

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LA SALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1112
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mcfarland@aol.com

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THOMAS F. MCFARLAND

May 10, 2005

By UPS overnight mail

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

Office of the Secretary
U.S. Department of Transportation

Public Room



Re: Docket No. AB-878, *City of Peoria, Illinois and Village of Peoria Heights, Illinois -- Adverse Discontinuance -- Pioneer Industrial Railway Co.*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Reply In Opposition To Request For Reconsideration Of OFA And Motion To Supplement Protest, for filing with the Board in the above referenced matter.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Applicants

TMcf:kl:enc:wp8.0:1021:ltrstb4

BEFORE THE
SURFACE TRANSPORTATION BOARD

CITY OF PEORIA, ILLINOIS AND
VILLAGE OF PEORIA HEIGHTS,
ILLINOIS -- ADVERSE
DISCONTINUANCE -- PIONEER
INDUSTRIAL RAILWAY CO.

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DOCKET NO. AB-878

213960

**REPLY IN OPPOSITION TO REQUEST FOR
RECONSIDERATION OF OFA
AND MOTION TO SUPPLEMENT PROTEST**

ENTERED
Office of Proceedings

MAY 11 2005

Part of
Public Record

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

VILLAGE OF PEORIA HEIGHTS, ILLINOIS
VILLAGE HALL
4901 North Prospect Rd.
Peoria Heights, IL 61616

Applicants

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204

Attorney for Applicants

DATE FILED: May 11, 2005
DUE DATE: May 18, 2005

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 REQUEST FOR
RECONSIDERATION OF OFA
AND MOTION TO SUPPLEMENT PROTEST**

Pursuant to 49 C.F.R. § 1104.13(a), the CITY OF PEORIA, ILLINOIS and the VILLAGE OF PEORIA HEIGHTS, ILLINOIS (the Municipalities) hereby reply in opposition to a pleading entitled "Request for Reconsideration of OFA and Motion to Supplement Protest" (the Pleading) filed by Pioneer Industrial Railway Company (PIRY) on April 29, 2005.

I. THE PLEADING SHOULD BE REJECTED

The Pleading should be rejected because it has been filed in violation of Board regulations for the sole purpose of delaying disposition of the discontinuance application, and thereby prolonging PIRY's operation of the Branch on a "holdover" basis. Rejection is especially warranted because processing of the discontinuance application has already been significantly delayed. It is provided in 49 C.F.R. § 1152.26(a) that Federal Register publication of notice of the filing of an abandonment application, which provides a schedule for processing of the application, is to occur 20 days after the filing of the application. In the present case, that Federal Register publication did not occur until 100 days after the application was filed.^{1/} That

^{1/} The application for adverse discontinuance was filed on November 16, 2004.

(continued...)

inexplicable 80-day delay has also occurred in regard to the dates for filing protests and replies to protests. The Board should not permit PIRY's irregular Pleading to further delay processing of this application.

Pleadings that do not comply with Board regulations are subject to rejection. 49 C.F.R. § 1104.10(a). The portion of the Pleading that seeks reconsideration of the determination that offers of financial assistance (OFAs) will not be entertained in this proceeding does not comply with the Board regulation that requires timely filing of pleadings. 49 C.F.R. § 1104.6. PIRY's "request for reconsideration of OFA" in essence is an appeal of the determination of the Director of the Board's Office of Proceedings in his decision served February 24, 2005 that OFAs will not be entertained in this matter. Pursuant to 49 C.F.R. § 1011.2(a)(7), an appeal of that determination was due no later than 10 days after the service date of that decision, or by March 6, 2005. PIRY's appeal is untimely in the extreme, being filed 54 days after the due date for its filing. Moreover, PIRY's Pleading does not contain any showing of good cause for that extremely late filing. PIRY's unjustified late filing of that appeal should be rejected.

The portion of the Pleading in which PIRY seeks to supplement its protest does not comply with the Board regulation that prohibits the filing of replies to replies. 49 C.F.R. § 1104.13(c). The facts asserted in the verified statement of Ms. Catherine Busch and PIRY's supporting argument attempt (unsuccessfully) to rebut the showing in the Reply to Protests that

^{1/}(...continued)

Pursuant to 49 C.F.R. § 1152.26(a), Federal Register publication should have occurred 20 days later on December 6, 2004. Instead, Federal Register publication did not occur until February 24, 2005, 100 days after the application was filed. The same 80-day delay occurred in regard to the date for filing protests and replies to protests. If the date for the Board's decision is also delayed by 80 days, that decision will be issued on May 25, 2005.

railbanking and trail use of a portion of the Branch would not deprive any shipper of rail service. (Reply at 3-4). That clearly constitutes prohibited reply to the Municipalities' Reply. In that respect, too, the Pleading does not attempt to show good cause for filing of the unauthorized reply. Consequently, PIRY's unjustified reply to reply should be rejected.

An additional reason for rejecting the Pleading is that it is repetitive and is filed in contravention of the Board's procedural decision. On July 22, 2004, PIRY filed a "Notice of Intent to File Offer of Financial Assistance." On July 23, 2004, the Municipalities filed a Motion for Rejection of that Notice on the ground that under Board precedent OFAs are not entertained in adverse discontinuance proceedings in which rail service would be continued by a replacement operator. On August 12, 2004, PIRY filed a Response to that Motion. In the procedural decision served February 24, 2005, Office of Proceedings Director Konschnik referred to those filings and said (at 4, note 2):

... This issue will be resolved in the decision on the merits in this proceeding ...

The procedural decision did not provide for additional pleadings on the issue of whether OFAs will be entertained in this matter. Consequently, the Pleading is impermissibly repetitive and contrary to stated Board procedure for resolution of the OFA issue. The Pleading should be rejected on that additional basis.

II. IF THE PLEADING IS NOT REJECTED, IT SHOULD BE DENIED

The Municipalities rely on the matter contained in their "Motion for Rejection of Notice of Intent to File Offer of Financial Assistance," filed July 23, 2004, as their substantive response in opposition to the request in the Pleading that PIRY be permitted to file an OFA in this matter. The precedent cited in that Motion is clear and consistent that OFAs will not be entertained in

adverse discontinuance cases in which the rail line owner has arranged for a replacement operator of the line. *Tacoma Eastern Ry. Co. -- Adv. Discon. -- Line of the City of Tacoma*, 1998 STB LEXIS 790 at *18-19 (Docket No. AB-548, decision served Oct. 16, 1998) (“*Tacoma Eastern*”); *Jacksonville Port Auth. -- Adv. Discon. -- in Duval County, FL*, 1996 STB LEXIS 200 at *17 (Docket No. AB-469, decision served July 17, 1996) (“*Jacksonville Port Authority*”); *Cheatham County Rail Auth. “Applic. and Pet. for Adv. Discon.”*, 1992 ICC LEXIS 224 at *18 (Docket No. AB-379X, decision served Nov. 4, 1992) (“*Cheatham County Rail Authority*”). As explained in those decisions, OFAs are not entertained in adverse discontinuance cases in which the rail line operator will be replaced because (1) an OFA would frustrate the Board’s finding that its jurisdiction should not be permitted to shield the “holdover” operator from the legitimate operation of State law; and (2) an OFA is not pertinent because rail service will be continued by a replacement operator.

PIRY’s attempts to avoid the effect of that legal principle are without merit. It is not true, as alleged at page 2 of the Pleading, that the principle does not apply in the present case because the replacement operator here will operate less than the full length of the Branch. If the application for adverse discontinuance is approved, Central Illinois Railroad Company (CIRY) will be authorized to operate, and will operate, the full length of the Branch. It is contemplated in this proceeding, therefore, that there will be a replacement operator for the entire length of the Branch. It is contemplated in the future that less than the full length of the Branch will be operated, but that will not be as a result of the proceeding at hand. Therefore, the “replacement-operator” principle applies with full force in the present proceeding.

Contrary to PIRY's allegation at page 2 of the Pleading, the Municipalities will not violate 49 U.S.C. § 10903 when a portion of the Branch is railbanked and converted to recreational trail use in the future. The Branch had been abandoned by the Rock Island Trustee prior to its acquisition by the Municipalities. *See Chicago, R.I. & P.R. Co. Abandonment*, 363 I.C.C. 150 (1980). As a result of that prior abandonment, the Branch is not now subject to the Board's abandonment jurisdiction. *See Southern Pacific Transp. Co. - Aban. - in LA County, CA*, 9 I.C.C.2d 385, 390 (1993); *SSW Ry. Co. - Aban. - in Smith and Cherokee Counties, TX*, 9 I.C.C.2d 406, 410 (1992); and *Consolidated Rail Corp. - Petition for Declaratory Order*, 1 I.C.C.2d 284, 285 (1984). Consequently, the Municipalities do not require Board authority under 49 U.S.C. § 10903 for full or partial abandonment of the Branch.

PIRY incorrectly alleges (Petition at 3) that the Municipalities have taken the position that conversion of a segment of the Branch into a recreational trail would not be an abandonment because there are no current shippers on that segment. The Municipalities' position actually is that that segment of the Branch is unused and unneeded in view of the absence of current shippers. (*See Reply to Protests at 3-4*). That makes that segment a logical candidate for conversion to trail use. However, the Municipalities can restore rail service on that segment if a demand were to materialize in the future.

PIRY incorrectly alleges (Petition at 3) that the Municipalities are arguing for application of a standard for evaluating the proposed adverse discontinuance other than the public-convenience-and-necessity standard in 49 U.S.C. § 10903(d). In an adverse discontinuance case in which the rail line owner has arranged for a replacement operator, the Board determines the public convenience and necessity of the proposed discontinuance on the basis of whether the

discontinuance and replacement would harm shippers on the rail line. *See Tacoma Eastern, supra; Jacksonville Port Authority, supra; and Cheatham County Rail Authority, supra.* The Municipalities position in this proceeding is consistent with that standard. (*See, e.g., Application at 8-12). Seminole Gulf Ry. L.P. - Adv. Aban. - in Lee County, FL, 2004 STB LEXIS 742 (Docket No. AB-400 [Sub-No. 4X], decision served Nov. 18, 2004), cited at pages 3-4 of the Pleading, is not to the contrary. That case was not a “replacement-operator” case.*

PIRY falsely states (Pleading at 5) that the Municipalities granted PIRY the right to operate the Branch “until terminated for cause . . . or by mutual consent.” Section 9(a) of the Operating Agreement provides:

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.

In truth, therefore, PIRY had a 20-year agreement for operating the Branch that expired by its terms on July 10, 2004. PIRY has been operating the Branch on a “holdover” basis pending the result of this application for adverse discontinuance. The Pleading is a transparent effort to prolong that holdover operation. As shown in this Reply, the Pleading is in violation of Board regulations and is entirely without legal merit. Consequently, the Pleading should be rejected or summarily denied.

CONCLUSION AND REQUESTED RELIEF

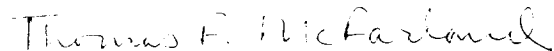
For the reasons stated herein, the Pleading should be rejected or summarily denied. In view of the inexplicable delay in processing this application, the Board's decision granting adverse discontinuance should be made effective on or shortly after the service date of the decision (instead of 30 days thereafter). There is precedent for doing so. *Cheatham County Rail Authority, supra*, 1992 ICC LEXIS 224 at *18.

Respectfully submitted,

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

VILLAGE OF PEORIA HEIGHTS, ILLINOIS
VILLAGE HALL
4901 North Prospect Rd.
Peoria Heights, IL 61616

Applicants



THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204

Attorney for Applicants

DATE FILED: May 11, 2005
DUE DATE: May 18, 2005

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2005, I served the foregoing document, Reply In Opposition To Request For Reconsideration Of OFA And Motion To Supplement Protest, by UPS overnight mail on Daniel LaKemper, Esq., Pioneer Industrial Railway Co., 1318 South Johanson Road, Peoria, IL 60617.



Thomas F. McFarland