

BEFORE THE
SURFACE TRANSPORTATION BOARD

CITY OF PEORIA, ILLINOIS AND)
VILLAGE OF PEORIA HEIGHTS,)
ILLINOIS -- ADVERSE) DOCKET NO. AB-878
DISCONTINUANCE -- PIONEER)
INDUSTRIAL RAILWAY CO.)

**REPLY IN OPPOSITION
TO PETITION TO REOPEN**

CITY OF PEORIA, ILLINOIS
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419 Fulton Street
Peoria, IL 61602

VILLAGE OF PEORIA HEIGHTS, ILLINOIS
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Applicants

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DATE FILED: March 6, 2006

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VILLAGE OF PEORIA HEIGHTS,)	
ILLINOIS -- ADVERSE)	DOCKET NO. AB-878
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Pursuant to 49 C.F.R. § 1104.13(a), the CITY OF PEORIA, ILLINOIS and the VILLAGE OF PEORIA HEIGHTS, ILLINOIS (the Cities) hereby reply in opposition to a Petition to Reopen (Petition) filed by Pioneer Industrial Railway Co. (PIRY) on January 24, 2006.^{1/}

BACKGROUND

By decision served August 10, 2005, the Board granted the Cities' application for adverse discontinuance of PIRY's rail service over the Kellar Branch, which is an 8.29-mile rail line owned by the Cities in Peoria and Peoria Heights, IL. In finding that public convenience and necessity supports discontinuance, the Board found that the Cities had contracted with a replacement operator, i.e., Central Illinois Railroad Company (CIRY), and that no shippers objected to discontinuance of PIRY's rail service, substitution of CIRY as operator of the Branch, and the Cities' plan to convert an unused portion of the Branch into a recreational trail at a later time (decision at 6). The Board noted that the Cities' contract with CIRY and the need for

^{1/} By decision served February 10, 2006, the Board extended the date by which the Cities can reply to the Petition to March 6, 2006.

CIRY to obtain Board authority before service can cease assured that a grant of the Cities' application would not result in a diminution of service that would have a serious adverse impact on shippers (*ibid.*).

By decision served November 18, 2005, the Board denied petitions by PIRY to reopen the proceeding to prohibit the Cities from removing the track on the unused portion of the Branch (1) pending resolution of a State Court action in which PIRY is seeking a determination that it has a contractual right to operate the Branch; and (2) until CIRY has received discontinuance authority over that segment. The Board reasoned that reopening was not appropriate because the Cities agreed that if the State Court were to enjoin removal of the track under consideration, the Cities would abide by that decision, and the clarification was not required because changes to the configuration of the Branch can be considered in the CIRY discontinuance proceeding (decision at 3).

By decision served December 23, 2005, in Docket No. AB-1066X, *Central Illinois Railroad Co. -- Discon. of Serv. Exempt. -- in Peoria County, IL*, the Board issued an exemption for CIRY's discontinuance of rail service over the unused portion of the Kellar Branch (i.e., 6.29 miles of the 8.29-mile rail line). That exemption was scheduled to become effective on January 22, 2006. When that exemption becomes effective, the trackage can be removed without further Board authority because the Branch had been abandoned when the City of Peoria acquired it from the Rock Island Trustee in 1984, which removed the Branch from Board abandonment jurisdiction.

Before the CIRY discontinuance exemption became effective, Carver Lumber Company (Carver) filed the letters that are attached to PIRY's current Petition. Carver took the position

that the CIRY discontinuance exemption should not become effective, and the unused portion of the Branch should not be removed, until Carver was assured of receiving satisfactory alternative rail service.

By decision served January 20, 2006, in Docket No. AB-1066X, *supra*, the Board stayed the effectiveness of the exemption for CIRY's discontinuance pending further Board order. That Board action has had the effect of precluding removal of trackage until Carver is assured of receiving adequate alternative rail service.

The connection of the Kellar Branch to the former Union Pacific rail line to the west has been completed and is train-ready. Rehabilitation of the Kellar Branch has been completed as of February 28, 2006. Carver has ordered two rail shipments, which are enroute. Union Pacific has stated that it will interchange those shipments to CIRY. CIRY has stated that it will deliver those shipments to Carver from the west. It thus appears that alternative rail service for Carver is at hand.

LEGAL STANDARD

The Petition is governed by 49 C.F.R. § 1152.25(e)(2)(ii), which provides as follows:

The Board will grant a petition to reopen only upon a showing that the action would be affected materially because of new evidence, changed circumstances, or material error.

In *Burlington Northern R. Co. -- Aban. Exempt. -- between Klickitat and Goldendale, WA*, 2005 STB LEXIS 235 (Docket No. AB-6 [Sub-No. 335X], decision served June 8, 2005), the Board explained the application of that standard as follows (at *5-6):

The Board may, at any time and on its own initiative, because of material error, new evidence, or substantially changed circumstances, reopen a proceeding under 49 U.S.C. 722(c), and any interested party may petition to reopen and

reconsider an action of the Board under regulations promulgated by the Board. In abandonment cases such as this, the regulations at 49 C.F.R. 1152.25(e)(4) apply and provide that a petition to reopen an administratively final action must state in detail the respects in which the challenged decision involves material error, or is affected by new evidence or substantially changed circumstances. Such a petition will be granted only upon a showing that the challenged action would be materially affected by one or more of those criteria. 49 C.F.R. 1152.25(e)(2)(ii) . . . (emphasis added).

REPLY

PIRY is attempting to parlay Carver's dissatisfaction with the delay in being served direction from the west into a ground for reversing the Board's decision adversely discontinuing PIRY's rail service over the Branch. It won't work. The two things are not related.

PIRY's Petition is admittedly based on the new evidence reflected in the January 4 and January 18 letters to the Board from Carver. (Petition at 4). But Carver's letters are not aimed at restoring PIRY to the Branch, in lieu of CIRY. Instead, the thrust of Carver's letters is that the 6.29-mile unused segment of the Branch should not be removed (as a result of the exemption for CIRY's discontinuance become effective) until Carver is being adequately served by CIRY from the west. Thus, Carver's focus is on the timing of the Board's decision, not on its merits. Carver's focus is on opposition to premature removal of trackage as a result of the Board's action in Docket No. AB-1066X, not on whether PIRY's rail service was properly discontinued in the Docket at hand. That such is the case is demonstrated by the action taken by the Board in response to Carver's letters, i.e, stay of the exemption for CIRY's discontinuance of service in Docket No. AB-1066X (a timing decision in that docket).

Neither Carver's letters, nor PIRY's Petition, undermines the basic findings of the Board in support of its decision adversely discontinuing PIRY's rail service over the Branch. Thus, the

Board found that “(n)o shippers object to the discontinuance of PIRY’s service” (August 10, 2005 decision at 6). That continues to be the case. There is nothing in Carver’s letters that even arguably could be considered to be an objection to discontinuance of PIRY’s rail service.

The Board found that “(n)o shippers object to . . . the substitution of CIRY as operator” (August 10, 2005 decision at 6). The Carver letters are critical of a CIRY derailment in attempting to provide service to Carver. The letters are also critical of CIRY’s delay in repairing the effects of that derailment to restore direct rail service to Carver. However, the Carver letters do not object to CIRY as the operator of the Branch. Carver may well have taken into account that the CIRY employee responsible for the derailment is no longer employed by CIRY. The trackage damaged by the derailment is now repaired. Direct rail service is now available to Carver.

The Board found that “(n)o shippers object to . . . the plans for recreational trail use” (August 10, 2005 decision at 6). That continues to be the case. The January 18 Carver letter makes it clear that Carver has consistently supported the concept of “a hiking/biking trail,” conditioned upon receiving adequate rail service by means of a new connection to the west. (January 18 letter, paragraph three).

The serious issues raised in the Carver letters are being adequately addressed by the Board in Docket No. AB-1066X, *supra*, which is the appropriate forum for consideration of those matters. There is simply nothing in those letters that shows, in the Docket at hand, that public convenience and necessity no longer permits discontinuance of PIRY’s rail service over the Branch. In the words of the applicable regulation, the Board’s decision adversely discontinuing PIRY’s rail service is not “affected materially” by the new evidence in Carver’s letters. Accordingly, there is no adequate ground for PIRY’s Petition to Reopen.

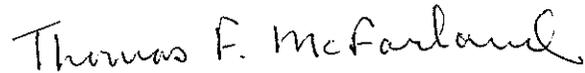
WHEREFORE, PIRY's Petition is required to be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2006, I served the foregoing document, Reply in Opposition to Petition to Reopen, by UPS overnight mail, on the following:

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