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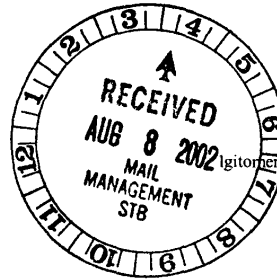
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August 8, 2002

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 700
Washington, D. C. 20423

RE: Ex Parte No. 346 (Sub-No. 25), *Rail General Exemption Authority—Lumber or Wood Products*.

Dear Secretary Williams:

Enclosed are the original and 10 copies of the Response and three diskettes. Please time and date stamp the additional copy of this letter and return it with our messenger. Thank you for your assistance.

If you have any questions, call or email me.

Sincerely yours,

Louis E. Gitomer
Attorney for CSX Transportation, Inc.

Enclosures

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AUG 8 2002

Dept of
Justice Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 346 (Sub-No. 25)

RAIL GENERAL EXEMPTION AUTHORITY—LUMBER OR WOOD PRODUCTS

RESPONSE OF CSX TRANSPORTATION, INC.
TO PETITION FOR PARTIAL REVOCATION OF EXEMPTION OF
BOLEN-BRUNSON-BELL LUMBER COMPANY, INC.

ORIGINAL



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Part of
Public Record

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INC.

Dated: August 8, 2002

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BOLEN-BRUNSON-BELL LUMBER COMPANY, INC.

CSX Transportation, Inc. ("CSXT") opposes the Petition for Partial Revocation of Exemption (the "Petition") filed by Bolen-Brunson-Bell Lumber Company, Inc. ("BBB") in this proceeding on July 19, 2002.

BACKGROUND

CSXT owns a 13.34-mile line of railroad in its Midwest Region, Nashville Division, Memphis Terminal, between Cordova, milepost 0NI 210.66, and Memphis, milepost 0NI 224.00, in Shelby County, TN (the "Memphis-Cordova Line"). In January 2001,¹ CSXT inspected the bridges on the Memphis-Cordova Line and determined that they were unsafe to continue operating over. As a result, CSXT embargoed the Memphis-Cordova Line on March 1, 2001, and began preparing to abandon the Memphis-Cordova Line. CSXT notified its customers and thought that the abandonment of the Memphis-Cordova Line would be unopposed.

A petition for exemption to abandon the Memphis-Cordova Line was filed with the Surface Transportation Board (the "Board") on August 24, 2001. BBB opposed a portion of the

¹ CSXT inspected the bridges again in June, 2002.

abandonment. The Board denied the petition. *CSX Transportation, Inc.—Abandonment Exemption—(Between Memphis and Cordova) in Shelby County, TN*, STB Docket No. AB-55 (Sub-No. 590X) (STB served December 12, 2001).

CSXT then filed a petition for exemption to discontinue service over the 12.24-mile portion of the Memphis-Cordova Line beyond the BBB facility between east of Memphis, milepost ONI 222.9, and Cordova, milepost 210.66, in Shelby County, TN. The Board granted this unopposed petition in *CSX Transportation, Inc.—Discontinuance Exemption—(Between East of Memphis and Cordova) in Shelby County, TN*, STB Docket No. AB-55 (Sub-No. 615X) (STB served July 17, 2002).

On July 10, 2002, CSXT filed an application to discontinue service over the 1.1 mile portion of the Memphis-Cordova Line serving BBB between Memphis, milepost ONI 224.00, and east of Memphis, milepost ONI 222.9, in Shelby County, TN (the “Memphis Line”). The Board notified the public that the due date for filing written comments and protests would be August 26, 2002. *CSX Transportation, Inc.—Discontinuance—at Memphis, in Shelby County, TN*, STB Docket No. AB-55 (Sub-No. 618) (STB served July 30, 2002) (the “*Memphis Discontinuance*”).

CSXT engaged in substantial, lengthy and serious negotiations with BBB not only before filing the August 24, 2001 petition to abandon the Memphis-Cordova Line, but while the petition was pending with the Board, and after the petition was denied. CSXT and BBB were involved in such discussions up until the time CSXT filed the *Memphis Discontinuance*.

On July 19, 2002 BBB filed the Petition and a formal complaint under Finance Docket No. 34236, *Bolen-Brunson-Bell Lumber Company, Inc. v. CSX Transportation, Inc.* (the “Complaint”). In the Complaint, BBB claims that the CSXT embargo instituted March 1, 2001 is unjustified in violation of 49 U.S.C. § 11101(a), and BBB seeks damages and an order requiring the repair of the Cypress Creek Bridge located at milepost 223.3 (the “Bridge”) so that CSXT can resume service to BBB’s facility on the Memphis Line.

In purported accordance with precedent,² BBB filed the Petition to partially revoke the exemption of lumber or wood products granted by the Interstate Commerce Commission (the “ICC”). *Rail Exemption—Lumber or Wood Products*, 7 I.C.C.2d 673 (1991) (the “*Lumber Exemption*”).³ As CSXT will show, BBB has not met the requirements of 49 U.S.C. §10502(d) and has not complied with all of the Board’s requirements to justify partial revocation of *Lumber Exemption*.

ARGUMENT

BBB correctly notes that the Board must partially revoke the exemption granted in *Lumber Exemption* so that it can prosecute the Complaint. In the Complaint, BBB claims that CSXT failed “to provide transportation and service on reasonable request in violation of 49 U.S.C. § 11101(a).” Simultaneously with this response, CSXT is answering the Complaint in that proceeding and contending that the Complaint is without merit. CSXT respectfully requests

² *Consolidated Rail Corp.—Declaratory Order—Exemption*, 1 I.C.C.2d 895 (1986); and *Consolidated Rail Corp.—Abandonment Exemption—in Erie County, NY*, STB Docket No. AB-167 (Sub-No. 1164X) (STB served October 7, 1998).

³ CSXT notes that some lumber is transported in boxcars, but that BBB did not seek revocation of the boxcar exemption. *Exemption from Regulation—Boxcar Traffic*, 3 I.C.C.2d 23 (1986) and 367 I.C.C. 425 (1983); *Railroad Exemption—Export Coal*, 1 I.C.C.2d 287 (1985).

that the Board deny the request to partially revoke *Lumber Exemption* because BBB has not met its burden under 49 U.S.C. § 10502(d) and terminate the merit less Complaint proceeding. Such action would avoid the needless expenditure of resources by the Board, BBB, and CSXT.

As the Board recently stated:

“Under 49 U.S.C. 10502(d), we may revoke an exemption when the application of a provision of Part A of subtitle IV of Title 49 to a person, class, or transportation is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101. To justify revocation, a petitioner must meet its burden of proof by articulating reasonable, specific concerns addressing the revocation criteria. Where, as here, an exemption has become effective and administratively final, the request for reopening and revocation is also subject to 49 CFR 1115.4, which requires that the petition ‘state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances.’ *Indiana Hi-Rail*, *supra* note 6.”

Canadian National Railway Company—Trackage Rights Exemption—Bangor and Aroostook Railroad Company and Van Buren Bridge Company, STB Finance Docket No. 34014 (STB served June 25, 2002).

The *Lumber Exemption* became effective on August 10, 1991. *Id.*, at 686. BBB has not met the heavy burden described above in order to warrant revocation of such exemption. In fact, BBB has not even argued material error, new evidence, or substantially changed circumstances in the Petition. For that reason alone, CSXT respectfully requests the Board deny the Petition.

In adopting the *Lumber Exemption*, the ICC found that the exemption would further six elements of the rail transportation policy of then 49 U.S.C. § 10101(a)(1, 2, 3, 4, 5, and 10) that “encourage competition and competitively-determined rate levels, minimize Federal regulation, promote efficiency, allow adequate returns and foster sound economic conditions in the industry, and eliminate noncompensatory rates.” *Id.*, at 675. BBB contends that *Lumber Exemption* must

be partially revoked “to carry out the national rail transportation policy of 49 U.S.C. § 10101(4) in favor of continuation of a sound rail transportation system to meet the needs of the public and the national defense.” Petition at 4. However, BBB does not explain how partial revocation of *Lumber Exemption* and prosecution of the Complaint will (1) create a sound rail transportation system, (2) meet the needs of the public, or (3) meet the needs of the national defense. As is more fully set out below, partial revocation would serve none of the purposes cited by BBB.

First, partially revoking *Lumber Exemption* will not result in a sound rail transportation system. Instead, revocation will impinge on the soundness of the rail transportation system. Railroads, such as CSXT, will become uncertain that they can continue to act in a deregulated environment. Railroad investment, such as CSXT’s decision not to make at best a marginal investment in a bridge that is required to serve only BBB, will be subjected to second guessing by parties with interests adverse to those of CSXT’s investors. A fiscally sound rail system will not result if every decision to disinvest for economic and safety reasons may be questioned by a third party based on the least of showings, as BBB has done. A sound railroad system is also a safe railroad system. BBB has not demonstrated that partial revocation of *Lumber Exemption* will foster a safe railroad system. Indeed, permitting a customer with no responsibility or potential liability for the operation of a safe railroad and the safety of that railroad’s employees to impose its judgment in place of railroad professionals’ as to the level of investment to provide safe operations would not foster a safe railroad system. That is particularly so where the third party has suggested that only minimal repairs are required (in contradiction of the opinions of

two bridge engineering experts), but has not identified the repairs to be made or the cost of those repairs.

Second, BBB is only interested in its situation, not the needs of the public. CSXT has sought to discontinue service over the Memphis Line, a 1.1-mile line serving only BBB, an entity with numerous alternate transportation options available to it. In fact, the broader public interest supports termination of service over the Memphis Line in order to investigate steps to improve crossing safety near schools and for future alternative uses of the corridor including but not limited to commuter or passenger use. There is a wider public interest than that of BBB. Indeed, as can be seen from the Complaint, BBB uses the facility on the Memphis Line to transload from railcars to truck. Complaint at 3, section I. Transloading to truck can occur at any number of locations in and around Memphis.

Finally, there is no indication that the partial revocation of *Lumber Exemption* sought by BBB will meet the needs of the national defense. There is no claim or statement in the Petition or Complaint alleging any defense need for BBB to transload railcars at a specified, much less any, location on the Memphis Line.

Against these unjustified claims, CSXT respectfully suggests that the Board balance the following policy findings of the ICC supporting *Lumber Exemption*, which have not been questioned, much less rebutted by BBB.

With regard to the rail transportation policy, the ICC concluded that: "continued regulation of rail movement of these lumber products is not necessary to carry out the RTP. Indeed, this exemption will significantly further several of these Congressional policy

objectives.” *Id.*, at 675. The ICC also remarked that 89 limber shippers and/or receivers commented on the proposal, and only one opposed it. *Id.*, at 687.

The potential abuse of market power was also addressed by the ICC: “In sum, this exemption will enhance the level of competition, benefiting shippers and also benefiting railroads in their competition with motor carriers.” *Id.*, at 678. In rejecting the concerns of the sole shipper opposed to the exemption, the ICC said: “In sum, there is no evidence of abuse or potential abuse of market power by the railroads for this traffic. Rather, shipper respondents are virtually unanimous in their agreement that there is sufficient competition to protect their interests and preclude any abuse of rail market power.” *Id.*, at 679.

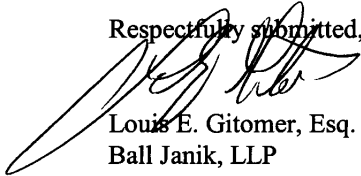
BBB has not addressed or refuted the conclusions of the ICC concerning the transportation policy or market abuse in seeking partial revocation of *Lumber Exemption*.

CONCLUSION

For the foregoing reasons, CSXT contends that BBB has not met its burden to justify the partial revocation of *Lumber Exemption* under 49 U.S.C. § 10502(d). Therefore, CSXT respectfully requests that the Board deny the Petition.

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Respectfully submitted,



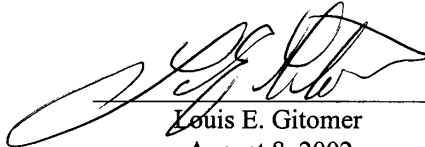
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Attorneys for: CSX TRANSPORTATION, INC.

Dated: August 8, 2002

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served upon counsel for
Bolen-Brunson-Bell Lumber Company, Inc., by fax and express mail.



Louis E. Gitomer
August 8, 2002