

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

THOMAS F. MCFARLAND



214-023

March 17, 2006

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

Re: Docket No. AB-1066X, *Central Illinois Railroad Company -- Discontinuance of Service Exemption -- in Peoria County, Illinois*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Reply In Opposition To Motion To Compel, for filing with the Board in the above referenced matter.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Petitioner

TMcf:kl:enc:wp8.0\1114\lstrtb5

ENCLOSURE

BEFORE THE
SURFACE TRANSPORTATION BOARD

CENTRAL ILLINOIS RAILROAD)
COMPANY -- DISCONTINUANCE OF) DOCKET NO. AB-1066X
SERVICE EXEMPTION -- IN PEORIA)
COUNTY, ILLINOIS)

REPLY IN OPPOSITION TO
MOTION TO COMPEL

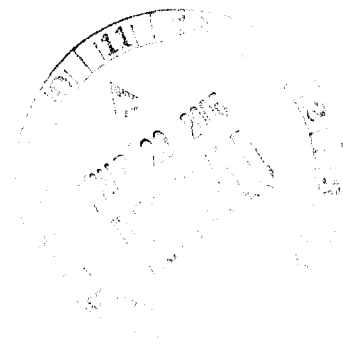
CENTRAL ILLINOIS RAILROAD COMPANY
P.O. Box 259
Granville, IL 61326

Petitioner

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

Attorney for Petitioner

DATE FILED: March 20, 2006



APR 10 2008
FBI - NEW YORK

MAY 1, 2000.

in the event that the exemption for discontinuance of CIRY's rail service over the 6.29-mile segment were to be revoked in this proceeding, PIRY would not be authorized to provide rail service over that segment. In that event, CIRY would continue to be authorized and obligated to provide service over the segment. PIRY thus has nothing to gain or lose depending on the outcome of this proceeding.^{1/}

If an exemption for discontinuance of CIRY's rail service were to become effective, the City of Peoria, which owns the 6.29-mile segment, would remove the trackage in that segment and convert the right-of-way into a recreational trail. The Board has acknowledged that Board approval is not required for that action because abandonment of the Kellar Branch is not subject to Board jurisdiction, inasmuch as the Branch had been lawfully abandoned when the City of Peoria acquired it in 1984. (*See* the Board's decision in this proceeding served November 21, 2005 at 2).

PIRY has no more legitimate interest in that action than it has in discontinuance of CIRY's rail service over the segment. If that segment were to be retained for rail operation rather than be converted into a trail, PIRY would not be authorized to operate that segment. CIRY would continue to be the authorized operator.

PIRY does not have a legitimate interest in the subject matter of this proceeding by virtue of pleadings that have been filed by Carver Lumber Company (Carver). PIRY cannot piggyback on Carver's interest in this proceeding to offset its own lack of legitimate interest. Carver has not

^{1/} The effect of the *City of Peoria* decision is that PIRY does not have a legitimate federal interest that authorizes its operation of the rail segment. Neither does PIRY have a contractual or property interest that authorizes such operation. In the seven months since PIRY's federal interest was terminated, no Court has determined that PIRY has a right to operate the segment by virtue of a contractual or property interest.

sought discovery, nor has Carver joined in PIRY's request for discovery. Thus it does not aid PIRY's position for it to state (Motion at 3) that "the information obtained through this discovery will allow Carver Lumber the opportunity to supplement its petition for reconsideration." Carver is not PIRY's agent. Carver's participation in this proceeding thus cannot benefit PIRY.

Consistently with PIRY's lack of legitimate interest in the merits of discontinuance of CIRY's rail service, PIRY's prior participation in this proceeding has been as a prospective acquirer of the 6.29-mile segment under the offer-of-financial-assistance (OFA) provisions of 49 U.S.C. § 10904.^{2/} On September 12, 2005, PIRY filed a Notice of Intent to File Offer of Financial Assistance. On October 10, 2005, PIRY filed a Motion for Clarification and Motion to Compel. The Motion to Compel sought a Board order requiring CIRY to furnish valuation information in furtherance of PIRY's intent to file an OFA. However, by decision in this proceeding served November 21, 2005, the Board granted CIRY's Motion to Reject PIRY's Notice of Intent to File OFA. That decision is final and effective. Judicial review of that decision was not sought. Consequently, PIRY no longer has a legitimate interest in this proceeding as a prospective OFA acquirer. The discovery submitted by PIRY is not directed to matters related to an OFA acquisition in any event.

The upshot of the foregoing is that PIRY does not have a legitimate interest in the subject matter of this proceeding, either as an opponent of the merits of the proposed discontinuance of

^{2/} On December 20, 2005, PIRY filed a Request to Hold in Abeyance Pending Compliance with the National Environmental Policy Act of 1969. That Request was denied by the Board in its decision served December 23, 2005. PIRY has filed a Petition for Judicial Review of that decision. *Pioneer Industrial Railway Co. v. STB*, D.C. Cir., No. 06-1019, filed Jan. 12, 2006. Discovery is not appropriate in regard to that matter, which will be decided on the record as made.

rail service or as a prospective acquirer of the segment of rail line. That being the case, PIRY is not a "party" entitled to submit discovery within the meaning of 49 C.F.R. § 1114.21(a). Consequently, PIRY's Motion to Compel should be denied.

2. Untimeliness

PIRY's discovery has been filed much too late in any event. CIRY's proposed discontinuance of rail service was processed pursuant to petition-for-exemption procedure. *See* 49 C.F.R. § 1152.60. It is provided in subsection (a) of that regulation, as follows:

... In the case of a petition for exemption for abandonment, notice of the filing of the petition will be published by the Board, through the Director of the Office of Proceedings, in the Federal Register 20 days after the petition is filed ...

The Federal Register notice in the present case was published on September 30, 2005. As here pertinent, that notice provided as follows:

... Replies to the petition are due on or before October 20, 2005 ...

In order to oppose the proposed discontinuance of rail service on a timely basis, therefore, PIRY was required to file a reply in opposition to the petition for exemption by October 20, 2005. PIRY failed to do so. In addition, PIRY failed to submit discovery on a timely basis in conjunction with timely opposition to the petition.

It is too late for PIRY to begin discovery now four months after the evidentiary record was closed under petition-for-exemption procedure. *See Illinois Central R. Co. -- Const. & Oper. Exempt. -- in East Baton Rouge Parish, LA*, 2001 S.T.B. 510 (Finance Docket No. 33877, served May 25, 2001). In denying a motion to compel in that matter, the Board said (at *7):

The lateness of KCS's filings here tends to impeach its representations that it needs the information it seeks. KCS served its informational requests on IC 10 weeks after IC had filed its petition and more than 7 weeks after KCS had filed a

detailed reply to IC's petition. In its reply, KCS made no mention of any need for discovery. This tends to support a conclusion that KCS did not serve its discovery in an attempt to elicit information it needed in order to reply to the petitioner's case in chief, which is the essential purpose of discovery.

PIRY's argument that the lateness of the submission of discovery was not a principal ground for denial of the motion to compel in that case (Motion at 7) is questionable, and without force in any event. It can be acknowledged that there were additional grounds for denial of the motion to compel. Nevertheless, PIRY does not, and cannot challenge the Board's rationale in that case that discovery submitted at an extremely late date is not to be sanctioned.

Nothing in PIRY's Motion to Compel detracts from the foregoing principles, which dictate denial of the Motion. PIRY alleges (Motion at 4) that CIRY sought discontinuance of its service obligation a little more than a year after receiving operating authority. That statement is misleading. Discontinuance authority was sought only for an unused 6.29-mile segment of the Kellar Branch. CIRY has not proposed discontinuance of service provided to any shipper.

PIRY's background description (Motion at 4-5) is out-of-date. The track connection that allows Carver Lumber to be served directly by rail from the west has been completed and is train-ready. On March 16, 2006, CIRY delivered three railcars of forest products directly to Carver Lumber's place of business. Those railcars had been interchanged to CIRY by Union Pacific Railroad at Pioneer Junction. These facts undercut any valid basis for PIRY's discovery. Alternative rail service is now being provided directly to Carver Lumber's place of business by CIRY.

The decisions cited at pages 8-10 of PIRY's Motion do not provide support for PIRY's position on the issue at hand. All of those decisions involved discovery in aid of requests for

revocation of class exemptions that had become effective without formal proceedings of any kind. Discovery in those cases may have been appropriate as a means for initial development of a record on which to base a ruling on the requests for revocation.

In contrast, the case at hand does not involve an accelerated class exemption. Instead, the record in this case was developed pursuant to petition-for-exemption procedure. PIRY had an opportunity to file a reply in opposition to the petition for exemption, but did not do so. Instead, PIRY unsuccessfully sought to acquire the segment by means of an OFA. PIRY should not be heard to say that discovery is now needed in this proceeding when it has had the opportunity to oppose CIRDY's petition on a timely basis but failed to do so, and instead erroneously pursued OFA procedure.

Neither do the decisions cited at pages 10-11 of the Motion provide support for PIRY's position. PIRY has cited those decisions for the proposition that the Board will grant discovery "to ensure a complete record" (Motion at 10). Those decisions do not support that proposition. Instead, those decisions involve instances in which the Board accepted replies to replies despite the prohibition against doing so in 49 C.F.R. § 1104.13(c), which is often honored in the breach. The Board should emphatically reject PIRY's attempt to extend that practice into the field of discovery.

PIRY's citation of 49 C.F.R. § 1121.2 at page 11, note 7 of the Motion does not aid PIRY's cause. That regulation provides that discovery may begin "upon the filing of the petition for exemption . . .". The Petition for Exemption here was filed on September 12, 2005. That was more than five months before PIRY submitted its discovery. The submission of discovery so

long after the filing of the petition for exemption is unduly late under any reasonable interpretation of discovery procedures.

PIRY's statement that CIRY does not object to the substance of any part of PIRY's discovery (Motion at 12) is materially misleading. CIRY has not objected to the substance of the discovery because there is no occasion for such an objection at this time. The Board is to first determine whether discovery is permissible at all. If the Board were to determine that it is, CIRY would respond or substantively object to the discovery as appropriate.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, the Motion to Compel should be denied.

Respectfully submitted,

CENTRAL ILLINOIS RAILROAD COMPANY
P.O. Box 259
Granville, IL 61326

Petitioner

Thomas F. McFarland

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

Attorney for Petitioner

DATE FILED: March 20, 2006

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2006, I served the foregoing document, Reply in Opposition to Petition to Reopen, by UPS overnight mail, on the following:

Daniel LaKemper, Esq.
Pioneer Industrial Railway Co.
1318 South Johanson Road
Peoria, IL 60617

William A. Mullins, Esq.
David C. Reeves, Esq.
Baker & Miller PLLC
2401 Pennsylvania Avenue, N.W.
Suite 300
Washington, DC 20037



Thomas F. McFarland