

ENTERED
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Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

THE BOROUGH OF DUMONT,

Complainant,

v.

CSX TRANSPORTATION, INC.; ABC
CORPORATIONS; AND XYZ
INDIVIDUALS,

Respondents.

DOCKET NO.: NOR 42174

ORAL ARGUMENT REQUESTED

**THE BOROUGH OF DUMONT’S CROSSMOTION TO HOLD THIS DOCKET IN
ABEYANCE AND OPPOSITION TO CSX TRANSPORTATION, INC.’S MOTION TO
DISMISS WITH PREJUDICE**

As set forth in CSX Transportation Inc.’s (“CSXT”) Motion to Dismiss, the Borough of Dumont’s (the “Borough”) Complaint involves several claims arising from CSXT’s destruction of a municipal sewage pipe while CSXT conducted excavation or boring activities at its property. Importantly, the Borough’s claims strictly seek monetary damages and relief.

The Borough generally agrees with CSXT’s assertion that the Surface Transportation Board (the “Board”) lacks subject matter jurisdiction for the instant claims for monetary damages. However, for the reasons set forth below, the Borough requests that the Board hold this docket in abeyance until judgment is entered by the applicable civil court. Alternatively, the Borough requests that any dismissal of the instant proceeding be without prejudice.

PROCEDURAL BACKGROUND

On September 28, 2022, the Borough filed its civil complaint against CSXT with the Superior Court of New Jersey. On November 17, 2022, the Borough separately filed the instant administrative proceeding with the Board. On December 2, 2022, CSXT filed a Notice of Removal of the Borough's New Jersey civil action to the District Court of New Jersey, asserting that the federal courts have subject matter jurisdiction. The Borough's civil case is currently pending before the District Court of New Jersey.

On December 6, 2022, CSXT filed an Application for Extension of Time within which to Answer, Move or Otherwise Respond to Plaintiff's Complaint with the District Court. Accordingly, CSXT's time to respond to the Borough's civil complaint was extended from December 9, 2022, to December 23, 2022. On December 19, 2022, to accommodate CSXT's request for additional time to complete its initial factual investigation, the Borough agreed to, and the parties entered into, a Stipulation and Order Extending Time to Respond to the Complaint with the District Court. As such, CSXT's time to respond to the Borough's civil complaint was extended from December 23, 2022, to January 13, 2023. **CSXT has not yet filed a response to the Borough's civil complaint.**

LEGAL ARGUMENT

CSXT's Motion to Dismiss with Prejudice is premature. CSXT seeks a conclusive dismissal of the current administrative proceeding before CSXT has even responded to the Borough's civil complaint with the District Court. The Borough should not be wholly precluded from seeking administrative remedies from the Board until CSXT commits to a factual and legal position in the parallel civil case.

Importantly, the Borough's position that the Board lacks subject matter jurisdiction for the instant matter differs from CSXT's stated position. The Federal Interstate Commerce Commission Termination Act ("ICCTA") provides the Board jurisdiction over rail carrier "practices, routes, services, and facilities" and the "construction, [and] operation" of carrier facilities. *See* 49 U.S.C. § 10501(b). Accordingly, the Board arguably has jurisdiction over certain common law claims that seek equitable relief related to railroad service, operations, and construction of physical properties or structures. *See also* CSXT's Motion to Dismiss, pg. 1-2, n. 3 (arguing that "the Board retains concurrent jurisdiction with the federal court to decide any defenses brought by CSXT asserting that the Borough's claims constitute preempted 'regulation of rail transportation' under 49 U.S.C. § 10501(b)").

In the instant case, the Board lacks subject matter jurisdiction as the Borough's claims are strictly for monetary damages to compensate the Borough for its losses in responding to CSXT's destruction of the sewer pipe. The Borough does not assert any equitable relief that could impact railroad carrier service, operations, and construction of properties pursuant to the ICCTA. However, the Borough is legitimately concerned that CSXT will obtain dismissal with prejudice of the instant administrative proceeding only to later assert in the civil case that the Borough's claims require equitable administrative relief (and are therefore precluded). The Borough is hopeful that CSXT will not employ such volte-face tactics in litigation. Nevertheless, the Borough is mindful that CSXT has previously taken the legal position indicating that it believes adjudication of the instant matter involves equitable relief subject to the Board's jurisdiction.

Specifically, the Borough's instant administrative proceeding and parallel civil complaint were necessitated by CSXT's unreasonable pre-litigation positions. Specifically, the Borough attempted to amicably resolve this matter with CSXT by requesting a reasonable site investigation

of the destroyed sewer pipe traversing CSXT's property and railroad tracks. In denying the Borough's reasonable requests for a site investigation, CSXT asserted that such requests would interfere with CSXT's "rail traffic, safety of rail operations, or include construction related activities within the influence zone of CSX's track structure[]" and that "any damage to CSX's track [caused by a proposed site investigation] would cause a significant economic impact on CSX and interrupt rail traffic throughout CSX's network."¹ As such, CSXT was already setting up an objection that reasonable site investigations would have the effect of preventing or unreasonably interfering with rail transportation and therefore involve the Board's jurisdiction under the ICCTA. Notably, CSXT's Motion to Dismiss expressly reserves the right to assert any appropriate preemption defenses in the federal court proceeding. CSXT's Motion to Dismiss, pgs. 1-2, n. 3.

Accordingly, the Borough is rightfully concerned that future adjudication of the civil complaint, including any civil court discovery orders for site investigations,² will later be contested by CSXT as falling within the Board's exclusive jurisdiction and exceeding the authority of the civil courts. The Borough requests that the Board hold the instant administrative proceeding in abeyance until final judgment is entered by the civil court, the parties otherwise settle, or a court so orders.

I. Abeyance is Appropriate in this Matter

In deciding whether to hold a docket in abeyance, the Board considers whether abeyance would promote efficiency and whether it would be fundamentally unfair to any party. *See e.g., Ballard Terminal R.R. – Pet. for Declaratory Order*, FD 36261, slip op. at 4 (STB served June 27, 2019). In this case, efficiency requires that this matter be held in abeyance until all factual and

¹ See Exhibit A, Letter from CSXT's Counsel at the time, Cohen & Merrick P.C., dated August 27, 2021.

² The Borough reserves all rights, and does not waive its arguments, with respect to its assertion that CSXT's liability involves negligence *res ipsa loquitur* (i.e., speaks for itself).

legal issues are raised before the civil courts. In addition, it is not fundamentally unfair to any party to hold this docket in abeyance. CSXT has not filed an Answer in the instant proceeding, nor has it filed a responsive pleading in the District Court. Discovery has not begun in any forum, and there is no prejudice by holding these proceedings in abeyance to allow either party to seek administrative relief in the future. On the other hand, it would be fundamentally unfair to conclusively dismiss and preclude the Borough from proceeding with any kind of relief from the Board before the Borough is even on notice of CSXT's factual and legal position.

Moreover, under 49 U.S.C. § 1321(b)(4), the Board may issue an appropriate order, such as a stay, when necessary to prevent irreparable harm. In this case, it is evident that a stay must be established as (1) there is a probability that the Borough will prevail on the merits of any challenges to the action sought to be stayed; (2) the Borough will suffer irreparable harm in the absence of a stay; (3) CSXT will not be substantially harmed if the stay is granted; and (4) the public interest supports the granting of the stay. *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

First, as set forth in the Borough's Complaint, CSXT was conducting excavation and boring work on its railway at the same time the Borough's sewer pipe was destroyed. This is not a coincidence. It is highly probable that the Borough will prevail on the merits of its case.

Second, dismissal with prejudice will irreparably harm the Borough for the reasons set forth above. Should CSXT eventually flip its position regarding the Board's jurisdiction at a later date, the Borough will be irreparably harmed by being unable to seek relief from the Board.

Third, CSXT will not be harmed in any way if the stay is granted. CSXT has not filed an Answer in the instant proceeding, nor has it filed a responsive pleading in the District Court.

Discovery has not begun in any forum, and there is no prejudice to CSXT by staying these proceedings to allow either party to seek administrative relief in the future.

Finally, the Borough brings this matter to recover damages caused to its municipal property and sewer system on behalf of its citizens. Granting the stay will not adversely impact the public as the case will proceed before the District Court. The public interest supports the granting of the stay as governmental bodies seeking damages should not be immediately dismissed from a Complaint with the Board before the defendant has responded to a civil complaint.

Accordingly, the Borough's request for abeyance should be granted.

II. Alternatively, A Dismissal should be WITHOUT Prejudice

With respect to CSXT's arguments that the Borough's complaint fails to assert a viable cause of action under 49 U.S.C. § 11704, CSXT ignores the fact that discovery has not commenced in the civil case. As such, the Borough's claims are limited to the information currently available, and CSXT's position that the Borough could never replead to state a claim under the ICCTA is facetious. Specifically, the Borough may become apprised of particular acts or omissions in violation of 49 U.S.C. § 11704 as additional facts are adduced in discovery.³ The Borough should at least be permitted to replead with the Board to account for these additional theories in the event it is required to proceed with this administrative claim in the future. As an alternative to granting an abeyance or stay, any dismissal should be without prejudice to permit the Borough to refile this proceeding in the event it is determined that the Board's involvement is required to fully adjudicate the Borough's claims.

³ For example, facts may arise demonstrating that the Borough's damages were caused by CSXT's failure to establish reasonable rules and practices. *See* 49 U.S.C. § 10501(b)(1); 49 U.S.C. § 10702.

CONCLUSION

The Borough respectfully requests that the Board grant its cross-motion to hold the docket in abeyance until judgment is entered with respect to the parallel civil court proceeding. Alternatively, the Borough requests that the instant administrative complaint be dismissed without prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2023, a copy of the foregoing cross-motion and opposition was served by email on the following counsel of record:

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August 27, 2021

Via U.S. First Class Mail and E-mail

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**Re: Damaged Sewer Line at CSX mile post QR-12.45 at or near the intersection
of Columbia and Cortland Avenues in the Borough of Dumont, New Jersey
Our File No. 1326.704**

Mr. Leibman:

We write in response to your July 26, 2021 letter regarding the Borough of Dumont's ("Dumont") rejecting CSX's counterproposals regarding inspection of the sewer line owned by Dumont located at CSX mile post QR-12.45 at or near the intersection of Columbia and Cortland Avenues in the Borough of Dumont, New Jersey (the "Sewer Line"). Due to the threat of litigation noted in your letter and the lack of a viable proposal provided by Dumont, CSX at this time declines the invitation for the parties' respective engineers to confer. Furthermore, CSX disclaims liability for any alleged damage to the Sewer Line as indicated in our prior correspondence. However, CSX welcomes the submission of additional proposals that do not interfere with CSX's rail traffic, safety of rail operations, or include construction related activities with the influence zone of CSX's track structure.

As previously indicated, CSX's engineering department has reviewed the request to inspect the Sewer Line contained in the R&V letter and determined that neither proposal regarding the inspection were acceptable as crafted.

Both of R&V's proposals would require excavation in close proximity to CSX's track and well inside the influence zone of CSX's track structure. The track in questions is a main artery of CSX's network connecting the Northeast to the remainder of CSX's network. Numerous trains traverse this track on a daily basis at a rate in excess of one train per hour. Even if viable from a safety and engineering standpoint, due to the activity on this track and the requisite safety measures associated with any work in proximity to the track, the protective services required would be costly.

As for the proposal to break into the Sewer Line and clean it with water jets to view the inside, this proposal is unacceptable as Dumont does not know the size and scope of the alleged break. If Dumont were to clear the pipe and evacuate the blockage, the pipe could begin to fill in with material above the pipe in the vicinity of the break, which could cause CSX's track structure to subside. Dumont's attempts to clear and break the Sewer Line could further expand the break or degrade the Sewer Line causing CSX's track structure to subside. Furthermore, Dumont's prior attempts to clear out the blocked Sewer Line in this way were unsuccessful and lead to water jetting equipment becoming lodged in the Sewer Line. CSX is concerned that the water pressure and removal of a blockage may cause the pipe to collapse and could cause unintended subsidence of the property impacting rail operations and safety. As previously noted by Mayor LaBruno "any soil undermining could cause a catastrophic incident in this area". Furthermore, any damage to CSX's track would cause a significant economic impact on CSX and interrupt rail traffic throughout CSX's network. Also, if work was to be performed as provided in the first proposed option, Dumont would be required by OSHA regulations as well as CSX protocols to utilize specialized sheeting and shoring in order to avoid a collapse, which would be costly.

As for the second option proposed by Dumont, CSX cannot agree to such an excavation as it calls for Dumont to excavate within the influence zone of the track structure. As an alternative, as indicated previously CSX will agree to Dumont excavating up to CSX's property line conditioned on Dumont entering into a construction agreement with CSX.

CSX is willing to review alternative plans prepared by Dumont and provided to the undersigned counsel. However, Dumont already had the opportunity to view the Sewer Line when it cleaned out that line on January 26, 2021. Dumont then undertook an inspection of the Sewer Line on January 29, 2021, and was present for CSX's inspection on February 10, 2021. Additionally, Dumont entered into an agreement with CSX on February 9, 2021, to abandon the Sewer Line in place.

Very truly yours,

COHEN & MERRICK P.C.

By: /s/ Jeffrey D. Cohen
Jeffrey D. Cohen
Matthew J. Haskins