

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

(202) 663-7823 (Direct Dial)
E-Mail: wmullins@bakerandmiller.com

October 28, 2010

VIA ELECTRONIC TRANSMISSION

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: STB Docket No. AB-308 (Sub-No. 4X), *Central Michigan Railway Company –
Abandonment Exemption – Line In Kent County, MI*

Dear Ms. Brown:

On October 22, 2010, Tennine Corp (“Tennine”), by and through its counsel, Mr. Frederick Mackraz, filed what it termed a “Notice of Objection and Claim of Ownership” (“Notice and Claim”) in the above referenced proceeding. Attached, please find Central Michigan Railway Company’s “Reply” to Tennine’s Notice and Claim. If there are any questions concerning this filing, please contact me by telephone at (202) 663-7823 or by email at wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

Enclosures

cc: Parties of Record
Frederick E. Mackraz
William F. Bartlett
James P. Pitz

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

STB DOCKET NO. AB-308 (SUB-NO. 4X)

**CENTRAL MICHIGAN RAILWAY COMPANY
- ABANDONMENT EXEMPTION -
LINE IN KENT COUNTY, MI**

REPLY TO NOTICE OF OBJECTION AND CLAIM OF OWNERSHIP

**William A. Mullins
BAKER & MILLER PLLC
2401 Pennsylvania Ave., NW
Suite 300
Washington, DC 20037
Tel: (202) 663-7823
Fax: (202) 663-7849**

**Counsel for Central Michigan
Railway Company**

Dated: October 28, 2010

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

STB DOCKET NO. AB-308 (SUB-NO. 4X)

**CENTRAL MICHIGAN RAILWAY COMPANY
- ABANDONMENT EXEMPTION -
LINE IN KENT COUNTY, MI**

REPLY TO NOTICE OF OBJECTION AND CLAIM OF OWNERSHIP

The Central Michigan Railway Company (“CMRY”) submits the following Reply to the Notice of Objection and Claim of Ownership (“Notice and Claim”) filed in this proceeding by Tennine Corp. (“Tennine”) on October 22, 2010. Tennine’s filing (1) objects to the abandonment notice; (2) objects to any transfer of CMRY’s right-of-way (“ROW”) to the Michigan Department of Natural Resources (“MDNR”); and (3) sets out their belief that they own the underlying real estate on certain portions of the ROW. As the pleading doesn’t specifically request the Surface Transportation Board (“STB” or “Board”) to do anything, the Board need not rule or take any action. Indeed, the pleading appears to be more in the nature of “putting a stake in the ground” or providing “notice” of its positions. Nonetheless, CMRY hereby files this Reply in opposition to any purported encumbrances on CMRY’s ability to either consummate its abandonment or negotiate a trails use and transfer the ROW to a qualified trail user.

First, with respect to Tennine’s objection to the abandonment notice, Tennine’s objection is untimely and could be stricken. The abandonment notice was filed on March 12, 2009 and

was published in the *Federal Register* on April 1, 2009. In accordance with the notice and the Board's regulations, the abandonment was to become effective on May 1, 2009, unless a party filed a stay request before that date. Tennine failed to file a stay request, petition for reconsideration, or any other form of comment in protest to the abandonment. Having sat on its rights for over a year and half, Tennine has waived any right to object to the abandonment notice and its current pleading is thus untimely. As such, the Board could reject it or strike it from the record. Nonetheless, even if accepted, which the Board could do given that it maintains jurisdiction over the track and ROW in that the abandonment has not yet been consummated, Tennine's arguments should be rejected because Tennine has failed to show that the use of the notice of exemption process was improper or that the notice should be revoked, rejected, or reconsidered.

Second, with respect to Tennine's objection to the proposed transfer of the ROW to the MDNR, the Board should not interfere with the transfer or otherwise prevent the transfer for the use of a trail. By decision issued April 30, 2009, the Board postponed the effective date of the abandonment in order to allow CMRY and MDNR to negotiate a trail use arrangement. In order to allow continued negotiations, the effective date was again extended by decisions issued November 3, 2009 and May 10, 2010. Finally, by letters filed on October 20, 2010, CMRY and MDNR have once again asked for the effective date to be postponed to allow negotiations to continue. CMRY hereby confirms that it has not yet consummated the abandonment. In accordance with the decisions and their letter requests, CMRY and MDNR continue to negotiate a trails use agreement.¹

¹ While CMRY and MDNR continue good faith negotiations for conversion of the ROW to a trail, there is no guarantee that an agreement will be reached. Consistent with the Board's

The negotiations contemplate a transfer of the ROW to MDNR for purposes of trails use. While Tennine may object to such a transfer, the Board has little to no authority to prevent it. In the context of a trails agreement, the Board's authority is ministerial in nature, and assuming MDNR's compliance with the regulations regarding its willingness to operate and manage a trail and the railroad's consent to such trails use, the Board must issue a notice of interim trail use ("NITU") and has very limited, if any, authority to prevent implementation of that trails arrangement or a transfer of the ROW for trail purposes. See Rail Abandonments--Supplemental Trails Act Procedures, 4 I.C.C.2d 152 (1987); Citizens Against Rails-To-Trails v. Surface Transportation Board., 267 F.3d 1144 (D.C. Cir. 2001). Birt v. STB, 90 F.3d 580 (D.C. Cir. 1996)("Birt"); Grantwood Village v. Missouri Pac. R.R., 95 F.3d 654 (8th Cir. 1996).

Finally, with respect to Tennine's claim that it owns (presumably in fee simple) certain parcels underlying the ROW, such ownership, even if accurate,² does not prevent the transfer of the ROW for purposes of implementation of a trail. As long as CMRY has not yet consummated the abandonment and is willing to continue trails negotiation, which is in fact the case here, the Board's jurisdiction remains and the property does not revert to the underlying property owners. Birt at 588-590. If a trails agreement is reached and the ROW transferred to the trail user, the ROW remains burdened by a railroad's right to restore rail service and likewise does not revert to any underlying property owners. Id. and Preseault v. Interstate Commerce Comm'n, 853 F.2d 145, 150 (2d Cir. 1988), aff'd, 494 U.S. 1, 108 L. Ed. 2d 1, 110 S. Ct. 914 (1990)("Preseault").

If underlying property owners believe that such a transfer would (or has) resulted in a

precedent and regulations, CMRY reserves the right to withdraw from those negotiations and consummate its abandonment.

² CMRY has no information to verify Tennine's claim that it has an "ownership" right in certain property underlying portions of the rail ROW. CMRY reserves the right to dispute this claim, but such rights are, at most, reversionary ownership rights because CMRY has not yet consummated the abandonment and the line remains subject to the STB's exclusive jurisdiction.

constitutional taking of their property rights, such underlying landowners have the right to seek compensation for such a taking pursuant to the Tucker Act. Id. Accordingly, the mere fact that Tennine may have an ownership right in the underlying ROW does not serve to prevent or otherwise block conveyance of the ROW to MDNR for trail use. Tennine's rights are clearly set forth in the Preseault decision and Tennine can avail itself of those remedies.

In the end, Tennine's Notice and Claim, albeit untimely and subject to being rejected or stricken from the record, presents no information or argument to prevent either consummation of the abandonment if a trails use agreement is not reached or the transfer of the ROW to MDNR in the event a trails use agreement is reached. Accordingly, any relief contemplated by the Notice and Claim should be rejected.

Respectfully submitted,



William A. Mullins
BAKER & MILLER PLLC
2401 Pennsylvania Ave., NW
Suite 300
Washington, DC 20037
Tel: (202) 663-7824
Fax: (202) 663-7849

Counsel for Central Michigan Railway Company

October 28, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Reply to Tennine's Notice and Claim by mailing copies of the same via prepaid first class mail to all parties of record in these proceedings or by more expeditious means of delivery.

Dated at Washington, D.C. this 28th day of October, 2010.



William A. Mullins