation of said track.

(e) The P&PU agrees to indemnify and hold the City harmless for any claims arising out of Section 7.D. and Section 9 of the "Rehabilitation Assistance Grant Agreement between the State of Illinois, the City of Peoria and the Peoria and Pekin Union Railroad", including costs and attorney fees.

6. CHARGE FOR TRACKAGE RIGHTS.

(a) For the use of said tracks by the P&PU pursuant to the provisions hereof, the P&PU shall pay to the CITY the sum of One Dollar (\$1.00) per annum. The P&PU shall make this payment to the CITY within fifteen (15) days after the effective date of this agreement. Subsequent annual payments will be made within fifteen (15) days after the anniversary date of this agreement.

(b) It is understood and agreed that the amount set forth in paragraph 6(a), above, does not include any cost or expense which the CITY, its agents, employees or assigns may incur on account of loss of or damage to property or injury to or death of persons, arising out of or in connection with the operation of any engines, trains, cars or equipment of the P&PU upon said tracks.

(c) The P&PU agrees for a period of thirteen (13) years from the effective date of this agreement, not to impose a per car surcharge against shippers and receivers located on or adjacent to said track, including team tracks, for any and all cars handled over said tracks pursuant to this agreement.

7. REPORTS AND RECORDS.

(a) The P&PU agrees to submit a report to the CITY on a calendar month basis, listing the car number and initials.

the shipper or receiver thereof, and the date of shipment, receipt, of all revenue cars shipped or received by industries located on or adjacent to said tracks, including team tracks. Such reports shall be submitted to the Department of Finance of the City by the tenth (10th) day of the month following the month in which the car was handled.

(b) All records of the P&PU pertaining to the movement of cars over and upon any part of the said tracks shall be open and available to the inspection of any duly authorized representative of the CITY at any and all times during normal business hours for the purpose of checking and verifying statements furnished by the P&PU in accordance with the provisions hereof.

8. DEFAULT.

The rights herein granted to the P&PU are expressly conditioned upon the performance by the P&PU of all and singular the covenants and agreements herein set forth to be performed by the P&PU. In the event the P&PU shall default in the performance of any of its obligations hereunder, and such default shall continue for a period of sixty (60) days after the receipt of written notice thereof by certified mail, return receipt requested, from the CITY, the CITY shall have the right at any time thereafter to terminate this agreement forthwith.

9. TERM OF AGREEMENT.

(a) This agreement shall remain in full force and effect for a minimum period of twenty (20) years unless and until terminated for cause as set forth above or by mutual consent.

(b) The P&PU shall, however, have the right to renegotiate the maintenance clause of this agreement after thirteen (13) years from the date hereof by serving written notice upon the CITY (and the Village of Peoria Heights if a portion of said tracks is transferred to the Village) of its desire to renegotiate said portion of the agreement.

10. RESERVED RIGHT OF ABANDONMENT.

This agreement shall in no way be construed as requiring or obligating the CITY to continue its ownership, maintenance, improvement or operation of said tracks, or the appurtenances thereto, nor in any way limit the CITY from disposing of, encumbering, or abandoning all or any part thereof, at any time it may see fit; provided, however, that in case the CITY shall desire to abandon all or any part thereof, it shall give the P&PU written notice at least ninety (90) days prior to such abandonment, and the P&PU shall have the right during such time to purchase any or all of the part to be abandoned, if and only if, the CITY does not plan to devote such part to another governmental use. Should the P&PU desire to purchase the right-of-way upon abandonment, the purchase price shall be equal to the salvage value of the material in said tracks, structures and appurtenances plus the fair market value of the right-of-way thereof.

11. NOTICE.

All notices required pursuant to this agreement to the City shall be addressed to the City Manager, City of Peoria, 419 Fulton, Room 207, Peoria, IL 61602. All notices to the P&PU shall be addressed to C.E. Hellums, Peoria & Pekin Union Railway, 101 Wesley Road, Creve Coeur, IL, 61611.

12. ASSIGNMENT.

The P&PU shall not transfer, assign or convey the rights granted hereunder without the written consent of the CITY, and only upon the condition that the assignee shall abide

by all terms, conditions and agreements hereof.

IN WITNESS WHEREOF, the parties have executed this agreement,
the year and date first above written.

CITY OF PEORIA

By *J. S. [Signature]*
City Manager

January 1, 1911

ATTEST:

Mary L. [Signature]
City Clerk

PEORIA AND PEKIN UNION RAILWAY COMPANY,

By *C. H. [Signature]*
President

ATTEST:

Paul D. [Signature]
Secretary

APPROVED

LEGAL DEPT.

By *A. H. [Signature]*

ASSIGNMENT

FOR AND IN CONSIDERATION OF THE SUM OF \$1.00, AND OTHER GOOD AND VALUABLE CONSIDERATION, PEORIA & PEKIN UNION RAILWAY COMPANY, an Illinois corporation (hereinafter "P&PU") hereby assigns, transfers and sets over to PIONEER INDUSTRIAL RAILWAY CO., an Iowa corporation (hereinafter "PRY"), all right, title and interest held by P&PU in and to the following described Agreement:

The Agreement dated July 10, 1984, between P&PU and the CITY OF PEORIA, ILLINOIS, of which PEORIA, PEORIA HEIGHTS & WESTERN RAILROAD is successor in interest, together with all supplements, amendments, and attendant rights and agreements, covering the lease and operation of the Rail Line formerly known as the "Kellar Branch" of the Chicago, Rock Island & Pacific Railroad Company; hereinafter the "Agreement" (a copy of which is attached hereto).

PRY hereby assumes and agrees to perform all the remaining and executory obligations of P&PU under the Agreement, and agrees to indemnify and hold harmless P&PU from and against any and all costs, expenses, claims, and liabilities whatsoever, arising from or in any way connected with the performance of the Agreement or the operation of the Rail Line, after 12:01 a.m., February 18, 1998, until the expiration or termination of the Agreement.

P&PU agrees to indemnify and hold harmless PRY from and against any and all costs, expenses, claims and liabilities whatsoever, arising from or in any way connected with the performance of the Agreement or the operation of the Rail Line, prior to February 18, 1998.

This Assignment shall be binding upon and inure to the benefit of the parties, and their respective successors and assigns. No waiver, modification or amendment of this Assignment shall be of any force or effect unless made in writing and signed by the parties.

This Assignment shall be effective at 12:01 a.m. Wednesday, February 18, 1998. For purposes of revenue cars in transit, outbound loads removed from the Rail Line prior to 12:01 a.m. February 18, 1998 and inbound loads placed on spot prior to 12:01 a.m. February 18, 1998 shall remain in the account of P&PU. PRY shall be entitled to receive its switch charge on all outbound loads removed from the Rail Line, and all inbound loads delivered to customers on the Rail Line after 12:01 a.m. February 18, 1998.

Dated this 19th day of February, 1998.

PEORIA & PEKIN UNION RAILWAY COMPANY

By: Paul O Feltenstein
Name: PAUL O FELTENSTEIN
Its: PRESIDENT

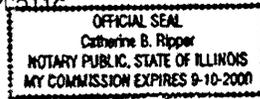
Page 1 of 4.

STATE OF ILLINOIS)
COUNTY OF Tazewell) SS

Before me the undersigned Notary Public personally appeared David J. Gettenstein who is known to me to be the President of PEORIA & PERIN UNION RAILWAY COMPANY, he signed the foregoing instrument and acknowledged before me that, being informed of the contents of said instrument, he, as such officer and with full authority, executed the same voluntarily for and as the act of said corporation.

Given under my hand and official seal this 19 day of February, 1998.

Catherine B. Ripper
Notary Public



ACCEPTANCE BY PRY:

The undersigned, PIONEER INDUSTRIAL RAILWAY CO. hereby accepts the above and foregoing ASSIGNMENT, upon the terms of the assignment set out hereinabove. Pioneer Industrial Railway Co. agrees that the maintenance reopener included at Section 9(b) of the Agreement is closed, and further agrees that the P&PU indemnification relates to liabilities for injuries, accidents, and incidents prior to the effective date of this Assignment and that it accepts the property "AS IS, WHERE IS", and will make no claim against P&PU for incidents occurring after the effective date of this Assignment based upon deficient maintenance prior to the effective date of the assignment.

By: Guy L. Brenkman
Guy L. Brenkman, President.

STATE OF ILLINOIS)
COUNTY OF PEORIA) SS

Before me, the undersigned Notary Public, personally appeared GUY L. BRENKMAN, who is known to me to be the President of PIONEER INDUSTRIAL RAILWAY CO., he signed the foregoing instrument and acknowledged before me that, being informed of the contents of said instrument, he/she, as such officer and with full authority, executed the same voluntarily for and as the act of said corporation.

Given under my hand and official seal this ___ day of February, 1998.

J. Michael Carr
Notary Public

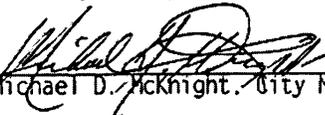


CONSENT TO ASSIGNMENT AND RELEASE
BY CITY OF PEORIA AND
PEORIA, PEORIA HEIGHTS & WESTERN RAILROAD

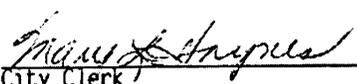
The undersigned, the CITY OF PEORIA, ILLINOIS, an Illinois municipal corporation, and owner of the PEORIA, PEORIA HEIGHTS & WESTERN RAILROAD does hereby, on behalf of itself and the said PEORIA, PEORIA HEIGHTS & WESTERN RAILROAD (collectively, the "City"), consent to the assignment by PEORIA & PEKIN UNION RAILWAY COMPANY, an Illinois corporation ("P&PU") of all of P&PU's right, title, interest and obligations in, to and under that certain Agreement dated July 10, 1984, wherein P&PU provides services to the City as the City's operator of the KELLAR BRANCH Line, also known as the PEORIA, PEORIA HEIGHTS & WESTERN RAILROAD to PIONEER INDUSTRIAL RAILWAY CO., an Iowa corporation ("PIRR"). City does hereby release P&PU from its obligation to continue rail service under the Agreement dated July 10, 1984, and agrees that P&PU has performed all of its duties and obligations under said Agreement to the City's satisfaction. The City expressly releases P&PU, its agents, employees, and assigns from any and all claims or demands arising out of occurrences on or after the effective date of this Assignment, on account of such loss, damage, destruction, injury or death suffered or incurred by any person arising out of any alleged defect, neglect or failure. City agrees to make no claim against P&PU as a result of the maintenance condition of the tracks, ties, roadbed, crossing protection devices and drainage.

Further conditions of the City's Consent to Assignment and Release, which conditions are expressly agreed to by PIRR, are that the maintenance shall remain as set forth in the July 10, 1984 Agreement, and that said maintenance provisions shall not be subject to renegotiation under Section 9(b) of said Agreement.

CITY OF PEORIA, ILLINOIS, an Illinois
municipal corporation.

By: 
Michael D. McKnight, City Manager

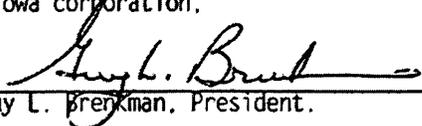
ATTEST:


Mary Ann Simpson
City Clerk

APPROVED:


Randall O'Leary
Corporation Counsel

PIONEER INDUSTRIAL RAILWAY CO.,
an Iowa corporation.

By: 
Guy L. Brenkman, President.

CONSENT TO ASSIGNMENT AND RELEASE
BY VILLAGE OF PEORIA HEIGHTS

The undersigned, the VILLAGE OF PEORIA HEIGHTS, ILLINOIS, an Illinois municipal corporation, and co-owner of the PEORIA, PEORIA HEIGHTS & WESTERN RAILROAD does hereby, on behalf of itself and the said PEORIA, PEORIA HEIGHTS & WESTERN RAILROAD (collectively, the "Village"), consent to the assignment by PEORIA & PEKIN UNION RAILWAY COMPANY, an Illinois corporation ("P&PU") of all of P&PU's right, title, interest and obligations in, to and under that certain Agreement dated July 10, 1984, wherein P&PU provides services to the Village as the Village's operator of the KELLAR BRANCH Line, also known as the PEORIA, PEORIA HEIGHTS & WESTERN RAILROAD to PIONEER INDUSTRIAL RAILWAY CO., an Iowa corporation ("PIRR"). Village does hereby release P&PU from its obligation to continue rail service under the Agreement dated July 10, 1984, and agrees that P&PU has performed all of its duties and obligations under said Agreement to the Village's satisfaction. The Village expressly releases P&PU, its agents, employees, and assigns from any and all claims or demands arising out of occurrences on or after the effective date of this Assignment, on account of such loss, damage, destruction, injury or death suffered or incurred by any person arising out of any alleged defect, neglect or failure. Village agrees to make no claim against P&PU as a result of the maintenance condition of the tracks, ties, roadbed, crossing protection devices and drainage.

Further conditions of the Village's Consent to Assignment and Release, which conditions are expressly agreed to by PIRR, are that the maintenance shall remain as set forth in the July 10, 1984 Agreement, and that said maintenance provisions shall not be subject to renegotiation under Section 9(b) of said Agreement.

VILLAGE OF PEORIA HEIGHTS, ILLINOIS

Attested to:

By: W.D. Cook
Name:
Title: Clerk

By: [Signature]
Name:
Title: Mayor

PIONEER INDUSTRIAL RAILWAY CO.

By: [Signature]
Guy L. Brenkman, President.

EXHIBIT B

OFFICE OF THE CORPORATION COUNSEL



December 2, 2004

Mr. J. Michael Carr, President
Pioneer Railcorp
1318 S. Johanson Road
Peoria, IL 61607

Dear Mr. Carr:

The City of Peoria has let a contract to do some rail and tie rehabilitation on the Kellar Branch within Pioneer Industrial Park. Our contractor, Metroplex Corporation, has tentative plans to begin some time next week. Please remove your equipment from the Kellar Branch rail lines in Pioneer Industrial Park north of Pioneer Parkway before next week.

As soon as we get the firm date for the beginning of the rail and tie rehabilitation project, we will notify you. Once the project begins, you will need to contact the Public Works Department at 309/494-8801 in order to schedule any deliveries or pick-ups within Pioneer Industrial Park. We will make every effort to restore the track for you to make timely deliveries. Other than for the mutually scheduled deliveries, we ask that you not operate any equipment within Pioneer Industrial Park at any time for the safety of all involved. The work is expected to take less than a month. We will notify you when the work is complete.

Should you have any questions, please feel free to call me at 309/494-8590 or Marvin Shoop, the Project Manager, at 309/494-8801.

Sincerely,

A handwritten signature in cursive script that reads 'Randall Ray'.

Randall Ray
Corporation Counsel

c: Marvin Shoop, Project Manager
Steve Van Winkle, Public Works Director



City Hall Building
419 Fulton Street
Peoria, Illinois 61602-1270
(309) 494-8590
FAX (309) 494-8559
E-MAIL legal@ci.peoria.il.us

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Daniel A. LaKemper, Esq.
General Counsel
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Peoria, Illinois 61607
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Dated: December 10, 2004.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34636

PIONEER INDUSTRIAL RAILWAY CO.

PETITION FOR DECLARATORY ORDER

Comes now PIONEER INDUSTRIAL RAILWAY CO. ("PIRY"), and respectfully requests that the Board institute a Declaratory Order proceeding, pursuant to 49 C.F.R. §11117, on the issue of the status of PIRY and the purported underlying landowners, the City of Peoria and the Village of Peoria Heights (the "Cities").

This Proceeding is necessary and proper to resolve outstanding issues between the parties, and proceedings pending before the Board. The Cities have alleged that the agreement between the Cities and PIRY expired on July 10, 2004. The Cities also entered into a new agreement with Central Illinois Railroad Company, which filed for an operation exemption in FD 34518. Finally, the Cities filed an Adverse Discontinuance action against PIRY in AB-878. The status of PIRY is a critical element of both of these proceedings.

I. **Background**

The Line at issue in this proceeding is approximately 8.29 miles, from a connection with the Tazewell & Peoria Railroad (formerly Peoria & Pekin Union Railway) at MP 1.71, through Peoria and Peoria Heights, to a terminus at Mile Post 10.00. The Line was once part of the Chicago, Rock Island & Pacific Railroad system. It was lawfully abandoned in 1980 (See Chicago, Rock Island & Pacific Railroad

Company, Debtor (William M. Gibbons, Trustee) – Abandonment – Entire System, AB-46 (Sub-No. 22), 363 I.C.C. 150, 171 (1980).

The City of Peoria acquired its interest in the Line in 1984 (and the Village of Peoria Heights later acquired its interest from the City). No Filing was made with the Commission. The Cities never provided any service or held themselves out as offering service. The Cities are not and have never been a carrier, as to the Kellar Branch..

Instead of seeking to become a carrier, the City of Peoria entered into an agreement with the Peoria & Pekin Union Railway Company (“P&PU”), an existing carrier, to provide service on the Line. The P&PU obtained Commission authority and provided service to the Line (See Peoria & Pekin Union Railway Company – Exemption From 49 U.S.C. §10901, Finance Docket No. 30545 (September 18, 1984).

P&PU assigned its agreement to PIRY in 1998, and PIRY assumed operation of the rail line as a Class III carrier (See Pioneer Industrial Railway Co. – Lease and Operation Exemption – Peoria, Peoria Heights & Western Railroad, STB Finance Docket No. 33549 (served February 20, 1998)).

A copy of the agreement, and the assignment, is attached as Exhibit A.

II. THE DISPUTE

The Cities have alleged that PIRY’s operating agreement expired on July 10, 2004. The agreement, however, contains no expiration date. In fact, the agreement is for an indefinite period, described in the Agreement as “a *minimum* period of twenty (20) years unless and until terminated for cause as set forth above or by mutual consent [emphasis added]” (See Exhibit A, attached).

PIRY has actively operated the line since obtaining its operating exemption in

1998. There has been no allegation of inadequate service.

Under the Interstate Commerce Commission's decision in Maine, DOT – Acq. Exemption, Me. Central R. Co., 81 I.C.C.2d 835 (1991), and the Board's recent decision in City of Venice – Abandonment Exemption – in Venice, IL and St. Louis, MO, STB Docket No. AB-863X (Decided June 22, 2004), PIRY's rights under its agreement with the Cities "are comparable to permanent easement interests," See City of Venice (at page 4).

The Agreement between the P&PU and the City of Peoria (Exhibit A), like the lease agreement construed in City of Venice, provided P&PU "with full common carrier rights to provide rail service." The indefinite duration is indicative of an easement, rather than a definitive term of years. Under the City of Venice and State of Maine line of decisions, it gave P&PU an interest comparable to a permanent easement. PIRY acquired P&PU's permanent easement interest in the Line by assignment in 1998 (See Pioneer Industrial Railway Co. – Lease and Operation Exemption – Peoria, Peoria Heights & Western Railroad, STB Finance Docket No. 33549 (served February 20, 1998).

The Board also held in City of Venice – Abandonment Exemption – In Venice, IL and St. Louis, MO, STB Docket No. AB-863X (Decided June 22, 2004), that when a City acquires an abandoned rail line it does not become "a rail common carrier" but is merely a landowner. Just as landowners granted easements to railroads in the 1800's, and early 1900's, and those railroads became carriers, PIRY holds a similar interest and status.

The Cities, in furtherance of their goal to abandon the majority of the Line and turn it into a trail, have entered into a new agreement with Central Illinois Railroad Company ("CIRC"), to operate the line, until a new connection can be made with the

Union Pacific Railroad. CIRC, has filed an Operation Exemption, pursuant to the Cities' "Interim Trackage Rights Agreement" (See FD 34518).

The Cities have also filed an adverse discontinuance proceeding against PIRY (See AB-878), and, within the past week, have taken the position that City contractors have the right to enter upon the right of way, tear up and replace ties, track and switches, and that PIRY should turn train dispatching over to the City's contractor (See Letter dated December 2, 2004, attached as "Exhibit B").

III. THE IMPORTANCE OF THE ISSUE

The Cities, at best mere landowners, have no right to revoke an easement and thereby, essentially usurp the Board's statutory authority to regulate common carrier rail service, and the authorized carrier's rights and obligations to provide common carrier service to shippers on the Line. Such power has never been recognized, and would open a Pandora's Box of potential problems.

As the Board is well aware, there were, as the railroads were built, hundreds of cities and towns granted land to railroads to come into their community. If every city and town that once upon a time granted a railroad operating rights over City property could, on a whim, revoke that authority and grant operating rights to another carrier, and those carriers are allowed to begin operations without any scrutiny, seven days after filing a simple notice of exemption, chaos could ensue.

The Interstate Commerce Commission Termination Act specifically strengthened federal preemption to avoid the kind of disruptions to interstate commerce that piece-meal local regulation almost guarantee.

What's more, thousands of private landowners have granted railroads right of way easements as well. What rights do they have if the Cities' position prevails?

It is important to carriers, shippers, and the national economy as a whole, that the Board's regulatory policy remain consistent. PIRY's position relies on the Board's holding in City of Venice, which was well-reasoned and consistent with prior precedent. The Cities position is totally based on the desired political outcome, without regard to the national rail system. _

IV. CONCLUSION

The issue of PIRY's status is critical to the proceedings before the Board, and the relationship of PIRY and the Cities. If that issue is determined in separate actions, or left unresolved, the integrity and consistency of the Board's process could be compromised. In order to resolve this important issue between the parties, provide shippers with some level of comfort as to the continuity of their service, and maintain the consistency of regulatory policy, PIRY respectfully requests that the Board institute a declaratory order proceeding that will construe PIRY's agreement with the Cities as the equivalent of a permanent easement, which the Cities cannot unilaterally revoke or ignore, merely because they seek to "substitute" another operator to further their political goals.

Respectfully submitted,



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VERIFICATION

I, Scott Isonhart, Secretary of Pioneer Industrial Railway Co., verify under penalty of perjury that I have read the above and foregoing Petition for Declaratory Order; that I have knowledge of the facts stated therein; and that those facts are true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file the foregoing document.

/s/ Scott Insonhart

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing instrument was served by electronic mail, and by sending it via UPS Next Day Air courier service, all charges paid, this 10th. Day of December, 2004, to the following:

Thomas F. McFarland, Esq.
Thomas F. McFarland, P.C.
208 South LaSalle Street,
Suite 1890
Chicago, Illinois 60604



Formal Filing

Docket #:

 FD

-34636

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Filed For: *	Pioneer Industrial Railway Co.
Filed By: *	Daniel A. LaKemper
(person who signed doc.)	
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