

SERVICE DATE – LATE RELEASE MAY 3, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-55 (Sub-No. 631X)

CSX TRANSPORTATION, INC.—ABANDONMENT EXEMPTION—IN SUMMIT
COUNTY, OH

STB Docket No. 42086¹

TERMINAL WAREHOUSE, INC. v. CSX TRANSPORTATION, INC.

Decided: May 3, 2005

This decision denies a petition for reconsideration of a decision in which the Board (1) declined to revoke a class exemption authorizing abandonment of an out-of-service line and (2) dismissed a separate complaint alleging that the embargo of the line was unlawful.

BACKGROUND

CSX Transportation, Inc. (CSXT), filed a notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments to abandon a 0.7-mile portion of a rail line in Summit County, OH (the Line). Pursuant to 49 CFR 1152.50(b), to invoke the class exemption, a rail carrier must certify that no local traffic has moved over the line for at least 2 years, that any overhead traffic can be rerouted over other rail lines, and that no formal complaint filed by a user of the rail line was either pending or decided in favor of the complainant during the 2-year period. CSXT made those certifications for the Line, which had been embargoed for the last 6 months of the 2-year period due to a damaged bridge. The exemption authority became effective on May 15, 2003, and CSXT exercised that authority on May 23, 2003.

Subsequently, Terminal Warehouse, Inc. (Terminal Warehouse) filed a petition to revoke the exemption as applied to the Line. It also filed a separate complaint in STB Docket No. 42086 challenging the embargo. As pertinent here, Terminal Warehouse alleges that the embargo of the Line was unlawful and that the Line did not qualify for 2-year out-of-service status. In a decision served on May 12, 2004 (May 2004 decision) in both dockets, the Board denied the revocation petition and dismissed the complaint, finding that Terminal Warehouse had failed to support its allegation that the embargo was unlawful or that CSXT's notice of exemption contained any false or misleading information. *Id.* at 4-6. On June 2, 2004, Terminal

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

Warehouse sought reconsideration of the denial of the petition to revoke in the abandonment proceeding and of the dismissal of its complaint. CSXT replied in opposition on June 22, 2004.

DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.3, a petition for reconsideration will be granted only upon a showing of material error, new evidence, or substantially changed circumstances. Here, Terminal Warehouse alleges that the Board committed material error by overlooking certain statements in an affidavit by William K. Hanlon, Terminal Warehouse's president. Terminal Warehouse points to Mr. Hanlon's statement that, in September 2002, a CSXT employee informed him that the Line was damaged and unsafe, but that CSXT "would likely" repair it.² Terminal Warehouse asserts that it relied on this representation in not requesting rail service or tendering any freight during the final few months of the 2-year out-of-service period (March 10, 2001 – March 10, 2003). As discussed below, Terminal Warehouse's arguments are unpersuasive.

1. The Abandonment Exemption.

Terminal Warehouse does not directly challenge the veracity of CSXT's certification, when CSXT invoked the class exemption procedures, that no local traffic had moved over the Line for at least 2 years and that there had been no formal complaint regarding a cessation of service. Thus, Terminal Warehouse has not shown that CSXT's notice of exemption contained false or misleading information that could provide a basis for finding it void ab initio.

Terminal Warehouse nevertheless argues (Petition for Reconsideration at 4-6) that we should consider disallowing use of the exemption on the basis of an equitable argument: that it would have requested service during the 2-year period had it not been lulled into inaction by the statement made by CSXT's employee. But its position — that, after not having used CSXT for so long, it would have made a request for service but for an equivocal statement that repairs "would likely" be made — is unconvincing. It is difficult to believe that a shipper that was losing business and money and had rail traffic that needed to move, as Terminal Warehouse now seems to claim, would have waited patiently without contacting the carrier to obtain more information about when rail service might be available and to push for speedy repairs.

Indeed, the record here contradicts Terminal Warehouse's claim that it relied on any representation that CSXT would repair the line. The only evidence of potential traffic over the Line during the 2-year out-of-service period was an email that Terminal Warehouse received from a potential customer on December 13, 2002 (3 months before the end of the 2-year period), asking whether it could store six rail cars at one of Terminal Warehouse's locations. In its email reply dated December 16, 2002, Terminal Warehouse declined, explaining that "the Metro Regional Transit Authority is trying to buy the line from CSX and we are discussing the reconnection of rail service from the north," and that "[e]ven if that works out, it will be quite some time before the connection is made . . . at least 1 year." This reply shows that,

² Although Mr. Hanlon states that the conversation took place in September 2001, we assume that he means 2002, as the bridge was not damaged until February 2002.

notwithstanding whatever conversations Mr. Hanlon might have had, Terminal Warehouse was not relying on CSXT to repair the line and provide rail service.

Terminal Warehouse's argument that it was unaware that the rail bridge had been removed or that CSXT intended to abandon the Line until the process was over is also inconsistent with evidence in the record. For example, in his own affidavit, Mr. Hanlon states that he was aware, in July or August 2002, that the bridge had been removed. In addition, as noted above, in its December 16, 2002 email (attached to the Hanlon affidavit), Terminal Warehouse acknowledged that the line would need to be reconnected. And Terminal Warehouse's letter to CSXT, dated February 14, 2003, indicated that Terminal Warehouse had reviewed a letter to a customer discussing CSXT's intention to abandon the line.³

As Terminal Warehouse acknowledges, under the 2-year out-of-service exemption procedures, a carrier is not required to individually notify former users of a line that it proposes to abandon the line. The record here shows that Terminal Warehouse was in fact aware of the situation well before March 26, 2003, when CSXT filed its notice of exemption with the Board invoking the class exemption, and that Terminal Warehouse had ample opportunity to file a complaint or otherwise pursue this matter before the 2-year out-of-service period had run.

Finally, Terminal Warehouse's only evidence of traffic that allegedly would have moved over the line segment consisted of the six rail cars that might have been moved into storage at the facility, after an 18-month period when Terminal Warehouse had no traffic to tender. Even if Terminal Warehouse had filed a complaint before March 10, 2003, which could have required CSXT to present its abandonment proposal in a petition for exemption or an application, the evidence of only six cars available for movement would not have been sufficient to warrant denying abandonment authority given the likely cost of rebuilding the bridge. Under these circumstances, we can see no benefit in revoking this exemption and forcing the parties to expend additional funds to engage in a more detailed inquiry into the abandonment proposal when the outcome of such a process is already clear.

2. The Complaint Proceeding.

Terminal Warehouse argues (Petition for Reconsideration at 5) that the Board wrongly premised its dismissal of the embargo complaint on the failure of any shipper to request service. As discussed above, the suggestion that Terminal Warehouse would have sought service but for CSXT's misrepresentation is not persuasive. But even if Terminal Warehouse had asked CSXT to move the six rail cars so that they could be placed in storage at Terminal Warehouse's facility, it would not have resulted in a different outcome in the embargo complaint proceeding.

In the May 2004 decision, the Board identified the factors it considers in addressing the reasonableness of an embargo: the cost of repairs, the amount of traffic on the line, the intent of the carrier, the length of the service cessation, and the financial condition of the carrier. Typically, an embargo is considered reasonable if the cost of repairs is high, the traffic on the

³ See Exhibit to CSXT's Response to Petition to Revoke.

line is light, and the carrier does not wait too long before deciding whether to repair the line or to seek abandonment or discontinuance authority instead. An additional factor can be the carrier's financial ability to make the repairs. See Decatur County Commissioners, et al. v. The Central Railroad Company of Indiana, STB Finance Docket No. 33386 (STB served Sept. 29, 2000), aff'd sub nom. Decatur County Comm'rs v. STB, 308 F.3d 710 (7th Cir. 2002).

Here, in the substantial filings it has made in this case, Terminal Warehouse has not addressed the cost of repairs, the cost of providing alternative access to rail service, the level of traffic on the line, the length of the embargo, the timing of the initiation of the abandonment process or the financial ability of the carrier to make the repairs. Terminal Warehouse has alleged that rail service is needed, but it has not shown that there would be sufficient traffic on the line to justify the cost of replacing the bridge or the cost of providing alternative access to rail service.⁴ The only specific evidence of possible traffic, aside from the email discussing the storage of six rail cars, was an affidavit from the president of B&F Polymers, a shipper storing two rail hopper cars on Terminal Warehouse's rail siding. That affidavit claimed that B&F regularly received delivery in one rail hopper car every other month. But that claim was belied by uncontroverted evidence that no traffic had moved on the line for more than a year before the bridge was damaged. Beyond that, Terminal Warehouse presented only an email (received after the expiration of the 2-year out-of-service period) regarding an opportunity to bid on a proposal for transloading, warehousing, and packaging services to be located in one of four states;⁵ and affidavits with generalized requests to preserve the rail line from the Ohio Rail Development Commission and from the Deputy Mayor of Akron, who stated that the line would help support future property values. A complainant must show more than a de minimis or speculative need for rail service to support a finding that an embargo is unreasonable. Accordingly, the Board properly found that Terminal Warehouse had not stated reasonable grounds for investigating its complaint.

3. Discovery. Finally, Terminal Warehouse contends that the Board acted improperly by not allowing it to seek discovery so that it could show that CSXT had misled it as to whether the carrier intended to repair the bridge or abandon the Line. However, the threshold evidence that Terminal Warehouse needed to present in the abandonment proceeding was evidence of its need for rail service, and that was evidence within its control for which it did not need discovery. Without evidence of more than a de minimis need for rail service, it would not be in the public interest to require CSXT to expend substantial funds to replace the bridge or otherwise reestablish rail service. Under these circumstances, the Board would not have found the embargo unlawful even if Terminal Warehouse had shown that the carrier intended to abandon the line once the bridge was damaged. Thus, the denial of discovery was not improper and did not prejudice Terminal Warehouse.

4. Conclusion. We understand that Terminal Warehouse is upset with the loss of potential rail service to its Home Avenue facility. But the fact is that a bridge that connected its

⁴ See Terminal Warehouse's Supplemental Verified Statements, Exhibit C.

⁵ See Complaint, Attachment C.

facility to the rest of the line was destroyed. Terminal Warehouse has not shown that reconsideration is warranted under the Board's governing standards. But given the likely expense of restoring service and the minimal traffic on the line, it is clear that even if we were to reconsider, we would find the abandonment justified and dismiss the complaint.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for reconsideration is denied.
2. This decision is effective on its service date.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary