

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS

2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

William A. Mullins
E-Mail: wmullins@bakerandmiller.com

DIRECT DIAL: (202) 663-7823

April 10, 2007

VIA ELECTRONIC FILING

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

RE: STB Docket No. AB-878
City of Peoria and the Village of Peoria Heights, IL – Adverse Discontinuance –
Pioneer Industrial Railway Company

Dear Secretary Williams:

I am filing herewith on behalf of Pioneer Industrial Railway Company (“PIRY”) a Reply in Opposition to the Joint Petition of Central Illinois Railroad Company and the City of Peoria for Leave to File a Reply to a Reply filed April 4, 2007. Carver Lumber Company also joins in PIRY’s Reply in Opposition and has authorized PIRY to so inform the Board. Copies of this Reply in Opposition are being served on all parties of record in accordance with the Board’s regulations. If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: wmullins@bakerandmiller.com.

Respectfully submitted,



William A. Mullins
Attorney for Pioneer Industrial Railway Company

Enclosures

cc: All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-878

**CITY OF PEORIA AND THE VILLAGE OF PEORIA HEIGHTS, IL—ADVERSE
DISCONTINUANCE—PIONEER INDUSTRIAL RAILWAY COMPANY**

**REPLY IN OPPOSITION TO JOINT PETITION FOR
LEAVE TO FILE A REPLY TO A REPLY**

**Daniel A. LaKemper
Pioneer Industrial Railway Co.
1318 S. Johanson Road
Peoria, IL 61607
Tel.: (309) 697-1400
Fax: (309) 697-8486**

**William A. Mullins
Robert A. Wimbish
BAKER & MILLER PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, D.C. 20037
Tel.: (202) 663-7823
Fax: (202) 663-7849**

Attorneys for Pioneer Industrial Railway Co.

April 10, 2007

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-878

**CITY OF PEORIA AND THE VILLAGE OF PEORIA HEIGHTS, IL—ADVERSE
DISCONTINUANCE—PIONEER INDUSTRIAL RAILWAY COMPANY**

**REPLY IN OPPOSITION TO JOINT PETITION FOR
LEAVE TO FILE A REPLY TO A REPLY**

Pioneer Industrial Railway Company (“PIRY”)¹ hereby replies in opposition to the Joint Petition of Central Illinois Railroad Company (“CIRY”) and the City of Peoria (“Peoria”)² for Leave to File a Reply to a Reply (“Joint Petition”), which the Joint Petitioners filed on April 4, 2007. As the Joint Parties themselves acknowledge, the reply to a reply³ that they wish to introduce via the Joint Petition is neither contemplated in the procedures that the Board specifically prescribed for this proceeding, nor is it permitted under the Board’s general rules of procedure. The Joint Petition should be denied. The Joint Parties have failed to articulate any reasonable basis for filing additional evidence and argument at this juncture. Instead, the Surreply that they wish to include in the record is nothing more than a thinly-veiled attempt by the Joint Parties to submit argument and evidence that was previously available to them but was not submitted in their February 22nd comments and is only now being introduced in order to further delay this proceeding and

¹ Carver Lumber Company (“Carver”) has authorized PIRY to inform the Board that Carver joins in and supports PIRY’s Reply in Opposition.

² Collectively, CIRY and Peoria refer to themselves as the “Joint Parties.” They will also be so referred to in this Reply.

³ The Joint Parties’ reply to PIRY’s and Carver’s respective replies will be referred to hereafter interchangeably as a “reply to a reply” or as the “Surreply.”

compensate for the paltry and one-dimensional filings that they have previously offered in this proceeding. If for some reason the Board is persuaded to grant the Joint Petition, then fundamental fairness and Board precedent require that PIRY and Carver be afforded an opportunity to respond to the Joint Parties' Surreply.

In addition, PIRY objects to the April 6, 2007 filing of the Village of Peoria Heights ("Peoria Heights"). As PIRY will briefly show below, Peoria Heights' April 6 letter filing has been filed well out of time, adds nothing to the merits of the subject adverse discontinuance application, and should be rejected.

BACKGROUND

As is relevant here, the Board issued a decision on January 12, 2007 ("January 12 Decision"), reopening this proceeding in order to reassess the merits of the subject adverse discontinuance application under the applicable public convenience and necessity ("PC&N") standard due to new evidence concerning inadequate rail service to Carver. The Board directed Peoria and Peoria Heights⁴ (the applicants in this adverse discontinuance proceeding) and CIRY to provide further evidence responsive to the balancing of the relative benefits and burdens under the PC&N standard by February 12, 2007. PIRY and Carver were given until March 5, 2007, to reply to the Cities' and CIRY's filings. Subsequently, the Cities requested, and the Board granted, an extension of time, so that supplemental evidence was due by February 22, and replies by March 15. As instructed by the Board, the parties dutifully and timely filed their respective supplemental evidence and argument.

On April 4, 2007, the Joint Parties filed the Joint Petition along with what they acknowledge is a reply to the respective March 15 replies of PIRY and Carver. The Joint Parties' "reply" is in fact a surreply not provided for in the January 12 Decision or in the Board's regulations. As such, it

⁴ Collectively, Peoria and Peoria Heights will be referred to as "the Cities."

should be rejected as untimely and procedurally improper. SWKR Operating Co. – Abandonment Exemption – In Cochise County, AZ, In The Matter Of A Request To Set Terms And Conditions, STB Docket No. AB-441 (Sub-No. 2X), 1997 STB LEXIS 286 (served Nov. 12, 1997) at *4-*5 (striking untimely evidence which was not a proper response in light of the procedural posture of the case).

On April 6, 2007, Peoria Heights submitted a two-page letter filing, which comments on the village's current position concerning the disposition of the Kellar Branch. It is not entirely clear how the Board or the parties to this proceeding properly should characterize this filing, but it appears most to resemble the sort of comments that the Board instructed proponents to the adverse discontinuance to file by no later than February 22 and, in that sense, it too should be rejected as untimely filed.

ARGUMENT

In response to the respective February 22 comments of Peoria and CIRY, Carver and PIRY showed why the Cities had not met their burden of proof to justify the grant of an adverse discontinuance and also provided specific and detailed discussion of the inadequacy of the so-called "Western Connection" as a substitute for rail service via the Kellar Branch. The record shows – and none of the parties here dispute – that, although Carver has a need for rail service directly to its Peoria facility,⁵ the Western Connection has proven an inadequate outlet for such service, and that Carver now trucks inbound loads to its facility from a railhead several miles distant at considerable additional cost to itself. PIRY's March 15 Reply in particular offered a detailed and thorough argument for why the facts in the record, as considered in the light of precedent, weighed in favor of

⁵ Among other examples in the record, Carver's July 21, 2006 filing in this proceeding reflects quite clearly how critical direct rail service is to Carver. That filing also illustrates the considerable effort that Carver has undertaken to broker an arrangement whereby it would be assured of such essential rail service, regardless of who the service provider might ultimately be.

denying the Cities' adverse discontinuance application. In fact, PIRY's reply offered a far more thorough analysis of the PC&N standard and relevant precedent in arguing against the adverse discontinuance than Peoria and CIRY had offered in support of it.

In all likelihood, Peoria and CIRY, after reading Carver's and PIRY's March 15th replies, realized the inadequacy of their previous filings, and that is why the Joint Parties are back at the Board now, asking for another chance to be heard. It appears that despite having been granted additional time to make their cases, Peoria and CIRY are suffering from what might be called "filer's remorse." That is, having examined the evidence and argument of their adversaries on reply, and finding their own efforts on opening lacking by comparison, the Joint Parties want another chance to litigate the issues. In short, the Joint Petition is a thinly-disguised request for a "do-over" or to have the last word which, in either case, the Board should not sanction.

The Board's rules are clear: replies to replies are not permitted. 49 CFR 1104.13(c). Although the Board may occasionally waive this rule, it always careful to do so only upon a balanced and reasoned finding that the surreply would contribute to a complete record without either prejudicing any party or delaying the proceeding.⁶ Here, granting the Joint Petition would be highly prejudicial to opponents to the adverse discontinuance and obviously would delay the proceeding. Moreover, granting the Joint Petition would produce an incomplete and imbalanced record. The January 12 Decision contemplated an evenhanded development of the record, with both sides having one chance each to make their respective cases on reopening. Now, the Joint Parties would like a second chance to add evidence and argument to the record, and not new evidence, but evidence and argument that was available at the time they made their February 22nd filings but for whatever reason was not submitted. This is simply an attempt to have the last word

⁶ See, e.g., Union Pacific Railroad Company – Abandonment – In Lancaster and Gage Counties, NE, and Marshall County, KS, STB Docket No. AB-33 (Sub-No. 140) slip op. at 1-2 (Corrected Decision STB served Dec. 12, 1999) ("Union Pacific").

and consistent with Board precedent should be rejected. See, Union Pacific, STB Docket No. AB-33 (Sub-No. 140) slip op. at 1-2 (in which the Board rejected the filing of a surreply where it appeared that the filing was “an effort to have the last word”). Indeed, both the Board and its predecessor have refused to accept evidence into the record if that evidence had been previously available but was not earlier presented. Pejepscot Industrial Park, Inc, d/b/a Grimm Industries—Petition for Declaratory Order, STB Finance Docket No. 33989, slip op. at 3 (STB served Nov. 7, 2003); B. Willis C.P.A. Inc.—Petition for Declaratory Order, STB Finance Docket No. 34013, slip op. at 3-4 (STB served July 26, 2002); S.R. Investors, Ltd. d/b/a Sierra Railroad Company—Abandonment—in Toulumne County, CA, Docket No. AB-239X, slip op. at 3 (ICC served Jan. 26, 1988).

If the Board should be inclined to allow such a noteworthy departure from its rules and prior order and accept the Surreply, then it must allow Carver and PIRY a full and fair opportunity to respond to it. Failure to do so would be highly prejudicial to Carver and PIRY. Among other things, the Joint Petitioners want to offer misleading evidence concerning rail service and rates to Carver via the Western Connection route that PIRY and Carver should be allowed to address.⁷ Because the original procedures called for Carver and PIRY to have a full opportunity to respond to CIRY and Peoria’s evidence, it would be highly prejudicial to change the rules in the middle of the

⁷ Amazingly, despite the January 12 Decision’s obvious focus on the current and future adequacy of service to Carver (an issue also highlighted in the Board’s February 13, 2007 decision in this proceeding compelling CIRY to respond to discovery tendered by PIRY), the Joint Parties claim that the Surreply should be accepted because CIRY could not have anticipated the “attacks on and inaccurate depictions of *its* service.” Joint Petition at 4 (emphasis in original). This is a ridiculous assertion as it is clear from the numerous Board decisions that the issue in this proceeding, consistent with the PC&N standards, is the adequacy of CIRY’s replacement service to Carver (and other potential shippers that may locate near Carver) via the Western Connection versus the service that PIRY had previously provided over the Kellar Branch. All of the evidence and argument set forth in the Surreply was previously available and should have been submitted on February 22nd. Having not done so, and now realizing that they should have better addressed the key issue in this proceeding, the Joint Parties want the Board to bail them out of their mistake by allowing them to have another bite at the apple. The Board should reject this request.

game. Indeed, in instances where the Board has allowed the filing of a reply to a reply, it has done so where the party opposing the surreply has taken the opportunity, without advance Board permission, to file a substantive response to the objected-to surreply.⁸ That is not the case here. Because Carver's current financial position requires that the Board move forward as quickly as possible in issuing a decision on the underlying merits of this proceeding, and given that the record was already complete, PIRY has elected not to further delay this proceeding and file a substantive response to the Surreply at this time. If the Board were to grant the Joint Petition, then, to remedy the prejudice that would otherwise flow from such Board action, PIRY respectfully requests 20 days from the date of that decision to file a response to the Surreply.

Granting the Joint Petition would most assuredly delay this proceeding. By employing a carefully configured "reply-and-comment" process on reopening, the Board designed a swift but fair process for handling the reopened case. The Joint Parties' efforts here would undermine that objective. The Joint Parties quickly gloss over this fact. The attitude of the Joint Petitioners is that, because the case is already so old, a little more procedural delay is of no consequence. Such a callous outlook ignores the fact is that delay increases the hardship that Carver experiences by absorbing higher transportation costs due to the loss of direct rail service. Sooner or later, Carver's added shipping costs are likely to drive it to close its Peoria facility, which is perhaps just as Peoria and CIRY might prefer. If Carver were forced by the passage of time to close its doors, dragging this proceeding out would clearly inure to the benefit of the Joint Parties. Indeed, procedural delay

⁸ See, e.g., HolRail LLC – Construction and Operation Exemption – In Orangeburg and Dorchester Counties, SC, STB Finance Docket No. 34421 (STRB served Feb. 12, 2007), slip op. at 3; Norfolk Southern Railway Company – Petition for Declaratory Order – Interchange with Reading Blue Mountain & Northern Railroad Company, STB Docket No. 42078 (STB served Apr. 29, 2003); cf. SMS Rail Service – Petition for Declaratory Order, STB Finance Docket No. 34483 (STB served Jan. 24, 2005) slip op. at 3 (accepting a party's surrebuttal, not contemplated under the Board's procedures, where the opposing party would not be prejudiced because it already had filed a substantive response to the surrebuttal).

may be part of Peoria's strategy here, because, with Carver out of the way, its trail plans could move forward without regard for interstate commerce considerations.⁹

The Joint Petition is far from a garden variety section 1104.13(c) waiver request. Rather, in this case, the Board specifically provided for a "comment and reply" process only. Therefore, the Joint Petitioners are not only asking for a waiver of the general rule, but they are also asking the Board to dispense with a Board-prescribed process specifically designed for this case. Accordingly, PIRY submits that the strictures against surreplies should be even more strenuously enforced where, as here, the party seeking to file a surreply does so contrary to the processes set forth in a prior Board order.

In their desperate attempt to have another chance to make their respective cases, the Joint Parties also argue that the PIRY has mischaracterized New York Cross Harbor R.R. v. STB, 374 F.3d 1177 (D.C. Cir. 2004) ("New York Cross Harbor") and that the Board should allow the Surreply so that the agency and all other parties to this proceeding may "benefit" from a dissertation concerning what that case is and is not about. This is not a sufficient justification for filing an impermissible surreply. The Board is fully capable of determining whether or not PIRY's interpretations of the several cases it has relied upon in opposition to the adverse discontinuance application, including New York Cross Harbor, are correct and does not need the self-serving, out-of-time "benefit" of CIRY's counsel's aid to make that decision. Indeed, the Board has recently

⁹ A review of the various internet "blogs" and other materials discussing this proceeding indicates that the City and the trail proponents appear to favor delay in hope that Carver will simply "give in" or fold under the financial pressure; thereby eliminating the underlying rationale for preserving rail service over the Kellar Branch. See e.g. www.wpgrr.com; http://peoriastory.typepad.com/peoriastory/kellar_branch_trail; "A White Flag for the Kellar?", March/April 2007, Tailgrass Sierran, newsletter of the Heart of Illinois Sierra Club.

made clear that it will deny a surreply that intends to address purported mischaracterizations of precedent.¹⁰ Accordingly, the Board should deny the Joint Petition here.

Finally, PIRY objects to Peoria Heights' April 6 filing. There is no procedural basis for this filing, and, indeed, it appears to be nothing more than late-filed comments directed to the merits of the reopened adverse discontinuance application. This letter filing should have been filed by February 22, 2007, and Peoria Heights has failed to seek leave to file more than a month later. Nor should it be accepted simply because the letter now reflects the most recent position of Peoria Heights.¹¹ The late filing is simply another example of a pattern among supporters of the adverse abandonment to file comments in this proceeding well out-of-time and without leave to do so. (Consider, for example, the comments of the Friends of the Rock Island Trail, Inc., tendered without the requisite request for leave to file on March 22, 2007.)

CONCLUSION

Neither the Joint Petitioner's Surreply nor Peoria Heights' April 6 filing has any place in the record at this point in the proceeding. The January 12 Decision reflected the Board's desire to promptly complete its review of the reopened adverse discontinuance proceeding and render a decision expeditiously. It appears now that proponents to the adverse abandonment would prefer nothing more than to delay the Board's processes, because such delay would put pressure on Carver

¹⁰ BNSF Railway Company – Abandonment Exemption – In Oklahoma County, OK, STB Docket No. AB-6 (Sub-No. 430X) slip op. at 2 (STB served Jan. 26, 2007):

Although purportedly filed to address alleged misrepresentations of the record and mischaracterization of the decisions cited by the railroads in their reply, petitioners' ... filing is an impermissible reply to a reply. The Board's regulations do not permit the filing of a reply to a reply. 49 CFR 1104.13(c). We find no reason to make an exception to our rules here. The Board can determine whether a party has properly relied upon a particular decision or group of decisions, and thus a reply to a reply addressing alleged mischaracterizations of cited cases does not warrant a departure from our rules.

¹¹ See Denver Terminal Railroad Company—Adverse Discontinuance—In Denver, CO, Docket No. AB-446 (Sub-No. 2) slip op. at 4 (served Jan. 9, 1997) (evidence occurring between the close of the record and issuance of a decision is not new evidence).

to capitulate to the city governments' designs. The Board must not facilitate such delay, and so it should deny the Joint Petition and reject as out-of-time Peoria Heights' April 6 letter filing. The Board should stick to its objectives for prompt action and should issue a decision on the reopened proceeding as soon as possible.

If for any reason the Board should allow any or all of the Surreply and/or Peoria Heights' April 6 filing to be admitted into the record, PIRY urges that the Board so indicate as quickly as possible so that PIRY and Carver can properly respond. Indeed, in the interest of fairness, should the Board accept either or both filings, PIRY and Carver request that it be given 20 days from the date of the Board's decision granting the Joint Petition and/or accepting Peoria Heights April 6 filing to prepare appropriate responses.

Respectfully submitted this 10th day of April, 2007,

Daniel A. LaKemper
Pioneer Industrial Railway Co.
1318 S. Johanson Road
Peoria, IL 61607
Tel.: (309) 697-1400
Fax: (309) 697-8486



William A. Mullins
Robert A. Wimbish
BAKER & MILLER PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, D.C. 20037
Tel.: (202) 663-7823
Fax: (202) 663-7849

Attorneys for Pioneer Industrial Railway Co.

CERTIFICATE OF SERVICE

I, Robert A. Wimbish, hereby certify that on April 10, 2007, I caused a copy of the foregoing Reply in Opposition to Joint Petition for Leave to File a Reply to a Reply to be served by first class mail, postage prepaid, or by more expeditious service upon all parties of record to this proceeding reflected on the Board's website.


Robert A. Wimbish