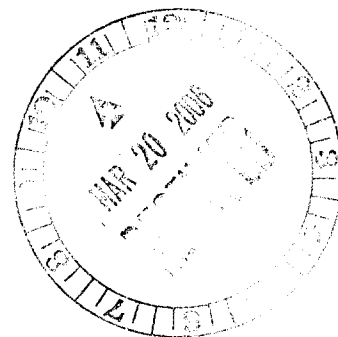


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THOMAS F. McFARLAND

216025

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-878, *City of Peoria, Illinois and Village of Peoria Heights,
Illinois -- Adverse Discontinuance -- Pioneer Industrial Railway Co.*

Dear Mr. Williams:

Hereby transmitted for filing in the above proceeding are the original and 10 copies of
Reply In Opposition To Motion To Compel.

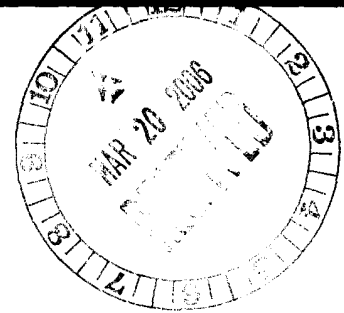
Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Municipalities

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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 MOTION TO COMPEL**

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

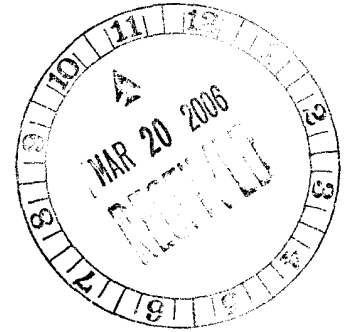
Applicants

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Attorney for Applicants

DATE FILED: March 20, 2006

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 MOTION TO COMPEL**

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 Motion to Compel (Motion) filed by Pioneer Industrial Railway Co. (PIRY) on March 9, 2006.

REPLY

PIRY's Motion to Compel should be denied because PIRY's discovery was filed long after any reasonable time for filing. Here, the request for discovery was not filed until more than six months after issuance of a final decision on the merits of the adverse discontinuance. Not only was the evidentiary record closed long before filing of the discovery, the proceeding itself had long been concluded before discovery was requested. Judicial review of the final decision was not sought in the 60-day window for filing.

Moreover, it cannot be argued here that discovery was requested in aid of PIRY's Petition to Reopen the proceeding. PIRY's Petition to Reopen was filed 30 days before discovery was requested.

Along the same lines, PIRY filed many other pleadings in this matter without having sought discovery:

<u>Pleading</u>	<u>Date of Filing</u>
Protest	March 21, 2005
Request for Reconsideration of OFA and Motion to Supplement Protest	April 29, 2005
Supplement to Request for Reconsideration of OFA	May 10, 2005
Request for Mediation	May 20, 2005

Discovery is simply not available where, as here, a proceeding has long been concluded. The Board's regulation on "(w)hen discovery is available," 49 C.F.R. § 1114.21(a), provides for discovery of subject matter "involved in a proceeding." The Federal Rule on which that Board regulation is patterned, FRCP 26(b)(1), provides for discovery of subject matter "involved in the pending action" (*see* Motion at 7, note 3). Discovery is not available before a proceeding has been instituted. Neither is discovery available after a proceeding has been disposed of by a final decision on the merits that has become effective in accordance with its terms.

There are few decisions that implement the foregoing principles only because discovery is hardly ever submitted after a proceeding has been concluded. One such decision is *Illinois Central R. Co. -- Const. & Oper. Exempt. -- in East Baton Rouge Parish, LA*, 2001 STB 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.

In that case, the motion to compel discovery was denied where the discovery was not submitted until long after the evidentiary record had closed. The principle of that case applies with much more force in the present case because not only is the record long closed, a final decision on the merits in the present case was issued over six months before the discovery was submitted. Discovery is simply not available at this extremely late date.

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 9) 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. It is not true, as alleged in the Motion at 4, that adverse discontinuance authority was obtained against PIRY "to facilitate removal of much of the Branch." PIRY's authority was discontinued because the Cities wanted to change rail operators after the term of PIRY's operating agreement expired. That change would have occurred regardless of any plan to remove a portion of the Branch.

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. It no longer need be said that it "appears" that alternative rail service for Carver is at hand (Motion at 8). It can be said definitively that alternative rail service is now being provided directly to Carver Lumber's place of business by CIRY.

PIRY disregards the fact that it has the burden of proof on the issue of reopening, when it argues (Motion at 8) that the Cities' Reply in Opposition to Petition to Reopen has insufficient proof that Union Pacific will interchange shipments with CIRY. It was up to PIRY to justify reopening; it was not the Cities' burden to prove that reopening was not warranted. In any event, Union Pacific has already interchanged shipments to CIRY (*see supra*).

The decisions cited at pages 11-13 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, nor an exemption of any kind. Instead, the record in this case was developed in a formal application proceeding under the abandonment statute. Moreover, PIRY actively participated in development of that record -- in spades. Not only did PIRY file a formal protest in opposition to the abandonment application, it filed no fewer than three additional pleadings prior to issuance of the Board's decision on the merits (*see supra* at 3), plus a Petition to Reopen thereafter. PIRY should not be heard to say that discovery is now needed in this proceeding when it has filed five

pleadings in this case, including a Petition to Reopen, without having sought discovery in conjunction with any of those pleadings.

Neither do the decisions cited at pages 13-14 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 13). 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 put itself in the Catch 22 position about which it complains at page 14 of the Motion. In view of PIRY's prior active participation in the proceeding, discovery may well have been too late if PIRY had submitted it prior to filing its Petition to Reopen. But there is no question whatsoever that its discovery is too late when it was submitted 30 days after the filing of PIRY's Petition to Reopen.

PIRY's statement that the Cities do not object to the substance of any part of PIRY's discovery (Motion at 15) is materially misleading. The Cities have 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 this extremely late date. If the Board were to determine that it is, the Cities would respond or substantively object to the discovery as appropriate.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, the Motion to Compel should be denied.

Respectfully submitted,

CITY OF PEORIA, ILLINOIS
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Attorney for Applicants

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:

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