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October 3, 2002



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

RE: Docket No. AB-55 (Sub-No. 618), *CSX Transportation, Inc.—Discontinuance Exemption—at Memphis, in Shelby County, Tennessee*

Dear Secretary Williams:

Enclosed are the original and 10 copies CSX Transportation, Inc.'s Response to the Motion to Strike in the above-entitled proceeding. Also enclosed are three diskettes containing the Response.

Please time and date stamp the additional copy of this letter and the Response, and return it to 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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Office of Proceedings

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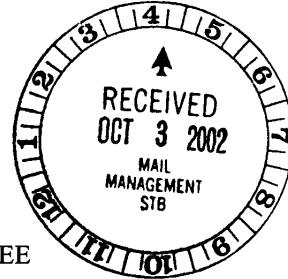
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ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-55 (Sub-No. 618)

CSX TRANSPORTATION, INC.
--DISCONTINUANCE--
AT MEMPHIS, IN SHELBY COUNTY, TENNESSEE



RESPONSE TO MOTION TO STRIKE

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Dated: October 3, 2002

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DOCKET NO. AB-55 (Sub-No. 618)

CSX TRANSPORTATION, INC.
--DISCONTINUANCE--
AT MEMPHIS, IN SHELBY COUNTY, TENNESSEE

RESPONSE TO MOTION TO STRIKE

CSX Transportation, Inc. ("CSXT") files this Response with the Surface Transportation Board (the "Board") to the Motion to Strike filed on September 23, 2002 (the "Motion") by Bolen-Brunson-Bell Lumber Company, Inc. ("BBB"). CSXT urges the Board deny the Motion and either: (1) decide this proceeding on the existing complete record, or (2) extend the deadline for deciding this discontinuance until December 24, 2002, grant BBB until October 25, 2002 to reply to only the issue raised in the Motion and allow CSXT until November 4, 2002 to respond.

The Board Should Deny the Motion.

BBB bases the Motion on two faulty premises: (1) that CSXT cannot introduce new evidence in rebuttal, and (2) that CSXT was addressing an operational issue in rebuttal.

New evidence is permissible on rebuttal. BBB is wrong when it states that "new evidence on rebuttal ... is prohibited under 49 C.F.R. § 1112.6." Motion at 3. The Interstate Commerce Commission (the "ICC") stated "There is no bar to the presentation of new evidence on rebuttal, however, as long as it is responsive to the reply." *Bituminous Coal--Hiawatha, Utah to Moapa, Nevada*, No. 37038 *et al.* (ICC served Dec. 7, 1988), at 4. The Board followed the ICC's precedent when it said "The Rules of Practice limit '[r]ebuttal statements . . . to issues

raised in the reply statements to which they are directed.’ 49 CFR 1112.6. This standard has been broadly interpreted and does not bar the introduction in rebuttal of new, but responsive, evidence and argument.” *Potomac Electric Power Company v. CSX Transportation, Inc.*, STB Docket No. 41989 (STB served November 24, 1997), at 3. The Board permitted the filing of new evidence in rebuttal that addressed issues raised in reply in an abandonment and discontinuance application proceeding. *South Orient Railroad Company, Ltd.—Abandonment and Discontinuance of Trackage Rights—Between San Angelo and Presidio, TX*, STB Docket No. AB-545 (STB served March 26, 1999). Under this standard, new evidence is permitted on rebuttal if it addresses issues raised in reply statements.

CSXT’s Rebuttal addressed the issues raised in BBB’s Protest. BBB is again wrong when it states that the “issue” addressed in CSXT’s rebuttal is “the manner in which CSXT transports traffic for which it receives switching charges.” Motion at 4. That is not the issue addressed by CSXT. CSXT addressed two issues prominently raised by BBB in the Protest filed on August 26, 2002 (the “Protest”): (1) freight car costs, and (2) the profitability of the Line.

CSXT agreed with BBB that it should not have attributed return on value of freight cars for foreign-owned freight cars. Rebuttal filed September 10, 2002, at 5. Since foreign-owned freight cars were used on the line, CSXT needed to determine how far those foreign cars traveled on CSXT’s lines to calculate off branch foreign-car per diem and mileage costs. Rebuttal at 6 and 19. CSXT turned to Mr. Wallen, its Terminal Trainmaster and Terminal Manager at Memphis, TN for a description of the operations between a foreign yard and CSXT’s Leewood Yard. Rebuttal at 58-60. Based on Mr. Wallen’s analysis, Ms. Preslar calculated foreign-car per diem and mileage costs. Rebuttal at 18-19. BBB has not questioned this “new evidence” in the Motion.

BBB's Protest mentions the profitability of the Line over 30 times. BBB has raised the issue and CSXT is entitled to respond, even with new evidence. In looking at the "Cost of Reciprocally Switched Cars", CSXT was not looking at operational issues, but at one component of the profitability of the Line. At pages 19-20 and 23 of the Rebuttal, Ms. Preslar looked at the profitability of the Line based on the operations as described by Mr. Wallen. Ms. Preslar then recalculated the cost to switch cars, and based on that calculation and the freight car costs, determined that the Line would incur an avoidable loss of \$43,802 in the Base Year, \$37,283 in the Forecast Year, and \$36,854 in the Subsidy Year. *Id.* This calculation directly responds to the argument that pervades BBB's Protest, that the Line is profitable.

The premises for the Motion are wrong in that CSXT is entitled to present, and has presented new evidence on rebuttal that is responsive to the issues raised in the Protest.

Further proceedings.

CSXT believes that the Board should decide this discontinuance application on the current record. CSXT believes that a complete record has been established, that the parties have had the opportunity to address all of the issues, and that the Board can proceed to decision.

BBB responded to CSXT at pages 7 and 8 of the Motion. BBB's response is an attempt to raise concerns about the calculations made by Ms. Preslar, but fails to do so. As it has done throughout this proceeding, BBB makes an erroneous and unproven assumption and then applies the incorrect legal standard to that faulty assumption. The Board should not be misled by such misconstrued arguments.

It is clear from Mr. Wallen's statement and Ms. Preslar's analysis in the Rebuttal that the movement of traffic from a foreign yard to Leewood Yard is an off-branch cost. As Ms. Preslar has done, such costs "shall be derived from the latest Form R-1 Annual Report for Class I

railroads filed with the Board prior to the conclusion of the subsidy year, ... and assigned to the branch according to the procedures set forth in 1152.33 of these regulations.” 49 CFR 1152.32. BBB attempts to confuse the Board by asking it to calculate off-branch costs using the on-branch standard. If BBB had fully quoted the regulations, it would have told the Board “The avoidable costs of providing freight service on a branch shall be just and reasonable, and shall not exceed those necessary for an honest and efficient operation.” 49 CFR 1152.32. So as not to condone such tactics, the Board should reject BBB’s arguments.

BBB then questions the motives for the off-branch move, but provides no evidence to support its argument. Although CSXT has the burden of proof in this proceeding, the Board should not permit an unsupported statement to outweigh evidence. BBB infers that CSXT’s off-branch operations, while “for its own operating convenience” are inefficient. Motion at 7. But there is not a scintilla of evidence. There are many factors that go into CSXT’s operating decisions other than mere mileage. However, BBB addresses nothing other than mileage. The Board should reject BBB’s argument, especially since it is premised on the wrong legal standard.

In the alternative, BBB should be given a period to reply. BBB suggests that CSXT is being generous “with the Board’s limited time for preparing a decision.” Motion at 6. CSXT is not suggesting that the Board be deprived of the time it needs to decide this proceeding. Instead, CSXT is willing to have the Board extend the time in which CSXT expects a decision in this proceeding in order to ensure that the Board has ample time to consider all of the relevant facts and make its decision, and, if the Board deems it necessary, to give BBB time to address CSXT’s Rebuttal concerning the profitability of the Line.¹

¹ In the Protest, BBB did not produce any evidence concerning CSXT’s cost evidence. Instead, BBB merely presented argument. In the Motion, BBB again presents argument concerning

The Board has extended statutory deadlines many times in the past. Indeed, in other CSXT abandonment proceedings the Board has extended statutory deadlines with² and without³ the support of CSXT. CSXT's proposal allows the Board to determine the public convenience and necessity based on the actual facts and provides due process to all parties, while extending the statutory deadlines. Allowing BBB a reasonable time to file whatever response it wants to the issues raised in the Motion, provide CSXT with a short response period and extend the time for the Board to issue a decision is not contrary to the Rail Transportation Policy, and in fact fosters the concepts of fair decisions (49 U.S.C. 10101(2)), reduced regulatory barriers to exit (49 U.S.C. 10101(7)), accurate cost information in regulatory proceedings (49 U.S.C. 10101(13)), and expeditious handling and resolution of matters (49 U.S.C. 10101(15)).⁴

BBB claims that it needs 45 days to respond to the issues of profitability. Motion at 6. CSXT does not believe that BBB needs that much time to respond, but is willing to delay its discontinuance, assuming the Board grants this application, for 55 days. In the alternative to denying the Motion and deciding this matter on the record before it, CSXT respectfully requests that the Board deny the Motion, and on the Board's own motion grant an exemption under 49

CSXT's rebuttal. It is CSXT's belief that BBB does not want to respond to the cost evidence presented in CSXT's Rebuttal because BBB has nothing more to say than it did in the Motion, at 6-7.

² See, e.g., *CSX Transportation, Inc.—Abandonment Exemption—in Polk and McMinn Counties, TN*, STB Docket No. AB-55 (Sub-No. 588X) (STB served August 9, 2001).

³ See, e.g., *CSX Transportation, Inc.—Abandonment Exemption—in Polk and McMinn Counties, TN*, STB Docket No. AB-55 (Sub-No. 588X) (STB served May 23, 2002).

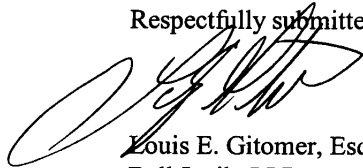
⁴ CSXT urges the Board not to require a new application with all of its costs and delays since all of the evidence necessary to render a decision is, or will shortly be, in this record. CSXT believes that the public interest is best served by deciding a matter based on all of the facts and that to exclude highly relevant facts on a procedural basis where due process can still be served is a disservice to the public.

U.S.C. 10502 from the time limits of 49 U.S.C. 10904 in order for BBB to reply, CSXT to respond, and the Board to issue a decision.

CONCLUSION

CSXT respectfully requests that the Motion be denied because CSXT was entitled to, and did, file new evidence in rebuttal that addressed the issues raised by BBB in its Protest, and the Board proceed to decide this matter. In the alternative, CSXT respectfully requests that the Motion be denied and that the Board extend the deadline for deciding this discontinuance until December 24, 2002, grant BBB until October 25, 2002 to respond to only the issue raised in the Motion and allow CSXT until November 4, 2002 to file surrebuttal to BBB's surreply.

Respectfully submitted,



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Attorneys for: CSX TRANSPORTATION,
INC.

Dated: October 3, 2002

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Response in Docket No. AB-55 (Sub-No. 618),
CSX Transportation, Inc.--Discontinuance—at Memphis, in Shelby County, TN was sent via
overnight delivery to:

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October 3, 2002