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January 9, 2006

## VIA ELECTRONIC FILING

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, DC 20423-0001

## IMMEDIATE HANDLING REQUESTED

Re: STB Docket No. AB-1066X  
*Central Illinois Railroad Company – Discontinuance Of Service Exemption –  
In Peoria County, IL*

Dear Secretary Williams:

Enclosed on behalf of Pioneer Industrial Railway Co., is a Petition for Stay Pending Reconsideration and/or Appeal. As can be seen from the certificate of service attached, copies of this petition are being served today on all parties of record.

Please acknowledge filing of this petition by return electronic receipt. If there are any questions concerning this filing, please contact me by telephone at (202) 663-7823 or by e-mail at [wmullins@bakerandmiller.com](mailto:wmullins@bakerandmiller.com).

Sincerely,



William A. Mullins

Enclosures

cc: Daniel A. LaKemper, Esq.  
All Parties of Record

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

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**STB DOCKET NO. AB-1066X**

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**CENTRAL ILLINOIS RAILROAD COMPANY-- DISCONTINUANCE OF SERVICE  
EXEMPTION – IN PEORIA COUNTY, IL**

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**PETITION FOR STAY PENDING RECONSIDERATION AND/OR APPEAL**

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**January 9, 2006**

**Attorneys for Pioneer Industrial  
Railway Co.**

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

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**STB DOCKET NO. AB-1066X**

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**CENTRAL ILLINOIS RAILROAD COMPANY-- DISCONTINUANCE OF SERVICE  
EXEMPTION – IN PEORIA COUNTY, IL**

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**PETITION FOR STAY PENDING RECONSIDERATION AND/OR APPEAL**

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Pioneer Industrial Railway Co. (“PIRY”), hereby moves the Surface Transportation Board (“Board” or “STB”) to stay its decision in this matter served December 23, 2005 (“Decision”), pending reconsideration and/or appeal of the Decision,<sup>1</sup> and the resolution of the pending state court litigation between PIRY and the Cities. New evidence brought to light by Carver Lumber Company (“Carver”) in its January 4 filing refutes fundamental premises of the Decision. Moreover, the Decision fails to comply with the Board’s responsibilities under the National Environmental Policy Act of 1969 (“NEPA”) and under 49 U.S.C. §10904, governing offers of financial assistance (“OFA’s”). If the Decision is not stayed, the cities of Peoria and Peoria Heights (“Cities”) will dismantle 6.29 miles of track, eliminating the prospect of rail service to Carver and others and causing as-yet unassessed environmental damage. The Board should stay the Decision to avoid these imminent harms.

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<sup>1</sup> Ordering paragraph 4 of the Decision requires the filing of this petition by January 9, 2006, and the filing of requests for reconsideration by January 17. PIRY intends to file such a petition for reconsideration or an appeal, by that date. PIRY notes that the Board’s website characterizes Carver Lumber’s filing as a “Petition for Reconsideration,” as does that filing itself. PIRY also intends to petition the Board to reopen the adverse discontinuance proceeding (STB Docket No. AB-878, cited in full in Footnote 3).

## BACKGROUND

Slightly more than a year after receiving authority to operate the Kellar Branch, and having failed to provide any service over the line (the one attempt at service resulted in a runaway train and a derailment),<sup>2</sup> Central Illinois Railroad Company (“CIRY”) petitioned the Board under 49 U.S.C. §10502 to exempt from 49 U.S.C. §§10903-05 CIRY’s discontinuance of service over a 6.29-mile section of a rail line known as the Kellar Branch. Until earlier this year, PIRY had operated over that section and over the remainder of the Kellar Branch under an agreement with Cities.<sup>3</sup> Because the Board had been told that any shippers who would be adversely affected by the CIRY discontinuance would continue to receive service via an alternative route and because no shipper objected to the CIRY discontinuance, the Board granted CIRY’s discontinuance request in its Decision.

On January 4, 2006, Carver filed a letter seeking reconsideration of the Decision and of the Board’s action in Adverse Discontinuance.<sup>4</sup> Carver’s request advises the Board that the

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<sup>2</sup> See PIRY’s September 2, 2005 filing in STB Docket No. AB-878, attached as Exhibit 1 hereto pursuant to 49 CFR §1112.7.

<sup>3</sup> Although PIRY had been operating over the Kellar Branch for years pursuant to a long term contract that PIRY had taken assignment of, the Cities contended that the agreement had expired, and in August 2005, obtained an adverse discontinuance order from the Board to dispossess PIRY of its right to use the Kellar Branch. See City Of Peoria and The Village of Peoria Heights, IL—Adverse Discontinuance—Pioneer Industrial Railway Company, STB Docket No. AB-878 (served August 10, 2005), petition to reopen denied Nov. 18, 2005 (“Adverse Discontinuance”). PIRY, however, asserts that its agreement with the Cities has not expired or been properly terminated. Accordingly, PIRY has filed suit in state court to enforce its rights under the agreement. Although PIRY has requested injunctive relief to prevent removal of any portion of the Kellar Branch, pending ruling on PIRY’s contractual rights, the court has thus far failed to address PIRY’s request due to a pending change of venue motion by the Cities.

<sup>4</sup> In light of the procedural posture of Adverse Discontinuance, PIRY recognizes that Carver’s request for “reconsideration” in that case should actually be treated as a petition to reopen. PIRY

Cities have, despite repeated requests by Carver, not lived up to their promises to the Board and the public to complete an alternative route to the Kellar Branch and to provide service over that route for those shippers who previously used the Kellar Branch and would be adversely impacted by the discontinuance. Although Carver patiently arranged to receive shipments via transload in order to allow the Cities time to remedy their default, over three months have now passed, with no remedy and no service in sight for Carver. As a result of this default by the Cities and CIRY, Carver, a small business, has been deprived of rail service since September, and has incurred over \$25,000 in additional transportation costs. Carver requests that the Board order service restored over the Kellar Branch in light of the Cities' multiple broken promises and CIRY's complete service failure.

Factual Background Regarding Environmental/Historic Review. CIRY did not submit an environmental or historic report with its discontinuance petition. Instead, CIRY claimed that it was not subject to these requirements, citing 49 CFR §§1105.6(c)(6) ["discontinuance of trackage rights where the affected line will continue to be operated"] and 1105.8, and Norfolk Southern Ry. Co. – Discontinuance of Service – In Sumter County, SC, STB Docket No. AB-290 (Sub-No. 264X), slip. op. at 2, n. 2 (STB served Aug. 30, 2005)(“Norfolk Southern”).<sup>5</sup>

The Board issued notice of CIRY's exemption petition on September 30. Therein, the Board stated, “SEA has determined that this action is exempt from environmental reporting requirements under 49 CFR 1105.6(c)(2) and from historic reporting requirements under 49 CFR

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will also petition to reopen the Adverse Discontinuance proceeding based on Carver's new evidence and the changed circumstances.

<sup>5</sup> As pointed out in PIRY's December 20<sup>th</sup> filing, neither the case nor the regulation cited by CIRY were applicable to the facts of this case, a point confirmed by the Board when it relied upon an entirely separate regulation to grant the environmental waiver in its Decision.

1105.8(b)(3). Consequently, SEA concludes that this action does not require the preparation of an Environmental Assessment.” STB Docket No. AB-1066X (served Sept. 30, 2005) (“Notice”), at 2.

On December 20, PIRY requested that the Board withhold issuance of a final decision pending compliance with applicable NEPA and NHPA requirements. PIRY pointed out that the regulation and case cited by CIRY to justify not filing an environmental report were inapplicable because they assumed either continued operation of the line or, at least, that some additional Board approval would be required for abandonment. Moreover, PIRY stated, the regulation cited by the Board ignored 49 CFR §1105.6(b)(3), which applies specifically to the type of discontinuance CIRY proposed. The Board rejected PIRY’s request to hold the decision in abeyance and issued its decision on December 23, holding that no environmental documents were required, pursuant to Section 1105.6(c)(2).

Factual Background Regarding OFA. On the same date that CIRY filed its discontinuance petition, PIRY filed a notice of intent to file an OFA for the Kellar Branch, and requested that CIRY provide the information specified in 49 CFR §1152.27(a). Three days later, CIRY moved to reject PIRY’s notice of intent. In the Notice, the Board stated that “Any filings related to these requests will be considered in the decision on the merits.” The Board also noted that any appropriate OFA would be due no later than 10 days after service of the decision granting the petition.

On November 21, the Board's Office of Proceedings ("Office"), purporting to act under authority delegated in 49 CFR §1011.7(b),<sup>6</sup> granted CIRY's motion to reject PIRY's notice of intent to file an OFA. In so doing, the Office held that OFA's to purchase a line are not authorized in discontinuance proceedings, citing three cases.<sup>7</sup> The Decision reaffirmed the Director's holding and stated that the Board would not consider an OFA to acquire a line in a discontinuance proceeding. The Board also, without any statutory findings, invoked 49 U.S.C. § 10502 to exempt CIRY's discontinuance from the otherwise applicable OFA provisions because "all three existing shippers will continue to have rail service." Decision at 4.

### ARGUMENT

The discontinuance exempted in this proceeding is the final step in the Cities' plans to remove the only existing rail line that provides access to Carver. If the discontinuance is allowed to become effective on January 22, Carver will be continue to be without rail service, the Kellar Branch will be salvaged and removed without any environmental analysis ever having been done, and the sole rail carrier who is willing and able to provide service, and in fact provided such service for years, will be denied the opportunity to provide service to a shipper, that desires

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<sup>6</sup> "[T]he Director of the Office of Proceedings shall have authority initially to determine . . . whether offers of financial assistance satisfy the statutory standards of 49 U.S.C. 10904(d)." 49 CFR §1011.7(b)(2). It is not clear that the Director has the authority to determine whether or not the statute is even applicable, which the Director did by rejecting PIRY's OFA on the basis that OFA's are not available in discontinuance proceedings.

<sup>7</sup> Delaware and Hudson Railway Company, Inc.—Discontinuance of Trackage Rights Exemption—in Susquehanna County, PA and Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Erie and Genesee Counties, NY, STB Docket No. AB-156 (Sub-No. 25X) (STB served Mar. 30, 2005) ("D&H"); CSX Transportation Inc.—Discontinuance Exemption—in Knox County, TN, STB Docket No. AB-55 (Sub-No. 641X) (STB served Jan. 2, 2004) ("CSX-Knox County"); CSX Transportation, Inc.— Discontinuance Exemption—(Between East of Memphis and Cordova) in Shelby County, TN, STB Docket No. AB-55 (Sub-No. 615X) (STB served July 17, 2002) ("CSX-Shelby County"). See slip op. at 5, n. 2.

and deserves such service. PIRY submits that the public interest would not be served by such a result. The Board should therefore stay its Decision in this case pending reconsideration, in light of Carver's new evidence and in light of inconsistencies and errors in the Board's treatment of environmental and OFA issues herein.

In seeking a stay, a petitioner must establish (1) that there is a strong likelihood of prevailing on the merits; (2) that the petitioners will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports granting the stay. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

**I. PARTIES SEEKING RECONSIDERATION ARE LIKELY TO PREVAIL ON THE MERITS**

**A. Carver's Letter Refutes the Main Factual Premise Which Led the Board to Authorize Discontinuance**

Under 49 U.S.C. §10502, the Board may exempt a rail transaction from application of 49 U.S.C. §10903 when it finds that (1) regulation of the transaction is not necessary to carry out the rail transportation policy of 49 U.S.C. §10101; and (2) either (a) the transaction is of limited scope, or (b) regulation is not needed to protect shippers from the abuse of market power. In this case, the Board held that detailed scrutiny of CIRY's discontinuance was not necessary to carry out the rail transportation policy, and that regulation was not necessary to protect shippers from abuse of market power. The Board refrained from determining whether the proposal was limited in scope. Carver's submission, however, undercuts the Board's findings, making reversal on

reconsideration likely. Accordingly, a stay should be issued to prevent change in the status quo that could irreparably harm Carver, PIRY and the public.

One of the Board's principal findings supporting its Decision was that the fact that no shipper had objected. As the Board stated:

The shippers served by CIRY . . . do not object, and will continue to be served from the north or from the south. . . . [O]verhead traffic will be rerouted.

Decision at 4. In light of Carver's submission, it is clear that this finding is not correct. As an initial matter, it is simply incorrect to state that the shippers are being served by CIRY. CIRY does not serve any of the shippers on the "north" end, and never has. In fact, the one time it did attempt to serve a shipper, the incident resulted in a runaway train, derailment, and an accident.

As Carver states:

In late Summer 2005, a relatively short portion of the northern end of the Kellar Line was taken down for repairs (with this section being down, no cars can be delivered, either from the east side via the old Kellar Line or from a new Western connection). At this writing [dated January 3, 2006] the project sits uncompleted and idle with virtually no substantial work having been done for at least three months or more.

Carver letter, page 1. In short, it is not correct that CIRY serves these shippers. Indeed, it has not done so ever, a fact it has failed to acknowledge to the Board. Moreover, if the discontinuance exempted by the Board were to be effectuated (and PIRY has every expectation that the Cities will move to eliminate the discontinued 6.29-mile segment of the Branch as soon as possible after January 22), traffic will not be rerouted because there is no new western connection.

Furthermore, while the Board was correct at the time it made its December 23<sup>rd</sup> decision that no shipper had objected,<sup>8</sup> we now know that this was because the City had made numerous promises to the shippers on the Kellar Branch regarding both the timing of the new connection that was to be constructed and the ability of the shippers to use the alternative service. As Carver makes clear, those were empty promises:

I have personally attended many meetings over the past years regarding the City's plan to abandon the Kellar Line to the Park District in favor of a new connection from the West. Multiple times the shippers were assured that service over the Kellar Line would not be discontinued until viable service from the West was established and running smoothly. In fact, our early support of the Kellar Line conversion was tied by a letter from the shipper's group to just an understanding with the City.

Carver letter, pg. 3. Of course as Carver had previously stated, the project remains unfinished and the contractor, Metroplex, "appears to have abandoned the project." Carver letter, pg. 1. Carver remains cut off from rail service, and elimination of the existing route, to which PIRY has contractual operating rights, would prevent PIRY, apparently the only party interested in providing rail service to Carver, from ever doing so.

It is now clear that the two predicates for finding that regulation was not necessary to protect shippers, *i.e.* that CIRY had served shippers and that no such shippers being served were objecting to the discontinuance, are now incorrect and no longer valid. A shipper has now objected. That shipper is suffering financial and operational harm. That shipper wants service restored on the Kellar Branch, not on the unfinished and unproven so-called "western connection." Reconsideration of the Decision, therefore, will likely lead to a different result than

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<sup>8</sup> Notably, however, CIRY's discontinuance petition did not recite service on shippers nor did the Decision require CIRY to serve the Decision on shippers. The source for the Board's statement in the Decision that "The shippers served by CIRY are aware of the relocation project [and] do not object," is unclear.

that reached in the Decision. Accordingly, a stay is in order because there is a likelihood of prevailing on reconsideration.

B. The Board's Handling of Environmental Issues Is Also Likely to Be Reversed

In this matter, the Board held that CIRY's discontinuance of service did not require environmental review because it would "not alter the amount of rail and truck traffic in the vicinity," because the impact of the discontinuance was considered in the EA related to the Cities' exemption to construct the (still uncompleted) western connection, and because considering the environmental impact of removal of the Kellar Branch would not inform the Board's decision on whether to allow the discontinuance. The Board reached these conclusions without even receiving an environmental report from CIRY.<sup>9</sup> These conclusions are wrong. They violated the Board's duties under NEPA to take a "hard look" at the environmental consequences associated with major actions, see Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976), and are likely to be reversed on reconsideration.

1. There Will Be Rail-To-Truck Diversions

Notwithstanding that fact that CIRY never asserted in any of its pleadings or arguments that the discontinuance was exempt from environmental documentation because the proposed

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<sup>9</sup> The Board and the ICC many times have rejected abandonment/discontinuance submissions which were filed without the required environmental reports. See, e.g., Fredonia Valley Railroad, Inc.-Abandonment Exemption-In Caldwell County, KY, STB Docket No. AB-592X, 2001 STB LEXIS 661 (served Aug. 9, 2001); Longhorn Railway Company-Discontinuance Exemption-In Burnet County, TX, STB Docket No. AB-501X, 1997 STB LEXIS 2958 (served April 1, 1997). See generally Consolidated Rail Corporation-Abandonment Exemption-in Middlesex County, NJ, STB Docket No. AB-167 (Sub-No. 1184X) (served Jan 5, 2004) at \*1, n. 1; Iowa Northern Railway Company-Abandonment Exemption-In Tama and Benton Counties, IA, Docket No. AB-284 (Sub-No. 4X), 1994 ICC LEXIS 109 (served July 7, 1994) at \*1, n. 2, and Consolidated Rail Corporation-Exemption-Abandonment in Middlesex County, NJ, Docket No. AB-167 (Sub-No. 1085X), 1987 ICC LEXIS 205 (July 28, 1987) at \*1, n. 1.

action would not exceed the threshold levels identified in 49 CFR 1105.7(e)(4) and (5) and CIRY never presented any evidence, verified statements, or certifications that the thresholds established in those sections would not be exceeded, the Board nonetheless, on its own motion, held that no environmental review was required. The Board based its rationale on Section 1105.6(c)(2) holding that no review was required because the:

action would not . . . exceed the threshold levels identified in 49 CFR 1105.7(e)(4) and (5) . . . [and] This discontinuance of service will not alter the amount of rail and truck traffic in the vicinity. PIRY has offered no support for a finding to the contrary.

There are several problems with the Board's statement. First, it is not PIRY's burden to present evidence that the action qualifies for a categorical exclusion under Section 1105.6(c)(2), it is the proponent of a proposed action that must certify or establish that the exemption is warranted. Implementation Of Environmental Laws, Ex Parte No. 55 (Sub-No. 22A), 1990 ICC LEXIS 104 (Mar. 20, 1990) at \*13 ("Under our current rules, an applicant must submit an Environmental Report to the Commission, which serves as the starting point for the preparation of the EA or EIS."), and \*16, n. 22 ("The stringent time frames for many Commission proceedings make the filing of accurate and complete environmental reports (and early communication with appropriate agencies) critical to our ability to prepare timely and thorough environmental documents."). Second, the Board had no evidence to make this finding because CIRY never presented any. CIRY did not provide an environmental report at all<sup>10</sup> and presented absolutely no evidence or certifications that the thresholds would not be exceeded. .

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<sup>10</sup> An environmental report calls for, among other things, an estimate of the amount of traffic that would be diverted to other modes if the proposed action occurred. See 49 C.F.R. §1105.7(e)(2). Because no report was prepared nor did CIRY present a certification regarding the thresholds, the Board had no information regarding diversions to other modes.

Even a cursory examination of the environmental impacts of the removal of the majority of the Kellar Branch would have informed the Board that a CIRY discontinuance could in fact result in diversion to other modes. Carver's letter shows that CIRY's failure to actually provide service before receiving discontinuance authority and the failure to establish the new connection did in fact result in a diversion of former rail traffic to a rail-truck transload. Removal of the 6.29-mile section of the Kellar Branch, plus the non-completion of the western connection, will make this condition permanent by preventing PIRY from restoring service. Likewise, we now also know that CIRY's assertion that there has been no local traffic on the segment for more than two years and that overhead traffic can and will be rerouted is false. Contrary to CIRY's verified petition, there were two carloads that originated during 2004 on the segment where CIRY proposes discontinuance. We also know that PIRY did in fact move a number of cars over the Kellar Branch in 2005. That traffic cannot be rerouted, as Carver's letter shows. Thus, the discontinuance will alter the amount of rail and truck traffic in the vicinity. Had the Board required an environmental report, it would have known this. It was thus material error for the Board to grant the exemption without an environmental report.

## 2. The Previous EA Did Not Address The Issue

The Board's assertion that its March 9, 2004 EA addressed "the consequences of rerouting the existing traffic" is likewise incorrect. First, like the Decision, that EA presupposed the correctness of the Cities' assertion that shippers like Carver would receive service from an operator other than PIRY via a newly-constructed connection. In fact, however, Carver's letter shows that connection has not been completed and Carver is not receiving service. Therefore, the March 9, 2004 EA is premised on factual suppositions that have been proven incorrect.

Second, the March 9, 2004 EA's only comment on the discontinuance at issue in this proceeding was that "Service over the approximately 7.5 miles of the segment that would no longer be required to serve shippers would be discontinued and the right-of-way proposed for use as a recreational trail." This statement is so general as to provide the public no real information about the scope of the proposed discontinuance so as to foster informed comment on the issue. In addition, Carver's letter shows that service over all of the Kellar Branch continues to be required to serve shippers, inasmuch as no alternate route exists and the authorized carrier in possession of the line - CIRY - refuses to serve.

### 3. The Board Was Required To Consider The Effects Of The Abandonment

Finally, the Board asserted that it lacked authority to approve or prevent the Cities' removal of the track once service was discontinued, and that it therefore could not consider the environmental impacts of that removal in deciding whether to authorize CIRY's discontinuance. CIRY's citations to cases in which EA's had been prepared when service would not continue following a discontinuance were inapposite, the Board held, because in those cases the involved lines had not been approved for abandonment, where in this case, the line had been previously approved for abandonment and presumably a NEPA analysis done at that time.

First, the notion that there had been an environmental analysis when the line was first authorized for abandonment in 1980 is incorrect. It is understandable that the Board would have this impression as CIRY told the Board that

The prior approval of abandonment of the rail line by the Board's predecessor is the reason why environmental and historic review and approval are not required for the partial abandonment of the line that will occur without the need for Board approval. Abandonment of the rail line was subject to environmental and historic review and approval when abandonment of the Branch was previously approved. There is no legal requirement for a second such review and approval at this time.

. . If abandonment of the Branch is not subject to environmental review and approval, it follows that discontinuance of rail service incidental to such abandonment is also not subject to environmental review and approval.

CIRY Dec. 22 reply at 3.

CIRY's statements were simply wrong. The abandonment of the rail line was not subject to environmental and historic review and approval when abandonment of the Branch was previously approved.<sup>11</sup> As a result, the environmental effects of the abandonment and subsequent salvage of the Kellar Branch has never been studied by this agency or any other agency. Because this agency's grant of discontinuance authority is the sole agency action that will result in the salvage of the line, it is this agency that has an obligation to study the environmental effects of that salvage. Goos v. Interstate Commerce Commission, 911 F.2d 1283, 1294 (8<sup>th</sup> Cir. 1990) ("The I.C.C. concedes that NEPA applies to abandonment proceedings, and has prepared environmental assessments on the environmental consequences of abandonment since 1987."), and Mid States Coalition for Progress v. Surface Transportation Board, 345 F.3d 520, 533-534 (8<sup>th</sup> Cir. 2003) (agency must prepare a detailed statement to establish that it has taken the requisite 'hard look' at the environmental consequences of its action).

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<sup>11</sup> The ICC approved the abandonment of the Rock Island's entire system in Chicago, Rock Island and Pacific Railroad Company, Debtor (William M. Gibbons, Trustee)-Abandonment-Entire System, 363 ICC 150 (1980). At 363 ICC 151, that report states that the Rock Island abandonment was handled pursuant to procedures adopted at 360 ICC 615 pursuant to the Milwaukee Railroad Restructuring Act, PL 96-101, 93 Stat. 736. The report adopting those procedures, Abandonment Procedures for Bankrupt Railroads, 360 ICC 615 (1979), specifies that all abandonments pursuant to the Milwaukee Railroad Restructuring Act were exempted from NEPA, and the bankrupt carrier was not required to file any environmental report. 360 ICC at 617. Accordingly, there was no examination of the environmental consequences of the Rock Island's abandonment of the Kellar Branch when that abandonment was approved.

Second, even assuming, arguendo, that the agency lacks authority at this time to approve the abandonment of this segment of the Kellar Branch because the track had previously been approved for abandonment, such lack of authority does not put the environmental effects of this reasonably foreseeable activity beyond the scope of the Board's environmental review. The Board has interpreted NEPA to require consideration of "all direct, indirect, and cumulative environmental impacts that are reasonably foreseeable" results of a proposal. Illinois Central Railroad Company-Construction and Operation Exemption-In East Baton Rouge Parish, LA, STB Finance Docket No. 33877, 2002 STB LEXIS 116 (served Feb. 20, 2002) at \*14.<sup>12</sup>

It is beyond dispute that removal of the line is a reasonably foreseeable consequence of the exemption sought from the Board in this proceeding; indeed, the petition itself stated, "The exemption for discontinuance here sought is necessary to enable the owners . . . to convert the Line into a recreational trail." The Board's failure to consider the environmental effects of this

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<sup>12</sup> Similarly, CEQ regulations mandate the consideration of the impact of connected actions and cumulative actions, and the inclusion of all such actions in the same impact statement. *See* 40 C.F.R. § 1508.25(a)(1) & (2) (2001); *see also* Council on Environmental Quality, Memorandum to Federal Agencies on Procedures for Improving Environmental Impact Statements (May 16, 1972), reprinted in 3 BNA Environmental Reporter 82, 87 ("Individual actions that are related either geographically or as logical parts in a chain of contemplated actions may be more appropriately evaluated in a single, program statement." (emphasis added)). The purpose behind this inclusion of related actions into a single impact statement is to "prevent agencies from dividing one project into multiple individual actions 'each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.'" Natural Resources Defense Council, Inc. v. Hodel, 865 F.2d 288, 297-298 (D.C. Cir. 1988) (citing Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir. 1985)); *see also* City of Rochester v. United States Postal Service, 541 F.2d 967 (2d Cir. 1976) ("To permit noncomprehensive consideration of a project divisible into smaller parts, each of which taken alone does not have a significant impact but which taken as a whole has cumulative significant impact would provide a clear loophole in NEPA.").

plainly foreseeable consequence of the Board's action is, by the standards set by the Board's own decisions, a failure to satisfy NEPA requirements.<sup>13</sup>

C. The Board's Refusal to Allow PIRY's OFA Is Also Likely to Be Reversed

As noted, the Decision reaffirmed the Director's holding and stated that the Board would not consider an OFA to acquire a line in a discontinuance proceeding. The Board also, without any statutory findings, invoked 49 U.S.C. § 10502 to exempt CIRY's discontinuance from the otherwise applicable OFA provisions because "all three existing shippers will continue to have rail service." Decision at 4. Because there is no statutory basis for finding that an OFA is unavailable in a discontinuance proceeding and because the Board made no findings with respect to its use of Section 10502, PIRY is likely to prevail on its contention that the Board's refusal to consider PIRY's OFA violated 49 U.S.C. §10904. Accordingly, a stay is in order.

The Board rejected PIRY's OFA on grounds that "Because this is discontinuance . . . , the Board does not consider OFAs to acquire the line for continued rail service." Decision at 4. In so concluding, the Board adopted the Office's conclusions in its November 21 order, which relied on three prior Board decisions - D&H, CSX-Knox County, and CSX-Shelby County, cited

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<sup>13</sup> As the party who operated over the Kellar Branch for the past seven years, and which still has a contractual right to operate over the line (an issue which is currently in litigation before an Illinois state court in Pioneer Industrial Railway Co. v. D.O.T. Rail Services, Inc., et al., LaSalle County Illinois Circuit Court No. 05-L-146), PIRY is concerned that any failure to fully follow NEPA and NHPA could impose unforeseen liabilities on PIRY. It may also impact any PIRY structures or property still owned or leased on the line that may be removed or salvaged without a proper NEPA analysis. Although the Cities told the Board in footnote 1 of their September 8, 2005 opposition to PIRY's petition to reopen or for clarification in AB-878 that PIRY's state court contract claims likely would be resolved before CIRY's discontinuance exemption became effective, the Cities have prevented the state court from acting in the case by seeking a change of venue. Absent a stay in this case, CIRY's discontinuance will become effective without PIRY having an opportunity to vindicate its claims in state court, as the Board suggested in Adverse Discontinuance.

in Footnote 5, above. These precedents, however, actually support allowing PIRY to proceed with an OFA purchase.

D&H involved a request to purchase Delaware & Hudson's trackage rights over a line owned by Norfolk Southern. In that decision, the Board said, "Only when a full abandonment (or discontinuance by the only party with a common carrier obligation) is approved is a complete loss of service threatened. It is this loss of service which may be forestalled by purchase of the line." D&H, slip op. at 3. Moreover, the agency said, "Interpreting section 10904 in a broader manner . . . is neither necessary nor appropriate to achieve the objective of the OFA process: to preserve rail service that would otherwise be lost as a result of line abandonment or service discontinuance." Id. (Emphases added.) Here, CIRY was the only party with the common carrier obligation. The grant of the discontinuance is the sole action remaining before rail service would be lost. Thus, D&H squarely affirms the Board's duty to accept an OFA from PIRY for this line.

CSX-Knox County and CSX-Shelby County are also not to the contrary. CSX-Knox County held, without discussion, that an OFA would not be considered for one carrier to acquire rights to serve a shipper where those rights would involve using the line of another carrier that served that same shipper. In that case, because there would be no loss of rail service, the ICC refused to allow an OFA. Similarly, CSX-Shelby County held, without discussion, that an OFA to acquire the line would not be accepted in a discontinuance proceeding where abandonment had previously been denied and thus an OFA would be available when and if the carrier sought renewed abandonment authority.

Boiled down to their essence, these cases denied OFA's because service would continue or because there would be another opportunity to file an OFA in a future abandonment proceeding. Neither of these precedents support denying PIRY the right to file an OFA in this case inasmuch as they involve the principle that no OFA is required when continued service is available to the shippers or later abandonment authority will be sought. Neither of those conditions exists here. If the discontinuance is allowed to proceed, the shippers will lose service, permanently, and there will be no further abandonment proceeding in which PIRY can file an OFA. Thus, the purpose of the OFA statute, which is to preserve service if there is a carrier willing and able to provide that service, would be violated if the discontinuance is allowed to proceed without an OFA and such an action would be inconsistent with prior precedent.

Likewise, the literal language of the statute provides that OFA's are available in the context of discontinuances. The Board does not have the authority to rewrite the statute. The terms of Section 10904 specify that "any person may offer to subsidize or purchase the railroad line that is the subject of such application [for abandonment or discontinuance]." 49 U.S.C. §10904(c). By this statutory language, it is clear that OFA's are available in the context of discontinuances, precedents notwithstanding. Furthermore, even if you review the precedents, they support PIRY's position, not the Board's. Accordingly, the Board's refusal to allow PIRY to pursue an OFA to purchase the line involved here violated the statute and the Board's own cited precedent. That refusal is likely to be reversed on reconsideration/appeal.

Perhaps realizing that the statute does allow for the filing of OFA's in the context of discontinuances, the Board did invoke 49 U.S.C. § 10502 to exempt CIRY's discontinuance from the otherwise applicable OFA provisions. While the Board does have the authority under

Section 10502 to exempt a transaction from application of another part of the statute, it may do so only if the appropriate findings required by Section 10502 are made. See Jost v. Surface Transportation Board, 194 F.3d 79, 86, 88 (D.C. Cir. 1999) (STB required to articulate findings to support exemptions), and Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-86 (1974) (agency must articulate a 'rational connection between the facts found and the choice made' to avoid being found to have acted arbitrarily and capriciously). Such findings were not made in this case. In this case, the only finding with respect to whether or not an exemption from the OFA provision was applicable was the Board's Ordering Paragraph #3. In other words, there were no findings. The failure to make such findings was thus reversible error. At a bare minimum, the Board was required to analyze whether or not granting an exemption from the OFA provisions was consistent with the rail transportation policy and would not result in abuse to shippers. It did not. Therefore, PIRY is likely to succeed on the merits of this claim as well and a stay should be granted until the Board makes such appropriate findings.

## **II. WITHOUT A STAY, CARVER AND PIRY WILL BE IRREPARABLY HARMED.**

An agency's order is "not ordinarily stayed without an appropriate showing of irreparable harm." Permian Basin Area Rate Cases, 390 U.S. 747, 777 (1968). Irreparable harm is, generally, harm that cannot be compensated economically at a later stage of litigation. E.g., Virginia Petroleum Jobbers Ass'n, 259 F.2d at 925. However, where there is a strong showing under one part of the Holiday Tours test, as there is above on the likelihood of Carver's and PIRY's success on the merits, a lesser showing under other parts is required. See Serono

Laboratories, Inc. v. Shalala, et al., 158 F.3d 1313, 1317-1318 (D.C. Cir. 1998); Busboom Grain Co., Inc. v. Interstate Commerce Commission, 830 F.2d 74, 75 (7<sup>th</sup> Cir. 1987).

It is clear that Carver will be irreparably harmed if the Board allows the common carrier obligation on the Kellar Branch to be lifted. CIRY has failed to provide service to Carver for months, costing Carver tens of thousands of dollars in added transportation expense, an extreme burden for a small business. Moreover, the Cities and CIRY have failed in their promises to provide service via an alternate route. If the Board allows CIRY's discontinuance so the Cities can remove most of the Kellar Branch - the avowed purpose of the exemption granted in the Decision - the line will be salvaged and Carver would be left only with CIRY's and the Cities' unfulfilled promises of service and no prospect of obtaining compensation for those broken promises. Indeed, Carver and PIRY could not later seek a damage claim for financial compensation because such actions would have been lawfully approved by the Board. Thus the type of harm suffered in the context of an abandonment and salvage of tracks cannot be subsequently economically remunerated.

Similarly, where, as here, there is a substantial likelihood of establishing a NEPA violation, irreparable harm is generally presumed. Davis v. Slater, 148 F.Supp.2d 1195, 1220 (D. Utah 2001). See also Realty Income Trust v. Eckerd, 564 F.2d 447, 457 (D.C. Dir. 1977). Indeed, "an injunction is the most common response to a NEPA violation." Association Concerned About Tomorrow, Inc. v. Dole, 610 F.Supp. 1101, 1119 (N.D. Tex. 1985). As such, the second prong of the Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc. test has been met.

### **III. OTHER PARTIES WILL NOT BE SIGNIFICANTLY HARMED**

There has been no showing that other parties will be significantly harmed if the Decision is stayed. While a stay of the Decision may require CIRY to continue to provide service over the line, in reality, CIRY will not be forced to continue a money-losing service because it in fact has not been providing service since it began operations, as Carver shows. If it did have to provide service, CIRY would be compensated for any such service by the shipper. If it did not want to provide that service, PIRY is willing and able to do so. Nor will the City lose any financial profit it may gain from salvaging the track because the City has promised not to salvage the track until it has completed the promised connection and alternative route. Because the connection has not yet been completed, and if one can trust the Cities' commitments, there is no harm to the City by preventing them from salvaging the track. Finally, as PIRY is more than willing to provide service to Carver or any other shipper, and to compensate the City for the use of the tracks, there is no financial harm to the City or to CIRY, as CIRY would not have to perform any operations. In the end, if a stay is granted, no party suffers irreparable harm. However, if a stay is denied, the shippers, PIRY, and the public (due to the failure to undertake an environmental analysis), will all suffer harm. The balance of these interests weights in favor of granting a stay.

### **IV. THE PUBLIC INTEREST REQUIRES A STAY**

The Board's primary function is to assure a sound rail transportation system to serve the public. A large part of that function is to ensure that shippers are provided adequate service at reasonable rates. 49 U.S.C. §11101. The whole underlying premise of Section 10904 is to provide a mechanism to preserve service to shippers if there is a carrier willing and able to provide that service, while relieving another carrier of that obligation. Likewise, no carrier

should be required to continue to conduct a money-losing operation or have its property taken without adequate compensation. The purpose of NEPA is to ensure that the environmental impacts of a proposed action are adequately examined before that action is taken.

This case presents a prime opportunity for the Board to satisfy all of these interests. There is a way by which CIRY can be relieved of its operating obligations, the City compensated for the use of its tracks, the environmental impacts adequately studied, and service to shippers maintained. That way is by granting the stay, reconsidering the Board's decisions, and then allowing PIRY to file an OFA. Granting the stay provides an opportunity for the Board to reconsider its decisions in light of the new evidence submitted by Carver, and correct its decision.. The public as whole will benefit. Denying the stay serves none of these public interests.

### **CONCLUSION**

The Board should stay the effect of the Decision. There is a strong likelihood that the Decision will be modified or entirely reversed in light of Carver's new evidence, in light of the strong need for more significant environmental review, and in light of the Board's violation of the statute and its own cited precedent with respect to rejection of PIRY's OFA efforts. Failing to stay the Decision would cause irreversible harm to Carver, PIRY and the shipping public, while granting a stay would not significantly harm other parties. Accordingly, under the

standards for determination of stays before this agency, the Board should stay the Decision pending reconsideration thereof.

Respectfully submitted,

Daniel A. LaKemper  
General Counsel  
Pioneer Industrial Railway Co.  
1318 S. Johanson Road  
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Phone: (309) 697-1400



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Attorneys for Pioneer Industrial Railway Co.

VERIFICATION

I, J. Michael Carr, verify under penalty of perjury, that I have read the above and foregoing Petition, know the facts asserted therein and that such facts are true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file this Verification.

Executed: January 9, 2006

  
\_\_\_\_\_  
J. Michael Carr, President  
Pioneer Industrial Railway Co.

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

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**STB DOCKET NO. AB-1066X**

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**CENTRAL ILLINOIS RAILROAD COMPANY-- DISCONTINUANCE OF SERVICE  
EXEMPTION – IN PEORIA COUNTY, IL**

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**PETITION FOR STAY PENDING RECONSIDERATION**

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**EXHIBIT 1**

**PIONEER INDUSTRIAL RAILWAY CO.**  
**1318 S. JOHANSON ROAD**  
**PEORIA, ILLINOIS 61607**  
**(309) 697-1400**

September 2, 2005

Vernon A. Williams, Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423

RE: Central Illinois Railroad Company (FD No. 34518; AB 878).

Dear Secretary Williams:

Enclosed is a recent article concerning an accident involving the Central Illinois Railroad Company ("CIRY") in Peoria, Illinois. This article is relevant to the issues the Board is considering in AB-878.

As you may recall, one of the issues raised by Pioneer Industrial Railway ("PIRY") in F.D. No. 34518 and 34636, was whether or not CIRY could and would operate safely, especially if joint operation of the Kellar Branch with PIRY were undertaken. By decision served February 23, 2005, the Board held that a joint operating agreement should be concluded before any joint operations are undertaken.

No joint operating agreement was concluded and joint operations never occurred. After the Board granted the City of Peoria's Adverse Discontinuance Petition (AB-878), the Attorney for the City demanded that PIRY vacate the line (without any Court determination, as contemplated in the Board's decision) and informed PIRY that CIRY intended to commence operations, without the requisite joint operating agreement (See attached letter).

Although PIRY did not believe the City could require PIRY to vacate the Line, absent a Court determination that PIRY's operating agreement had indeed expired, PIRY concluded that attempting to maintain physical possession of the Line would imperil public safety, and that of its crews. PIRY, therefore, voluntarily vacated the Line, filed an action in State Court, as

contemplated by the Board, and embargoed the Line to PIRY traffic (see attached letter).

Now, CIRY's performance, it would certainly appear, fully confirms that PIRY's concerns about the safety and competence of CIRY were well-founded, and that joint operation of this line, with CIRY, is not feasible.

PIRY again respectfully requests that the Board expeditiously rule on its pending petition in AB-878.

Sincerely yours,

/s/ Guy L. Brenkman

Guy L. Brenkman, CEO.

cc: Board  
Thomas F. McFarland, Esq.  
City of Peoria  
William Mullins, Esq.

# CENTRAL ILLINOIS RAILROAD ATTEMPTS TO OPERATE THE KELLAR BRANCH

PEORIA, IL—The Central Illinois Railroad Company ("CIRY") took over the operation of the former CRI&P Kellar Branch between Peoria, Peoria Heights and the Pioneer Industrial Park in central Illinois after the Surface Transportation Board granted the City of Peoria's adverse abandonment petition (AB-878, Served August 10, 2005). CIRY, headquartered in Granville, Illinois, placed a car mover on the Line and attempted to use it as a locomotive. They learned the hard way that it will take more than a car mover to get a loaded center-beam flat car and

a loaded boxcar to the northern end of the Line.

Observers report that the result, when the car mover tried to pull the two cars up the steep graded hill to Peoria Heights on Saturday, August 27, was a runaway and a derailment. The trackmobile reportedly lost traction and ended up sending two cars back down the hill at approximately 30 mph. The cars ran through several public crossings (these include major crossings at Abington, Madison, Jefferson and Adams Streets), before crashing into



ABOVE: Trying to move a centerbeam and a boxcar uphill proved to be too much for CIRY's 4500 Trackmobile unit.

another railcar and derailing, near where the Kellar Branch connects with the Tazewell & Peoria Railroad.

The crews reportedly jumped from the trackmobile before the crash, so luckily, there were no reported injuries.



ABOVE LEFT: The last car is derailed and other cars are on the twisted rail. MIDDLE: You can see the twisted rail, and the lading cable has snapped off. RIGHT: Close up shot of the twisted rail.

BOTTOM LEFT: The cars are tilted from the derailment, and you can see the loads have shifted. MIDDLE: View from the Kellar Branch to the Tazewell & Peoria Railroad. RIGHT: A close up of the twisted rail, and a derailed car.

All Photographs taken by David Thurman

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THOMAS F. MCFARLAND

August 15, 2005

By certified mail,  
(return receipt requested)

Daniel A. LaKemper  
Pioneer Railcorp  
1318 S. Johanson Rd.  
Peoria, IL 61607

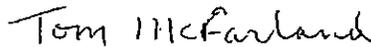
Re: Operation of the Kellar Branch at Peoria-Peoria Heights, IL

Dear Dan:

This confirms verbal advice today that Central Illinois Railroad Company (CIRY) will commence operation of the Kellar Branch at Peoria-Peoria Heights, IL, effective at 12:01 a.m., Monday, August 22, 2005. That operation will be in furtherance of an agreement between CIRY and the City of Peoria, Illinois and the Village of Peoria Heights, Illinois. That operation is in accordance with Surface Transportation Board (STB) decisions in its Finance Docket No. 34518, *Central Illinois R. Co. -- Oper. Exempt. -- Rail Line of the City of Peoria, et al. in Peoria and Peoria Heights, Peoria County, IL*, served July 28, 2004 and Feb. 23, 2005 (not printed), and its Docket No. AB-878, *City of Peoria and the Village of Peoria Heights, IL -- Adverse Discon. -- Pioneer Industrial Ry. Co.*, served Aug. 10, 2005 (not printed).

This is to advise correspondingly that Pioneer Industrial Railway Co. (PIRY) should cease rail operations and vacate the Kellar Branch at Peoria-Peoria Heights, IL, no later than 11:59 p.m., Sunday, August 21, 2005.

Very truly yours,



Thomas F. McFarland  
*Attorney for the City of Peoria, Illinois  
and the Village of Peoria Heights, Illinois*

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cc: Randy Ray, Esq., by fax to 309-494-8559  
Melinda Sammons, by fax to 815-339-6400

**PIONEER INDUSTRIAL RAILWAY CO.**  
**1318 S. JOHANSON ROAD**  
**PEORIA, ILLINOIS 61607**  
**(309) 697-1400**

August 22, 2005

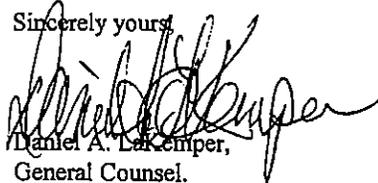
Thomas F. McFarland, Esq.  
208 S. LaSalle St.  
Suite 1890  
Chicago, Illinois 60604

RE: Kellar Branch (STB Docket No. AB-878)

Dear Tom:

This is in response to your letter dated August 15, 2005, regarding the Kellar Branch. In view of the fact that you have advised us that Central Illinois Railroad Company intends to commence operations today without a joint operating agreement, as well as the pending construction work in Pioneer Park, Pioneer Industrial Railway Co. ("PIRY") has removed its equipment from the Kellar Branch, and temporarily ceased service pursuant to an embargo. PIRY does so under protest, and reserves the right to lift the embargo and resume service if the Court, pursuant to the Surface Transportation Board's decision, finds in favor of PIRY on the pending contract action.

Sincerely yours,



Daniel A. LaComper,  
General Counsel.

CERTIFICATE OF SERVICE

I, David C. Reeves, hereby certify that on this 9th day of January, 2006, copies of the foregoing Petition for Stay Pending Reconsideration and/or Appeal have been served by first class mail, postage prepaid, or by more expeditious means of delivery upon all parties of record to this proceeding identified on the Surface Transportation Board's website.

A handwritten signature in black ink, appearing to read "David C. Reeves", written over a horizontal line.

David C. Reeves  
Attorney for Pioneer Industrial Railway Co.