

206655

BALL JANIK LLP

A T T O R N E Y S

1455 F STREET, NW, SUITE 225
WASHINGTON, D.C. 20005

www.balljanik.com

TELEPHONE 202-638-3307
FACSIMILE 202-783-6947

lgitomer@dc.lp.com

LOUIS E. GITOMER
OF COUNSEL
(202) 466-6532

November 15, 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 Petition 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

ENTERED
Office of Proceedings

NOV 15 2002

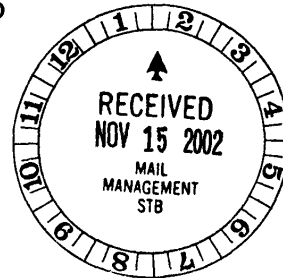
Part of
Public Record

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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



RESPONSE OF CSX TRANSPORTATION, INC. TO PETITION FOR REOPENING AND
STAY OF DECISION SERVED OCTOBER 28, 2002 FILED BY BOLEN-BRUNSON-BELL
LUMBER COMPANY, INC.

Natalie S. Rosenberg, Esq.
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
(904) 359-1253

Louis E. Gitomer, Esq.
Ball Janik, LLP
1455 F Street, NW, Suite 225
Washington, DC 20005
(202) 638-3307

Attorneys for: CSX TRANSPORTATION,
INC.

Dated: November 15, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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



RESPONSE OF CSX TRANSPORTATION, INC. TO PETITION FOR REOPENING AND
STAY OF DECISION SERVED OCTOBER 28, 2002 FILED BY BOLEN-BRUNSON-BELL
LUMBER COMPANY, INC.

CSX Transportation, Inc. ("CSXT") opposes the Petition for Reopening and Stay of Decision Served October 28, 2002 (the "Petition") filed by Bolen-Brunson-Bell Lumber Company, Inc. ("BBB") on November 12, 2002. CSXT respectfully urges the Surface Transportation Board ("Board") to deny the Petition. BBB has not met the criteria for a stay, nor has it demonstrated new evidence, changed circumstances or material error to warrant reopening.

In responding to the Petition, CSXT will first respond to BBB's erroneous claim that the Board committed material error. CSXT will then address BBB's failure to meet the criteria for a stay.

BACKGROUND

CSXT filed an Application on July 10, 2002 under 49 U.S.C. § 10903(d) seeking authority to discontinue the operation of rail transportation over the 1.1-mile rail line portion of its Midwest Region, Nashville Division, Memphis Terminal between milepost ONI 224.0, at Memphis, TN and milepost ONI 222.9 east of Memphis, TN (the "Line"), all in Shelby County,

TN. After considering a protest filed by BBB and CSXT's rebuttal (the Board struck portions of CSXT's rebuttal in response to a motion filed by BBB), the Board granted the application. *CSX Transportation, Inc.—Discontinuance—at Memphis in Shelby County, Tennessee*, STB Docket No. AB-55 (Sub-No. 618) (STB served October 28, 2002) (the "*Application Decision*").

THE APPLICATION DECISION IS NOT BASED ON MATERIAL ERROR

The Board correctly concluded that continued operation of the Line by CSXT would be a burden on CSXT and interstate commerce, especially in light of the fully justified costs to repair and replace the Cypress Creek Bridge at milepost ONI-223.3. The evidence also justified the Board in concluding that there would be little harm to BBB. The Board granted the application based upon the correct balancing of the substantial harm to CSXT compared to the minimal harm to BBB.

1. THE BOARD CORRECTLY CONCLUDED THAT CONTINUED OPERATION OF THE LINE WOULD BE A BURDEN ON CSXT AND INTERSTATE COMMERCE

A. Future Profitability

BBB erroneously claims that the Board was wrong when it said "Rehabilitation and replacement of the Cypress Creek Bridge would require an expenditure that cannot be justified by limited and speculative future profitability." *Application Decision*, at 9. Basically, BBB's argument assumes that the Board is without discretion on matters relating to future profitability and is required to assume that the Forecast Year projection is really a Forecast 10-Year certainty. BBB makes this faulty argument by constructing an erroneous hypothesis that the traffic and revenue projections made in the Forecast Year are eternal based upon a misleading parsing of language found in the Board's regulations and several decisions by the Board and its predecessor,

the Interstate Commerce Commission (the "ICC"). There is simply no precedent to support BBB's creative contention.

BBB is wrong to cast the Forecast Year as a requirement with which the Board must comply. The Forecast Year regulation requires an applicant to provide information to the Board in its application forecasting projected traffic in the year immediately following the filing of an abandonment or discontinuance application with the Board. The requirement on the Board, if any, is to review the application for completeness and compliance with the regulations at 49 C.F.R. § 1152.

BBB has not shown that CSXT did not comply with the Board's rules in filing the discontinuance application, which included Forecast Year data. Nor has BBB shown that the Board erred in accepting the Forecast Year data.

It appears that BBB's complaint is that the Board did not accept the Forecast Year data, conclude that the Line was profitable, ignore all other evidence of record, and deny the discontinuance. However, that is not the Board's function. The Board is to weigh and balance all of the evidence submitted, not just that favorable to the protestant, and determine whether the public convenience and necessity permit the discontinuance. *Colorado v. United States*, 271 U.S. 153 (1926). It appears to CSXT that BBB's complaint is that the Board exercised its broad discretion to consider factor unfavorable to BBB and concluded that continued operation of the Line would be a burden on CSXT. An analysis of the specific flaws in BBB's Forecast Year argument follow.

The Forecast Year is a 12-month period (49 C.F.R. § 1152.2(h)), not a 10-year, or longer, period as BBB claims. In trying to support its outrageous position, BBB's reading of 49 C.F.R. § 1152.22(d)(2) turns the regulation on its head. BBB claims that this regulation "is the sole basis

on which future revenues, costs and return on value are to be estimated.” Petition at 6.

However, the word “sole” is not part of the regulation. Indeed, the specific language of the regulation states: “The carrier shall compute an estimate of the future revenues attributable, avoidable costs and reasonable return on the value for the line to be abandoned, for the Forecast Year” This regulation sets forth the requirements for computing revenues, costs and return for a 12-month forecast period; it does state that the forecasted revenues, costs and return apply beyond that 12-month period, as BBB would.

BBB is correct that the ICC decided to replace the Base Year with the Forecast Year, but only as an indicia for the relevant 12-month period, not the indefinite future.¹ BBB overlooked the change made by the ICC when it did not adopt its proposal to require “a multiple year forecast of operating results in those situations where significant costs will not be avoided until well after the close of the Forecast Year.” *Abandonment Regulations—Costing*, 5 I.C.C.2d 123, 127 (1988) (“*Costing Rules*”). BBB attempts to tie its misstatement in *Costing Rules* to its misinterpretation of the Board’s decision in *Aban. and Discon. Of R. Lines under 49 U.S.C. 10903*, 1 S.T.B. 894, 896² by claiming that “the forecast year continues to be the indicator of future rail line profitability,” Petition at 6, when the Board was actually explaining why it was denying a request that it require even more data in an abandonment application. Here, BBB again tries to make its case by citing language from a Board decision out of context.

BBB then cites two cases that do not address its hypothesis that the data developed for the Forecast Year applies to all future years. *Union Pacific R.R. Co.—Aban.—Wallace Branch, ID*, 9

¹ The portion of the ICC’s decision quoted by BBB at page 6 of the Petition was in the section titled “Nature of Proposed Rule Changes,” not the rules finally adopted by the ICC.

² The quote cited by BBB to be at page 896 is actually at page 909, and the exact wording is slightly different than that quoted by BBB.

I.C.C.2d 325 (1992) disallows modification of the Forecast Year by unsubstantiated traffic increases proposed by the shipper beyond the 12-month period of the Forecast Year. In *Central Michigan Ry. Co.—Abandonment*, 7 I.C.C.2d 557 (1991), BBB cites a case that is not relevant to this proceeding because it involved an attempt to modify the Forecast Year several years after the abandonment application was filed. These cases do not stand for the false proposition posited by BBB that the Forecast Year is the immutable measure of profitability into the indefinite future.

BBB then goes on to combine a decision that properly explains that the ICC and Board have discretion to determine whether a rehabilitation expense can be justified based on future traffic³ with a sentence from a decision eight years later explaining what the ICC was proposing in a rule.⁴

Having created a fictitious rule concerning the immutability and permanence of the Forecast Year, BBB naturally claims that the Board did not follow this fictitious rule in deciding to grant the discontinuance in the *Application Decision*. Instead, BBB claims that it is entitled to the presumption that for at least ten years it will continue in business and will continue to receive the same volume of traffic, that CSXT's costs will not rise, and that the cost of rail transportation will not change.⁵ CSXT urges the Board to reject such an outrageous claim. Although the

³ *Illinois Central Gulf R. Co.—Abandonment*, 363 I.C.C. 729, 731 (1980).

⁴ In the *Costing Rules*, at 127, the ICC, in a section of the decision titled "Nature of Proposed Rule Changes", discussed requiring support for Forecast Year projections and capitalizing rehabilitation required in the Forecast Year. The Board did not adopt the outrageous position of BBB that "as a matter of law ... the forecast year operating profit of \$40,371 derived in accordance with the Board's forecast year regulations was required to be used as the basis for the finding regarding the future profitability of the rail line." Petition at 7. As discussed above, the Forecast Year results are only valid for that 12-month period. Beyond the Forecast Year, CSXT contends that the Board has discretion to determine the potential profitability of a railroad line.

⁵ If this is not the case, BBB basically argues that it should have been permitted to present evidence to establish that it would continue in business for at least 10 years and that traffic would remain at current levels. No one, not even BBB, can accurately predict the future. There are no guarantees of continuing viability and any evidence on that point would not have been entitled to any weight.

Forecast Year analysis likely carries great weight in the Board's determination of future profitability, there is no basis in law for suggesting that the Forecast Year is the only factor applicable and that the Board is unable to utilize reasonable discretion.

However, all of this creative analysis by BBB merely leads back to the same arguments that BBB made before and were rejected by the Board. On page 9 of the Petition, BBB concludes that CSXT will earn a profit each year of \$4,720 after it amortizes the bridge repair based on an annual interest rate of 4.75%, making this a "highly profitable" line according to BBB. As an initial matter, CSXT must point out that \$4,720 is far from highly profitable. The Line is not even as profitable as BBB would have the Board believe, however, because BBB artificially inflated "profits" by utilizing an inappropriate cost of capital multiplier. CSXT should be allowed to earn the cost of capital of 10.2%. Using the current cost of capital will actually result in a "profit" (as defined by BBB) of \$372 per year by amortizing bridge repairs over 10 years, while excluding any additional repairs that might be needed for the 80-year old Cypress Creek Bridge (Amortization Schedule attached as Exhibit 1).⁶ If the cost of capital, which is at an historic low, increased as little as 0.3% to 10.5%, CSXT would not be able to earn its cost of capital.⁷

B. Bridge Replacement Costs.

BBB next argues that the replacement of and the cost for replacing the Cypress Creek Bridge are overstated. This issue was before the Board previously, without any contradictory evidence from BBB. Again, BBB is trying to confuse the issue. For purposes of this proceeding,

⁶ The Annual amortization payment for rehabilitation would increase from \$27,442 proposed by BBB to \$31,790 at a 10.2% cost of capital. All other calculations made by BBB at page 9 of the Petition would remain the same.

CSXT conservatively presented the Board with the cost to repair the Cypress Creek Bridge and the Board accepted the repair and replacement costs justified by CSXT. *Application Decision*, at 7. CSXT did present evidence, however, that in reality, CSXT would likely replace the Cypress Creek Bridge (Rebuttal at 38-39). If CSXT had concluded that it was economically advantageous to continue to operate the Line into the indefinite future it would follow the economically prudent approach and just replace the bridge at a cost of \$360,000 instead of repairing it at a cost of \$214,500, and then replacing it about 10 years later for \$360,000 (in 2001 dollars).

BBB fails to recognize that the Cypress Creek Bridge was built over 80 years ago to carry loads of 30 tons per axle when steam locomotives and 40-foot boxcars were state of the art. The Cypress Creek Bridge was designed in an era when it was required to bear a much lighter load. BBB has received cars that carry up to 102 tons (See Application, Volume III, pages 6-9) and are moved by diesel locomotives far out-weighting the old steam locomotives of the 1920's. Today, the Cypress Creek Bridge is expected to typically carry loads of 70 to 80 tons per axle. Merely duplicating an 80-year old structure meant to carry loads that weighed less than half of what modern loads weigh raises safety and efficiency concerns.

BBB also continues to fail to recognize that simply making significant repairs will not extend the life of the Cypress Creek Bridge. As Leroy Davidson clearly explained in his Rebuttal Verified Statement:

The Protest also argues that if you make the significant repairs recommended by CSXT, then you would basically have a new bridge that would last for another 40 or 50 years. Unfortunately, that is not the case. Although the new components in and of themselves would arguably last for 40 to 50 years, if we only do the repair work suggested, the

⁷ At a 10.5% cost of capital, the Annual amortization payment for rehabilitation would increase to \$32,256 resulting in a shortfall of \$94 in covering CSXT's annual cost-of-capital return.

pilings left in place (the foundation of the Bridge) would still be old and would eventually fail. At that time, the remainder of the substructure would have to be replaced. You would be required to tear the Bridge completely apart to accomplish this. Since the pilings will eventually fail, CSXT believes that it would be more cost effective to go ahead and replace the Bridge.

CSXT estimated the cost to replace the Cypress Creek Bridge to be \$360,000, which has not been challenged by any evidence submitted by BBB (See Application, Volume I, Verified Statement of Leeroy Davidson, page 47). Amortizing the replacement cost of the Cypress Creek Bridge over 50 years at the current 10.2% cost of capital results in an even higher annual amortization payment of \$37,008, with CSXT failing to cover its cost of capital by \$4,846 (assuming a stable level of traffic). The Board was correct to accept the replacement cost of the Cypress Creek Bridge submitted by CSXT.

C. Bridge Rehabilitation Costs

BBB goes on to argue that the Board should allow the Cypress Creek Bridge to only be rehabilitated to 1920 standards, instead of CSXT's modern standards. The Board correctly rejected BBB's argument in the *Application Decision*, at 6-7. The Board correctly concluded the inspection "conducted by CSXT's expert to be superior to the inspection conducted by BBB's expert." *Id.*, at 7. The Board then determined that the superior CSXT inspection "produces the best estimate of costs needed to repair the bridge." *Id.*

BBB argues that the Board erred in permitting the repair of 120 stringers. BBB claims that CSXT admitted that only 36 of 84 stringers in the Cypress Creek Bridge required replacement. Petition at 10. In making that argument, BBB takes out of context and badly misconstrues the rebuttal statement of Mr. Davidson at page 41, which states:

One of the biggest differences between my opinion based on the CSXT standards and the Stone report relates to the aforementioned stringers. Where I

believe that approximately 120 stringers need to be replaced/added, Mr. Stone recommended replacing 13 of the stringers. I believe that only replacing 13 stringers would be a substandard repair job to say the least, and the Bridge would not be safe to operate over. CSXT's inspection revealed that 36 stringers out of the 84 existing stringers are "rejects" and should be replaced. Reject stringers are stringers that are 50 percent or less effective. Therefore, approximately 42 percent of the stringers are less than 50 percent effective in my opinion and therefore, the Bridge is not safe to carry traffic. Although the remaining stringers are each individually more than 50 percent effective, the combined deterioration and their poor condition, this Bridge is not in a condition to run any traffic over at this time absent very extensive repairs. The remaining stringers will all become rejects within 10 years and have to be replaced. It will be more cost effective and efficient now to replace all of the stringers and add those necessary to bring the Bridge up to CSXT standards than to replace 36 stringers today and the remaining 48 over 10 years, as well as add the 36 stringers needed to bring the Bridge up to CSXT standards.

The very rule cited by BBB, 49 C.F.R. § 1152.32(m)(1), supports replacing all of the stringers at once as proposed by Mr. Davidson, instead of on an inefficient piecemeal basis. "Applicant, in making its projections of rehabilitation costs, shall give consideration to: ... (ii) The cost to attain the rehabilitation level resulting in the lowest operating and rehabilitation expenditures." 49 C.F.R. § 1152.32(m)(1)(ii). When determining the level of rehabilitation for a bridge, Mr. Davidson's paramount concern, and that of CSXT, is safety.⁸

In addition to safety, Mr. Davidson must also consider the costs involved and the efficiency of operation when making repairs. The cost of piecemeal repairs as suggested by BBB would multiply the costs of marshalling and moving repair crews to the area. It is more efficient to make all of the repairs at once.

⁸ Bridges are not like rail track. There is no excepted category for bridges. If a train falls off excepted track it may be a minor accident. (CSXT does not condone creating conditions that would create even a minor accident. CSXT adheres to the motto that "Safety is job 1" because it is the best policy for CSXT's employees and customers.) But, if a train falls off a bridge, it is probable that it will not be a minor accident.⁸ A careful reading of the rules at 49 C.F.R. § 1152.32(m) shows that those rules were prepared with the Federal Railroad Administration track

BBB continues to argue that the bridge deck does not need to be replaced. This shows BBB's lack of familiarity with bridge repair procedures and the Cypress Creek Bridge. The bridge deck cannot be lifted to replace stringers, but must be removed completely. The Cypress Creek Bridge wood deck is over 80 years old, fire damaged and suffering decay. But, BBB sees no reason to replace the deck after removing it from the bridge. Because of the age and condition of the bridge deck as testified to by Mr. Davidson, the deck will be destroyed when it is disconnected from the rest of the bridge. Imagine the condition of a piece of lumber after removing that 80-year old burned and decaying piece of lumber from another piece of lumber where it has been tightly connected with nails and screws for 80 years and has been used for nearly 80 years under very heavy loads. BBB wants the Board to believe that after removing that piece of lumber it will be in the same condition as it was when new. CSXT takes a more realistic and practical approach that the piece of lumber is in poor condition and beyond its useful life and will be damaged, and made useless through the process of disconnecting from the rest of the bridge. For that reason Mr. Davidson was correct to include the replacement of the bridge deck. Application, Volume I, pages 46-47.

D. Subsidy Year Payment

Regardless of whether BBB is correct on the subsidy cost issue it raises; there is still substantial evidence of record of the continuing burden on CSXT of having to repair the Cypress Creek Bridge and in order to operate over the Line. However, it may be time for the Board to revisit the ICC's holding that "rehabilitation costs must be amortized over a period of years and that it is incorrect to assume that the rehabilitation cost will be recovered in a single projected

safety standards of 49 C.F.R. § 213 in mind. Indeed, excepted track is not permitted on bridges. 49 C.F.R. § 213.4(d).

year operation.” *Louisville and Nashville R. Co.—Abandonment*, 366 I.C.C. 1, 22 (1981) (the *L&N Case*”).

That ruling was made in a coordination proposal that included abandonments and that was filed prior to the enactment of the Staggers Rail Act of 1980, Pub. L. 96-448 (the “Staggers Act”). One of the most beneficial provisions of the Staggers Act was the legislative allowance of transportation contracts between railroads and shippers. The ability of railroads and shippers to enter long term contracts that ensure service to a shipper while guaranteeing long term revenue to a railroad is a prime reason for the Board to revisit the ruling cited above from the *L&N Case*.

It seems fair for railroads to amortize rehabilitation costs over the life of guaranteed rail business if there are contracts with shippers to provide such business. However, it seems unfair and burdensome to railroads to require them to expend large sums to rehabilitate rail lines and then have to amortize those costs over many years when there is no risk to their shippers who can decide to stop using railroad service the next day.

The facts in the instant proceeding make this point. CSXT faces the possibility of expending at a minimum \$214,500 to repair the Cypress Creek Bridge. The sole user of rail service on the Line is BBB who does not pay for freight, who for the vast majority of shipments delivered to its facility (154 out of 198 in 2000) is not even the consignee, but merely a convenient delivery point, and who has alternative rail-motor service available. CSXT faces the realistic prospect that it could spend \$214,500 to repair the bridge or \$360,000 to replace the bridge and then before the cost is amortized, BBB decides to go out of business or relocate off the line or perhaps a competitor realizes that it can provide the reload that BBB offers for \$500 per car today for \$400 per car eliminating 75 percent of the traffic delivered to BBB and 75 percent of the revenue that BBB claims CSXT can expect. CSXT would be very comfortable

making the bridge repair or replacement if BBB entered a long term take or pay contract where CSXT knew that it would recoup its investment over time. CSXT is not seeking a guarantee, only the ability to share the risk with the party that will receive the most benefit from CSXT's expenditure.

CSXT will incur substantial costs to repair the Cypress Creek Bridge that it is unlikely to recoup once the currently historically low cost of capital rises to more normal levels. If CSXT takes the safest, economically and operationally efficient approach and replaces the Cypress Creek Bridge at a cost of \$360,000, CSXT will never recoup that investment even at the historically low cost of capital that exists today. The Board was correct in accepting CSXT's repair and replacement costs because the evidence of record supported those costs and did not support the costs proffered by BBB. The reliable evidence of record supports the Board's conclusion that continued operation of the Line would be a burden on CSXT and interstate commerce.

2. BBB WILL INCUR MINIMAL, IF ANY, HARM AS A RESULT OF THE DISCONTINUANCE OF SERVICE OVER THE LINE.

BBB claims that it will lose nearly \$100,000 per year if it does not have direct service from CSXT to its facility. Petition at 12. As in the application proceeding, BBB does not indicate whether this is gross or net revenue.

CSXT urges the Board to recognize that when CSXT served its facility directly that BBB did not pay the freight for rail transportation. Indeed, for the majority of the traffic delivered to its facility in 2000, BBB is not even the consignee; it is merely the delivery point.⁹

⁹ Of the 198 carloads delivered to BBB in 2000, 144 were not consigned to BBB but other receivers who were merely using BBB's facility for convenience. BBB received only 54 carloads in 2000 and has not claimed that it expects increased traffic in the future.

However, BBB does have alternative transportation service available. Throughout the duration of this proceeding, BBB has continued to have rail cars emptied at Leewood Yard and other railroad's facilities in the Memphis area and delivered by truck to it at a cost claimed by BBB to be \$500 per car. BBB does have and has used alternate rail-truck transportation.

Although BBB claims to be a small business, there is no evidence of record in this discontinuance proceeding whether BBB is family business or a multi-billion dollar international conglomerate.

Based on the record and the actions of BBB since the Line was embargoed, the Board can safely conclude that alternate transportation is available to BBB. However, BBB failed to present any evidence of the effect on its net income. Its pre-embargo reload service may or may not have been profitable, but BBB chose not to provide that evidence to the Board. It is unfair for BBB to cast its failure to present evidence as the Board's failure to weigh the non-existent evidence.

3. THE BOARD CORRECTLY BALANCED BURDEN ON CSXT AGAINST HARM TO BBB

CSXT demonstrated by clear, convincing and detailed evidence that the continued operation of the Line would create a burden because of the difficult operation involved and the cost to repair (\$214,500) and replace (\$360,000) the Cypress Creek Bridge, and the Board agreed with CSXT. The Board also correctly concluded that BBB had alternate transportation available, as has been demonstrated by BBB's continued receipt of shipments at its facility. Finally, the Board determined that BBB had not presented evidence of any burden other than some unspecified net increased cost as the result of using alternate transportation. In balancing the interests presented to it, the Board arrived at the correct result and did not commit material error.

BBB is basically asking the Board to require CSXT to repair/replace the Cypress Creek Bridge, at CSXT's sole cost and expense (\$214,500-\$360,000) in order to allow CSXT to make a yearly profit of \$4,720 (actually \$372) and BBB to make a yearly profit of \$100,000. The equities certainly suggest that if any party should be willing to pay to repair or replace the Cypress Creek Bridge, it should be BBB, the entity allegedly profiting handsomely from the use of the Line.

A STAY IS NOT WARRANTED

1. THE STAY CRITERIA.

The Board has said that:

The standards governing disposition of a petition for stay are: (1) whether the petitioner is likely to prevail on the merits; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other interested parties; and (4) whether issuance of a stay is in the public interest. *Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); and *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921 (D.C. Cir. 1958). The party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. *Canal Authority of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

CSX Transportation, Inc.—Abandonment Exemption—in Rocky Mount, Nash County, NC, STB Docket No. AB-55 (Sub-No. 562X) (STB served December 30, 1999). BBB has failed to carry its burden and meet any of the standards warranting a stay.

2. BBB HAS NOT SHOWN THAT IT IS LIKELY TO PREVAIL ON THE MERITS OF ITS PETITION TO REOPEN.

As discussed above, BBB is not likely to prevail on the merits. BBB has not demonstrated that the Board's decision contains material error. The Board made the requisite findings based on an evaluation of the evidence presented. CSXT proved that it would incur a continuing burden as a result of its difficult operations in crossing a double-tracked main line and

from the cost of repairing and/or replacing the Cypress Creek Bridge. On the other hand, BBB did not demonstrate a lack of transportation alternatives, but instead showed that it does have rail-truck transportation available to it. Moreover, BBB failed to produce any evidence of the cost increase to use alternative transportation. The Board balanced these factors correctly in concluding that the public convenience and necessity permit the discontinuance of service over the Line by CSXT.

3. CSXT WILL BE SUBSTANTIALLY HARMED BY A STAY.

BBB claims that since CSXT is not required to operate over the Line it will incur no harm if a stay is granted. That is wrong. Alleged liability under the complaint brought by BBB will continue to accrue if the discontinuance does not become effective. BBB argues that it will be irreparably harmed if the liability under the complaint it filed with the Board is ended by the discontinuance becoming effective and ratifying the embargo. BBB is being inconsistent when it argues that accruing claims will not hurt CSXT, but that cutting off those claims will harm BBB. The Board should not let BBB have it both ways.

4. BBB WILL NOT BE IRREPARABLY HARMED WITHOUT A STAY.

BBB argues that it will lose potential claims in a complaint proceeding before the Board. First, BBB's ability to prevail in the complaint proceeding is speculative at best. The evidence has not even been fully presented in that proceeding and no Board decision has been made. Moreover, BBB is looking at only monetary damages, not an acceptable basis for a stay, and such economic loss does not, by itself, constitute irreparable injury. *Union Pacific RR Co. -Aban.-Fremont & Teton Counties, ID*, 6 I.C.C.2d 641, 648 (1990), citing *Wisconsin Gas Co. v. FERC*, 758 F. 2d 669, 674 (D.C. Cir. 1985). Finally, BBB continues to receive alternate transportation service.

5. THE PUBLIC INTEREST DOES NOT FAVOR A STAY.

The Board did not disregard its Forecast Year regulations as argued by BBB. The Board required CSXT to follow those regulations in presenting its evidence and weighed that evidence as part of all of the evidence available in exercising its discretion to grant the discontinuance. Contrary to BBB's statement, the Board required CSXT to follow its rules, properly exercised its discretion, and has given the public every reason to have confidence in the Board's processes and that the Board will follow its own rules.

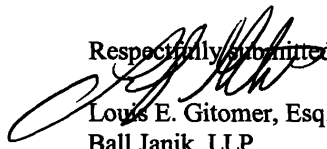
CONCLUSION

CSXT contends that the Board properly exercised its discretion in finding that the public convenience and necessity permit the discontinuance of service over the Line. The Board's decision is not based on material error. The Board required CSXT to follow the Forecast Year regulations in preparing its application and carefully and correctly weighed and balanced the evidence before it. Nor has BBB met its burden of persuasion on all of the elements necessary to justify the extraordinary relief of a stay.

CSXT respectfully requests the Board to deny BBB's petition to reopen and BBB's petition for stay.

Natalie S. Rosenberg, Esq.
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
(904) 359-1253

Respectfully submitted,


Louis E. Gitomer, Esq.
Ball Janik, LLP
1455 F Street, NW, Suite 225
Washington, DC 20005
(202) 638-3307

Attorneys for: CSX TRANSPORTATION,
INC.

Dated: November 15, 2002

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2002, this Response was served by overnight delivery on Thomas F. McFarland, Esq., counsel for Bolen-Brunson-Bell Lumber Company, Inc.

A handwritten signature in black ink, appearing to read 'L. Gitomer', is written over a horizontal line.

Louis E. Gitomer
November 15, 2002

ATTACHMENT

Amortization Calculator

This page requires forms and table support. You may want to find out [more about this calculator](#) or look at some [Frequently Asked Questions](#) and their answers. Comments, complaints, or compliments to [Bret Whissel](#) by [sending mail here](#), but please review the FAQ before asking questions.

Almost any data field on this form may be calculated. Enter the appropriate data in each slot, leaving blank (or zero) the value that you wish to calculate, and then activate "Calculate" to update the page.

Calculate

☐ Show Amortization Schedule

Principal:

Payments per
Year:

Annual
Interest Rate:

Number of
Regular
Payments:

Balloon
Payment:

Payment
Amount:

Principal borrowed: \$214500.00

Annual Payments: 1 Total Payments: 12

Annual interest rate: 10.20% Periodic interest rate: 10.2000%

Regular Payment amount: \$31789.80 Final Balloon Payment: \$0.00

Note: the following numbers are estimates. See the amortization schedule for more accurate values.

Total Repaid: \$381477.60

Total Interest Paid: \$166977.60

Interest as percentage of Principal: 77.845%

Payment	Principal	Interest	Cum Prin	Cum Int	Prin Bal
1	9910.80	21879.00	9910.80	21879.00	204589.20
2	10921.70	20868.10	20832.50	42747.10	193667.50
3	12035.71	19754.09	32868.21	62501.19	181631.79
4	13263.36	18526.44	46131.57	81027.63	168368.43
5	14616.22	17173.58	60747.79	98201.21	153752.21
6	16107.07	15682.73	76854.86	113883.94	137645.14
7	17750.00	14039.80	94604.86	127923.74	119895.14
8	19560.50	12229.30	114165.36	140153.04	100334.64
9	21555.67	10234.13	135721.03	150387.17	78778.97

10	23754.35	8035.45	159475.38	158422.62	55024.62
11	26177.29	5612.51	185652.67	164035.13	28847.33
12	* 28847.33	2942.43	214500.00	166977.56	0.00

*The final payment has been adjusted to account for payments
having been rounded to the nearest cent.

Amortization Calculator

This page requires forms and table support. You may want to find out [more about this calculator](#) or look at some [Frequently Asked Questions](#) and their answers. Comments, complaints, or compliments to [Bret Whissel](#) by [sending mail here](#), but please review the FAQ before asking questions.

Almost any data field on this form may be calculated. Enter the appropriate data in each slot, leaving blank (or zero) the value that you wish to calculate, and then activate "Calculate" to update the page.

Calculate

☐ Show Amortization Schedule

Principal:	214500.00	Payments per Year:	1
Annual Interest Rate:	10.5000	Number of Regular Payments:	12
Balloon Payment:		Payment Amount:	32255.81

Principal borrowed: \$214500.00

Annual Payments: 1 Total Payments: 12

Annual interest rate: 10.50% Periodic interest rate: 10.5000%

Regular Payment amount: \$32255.81 Final Balloon Payment: \$0.00

Note: the following numbers are estimates. See the amortization schedule for more accurate values.

Total Repaid: \$387069.72

Total Interest Paid: \$172569.72

Interest as percentage of Principal: 80.452%

Payment	Principal	Interest	Cum Prin	Cum Int	Prin Bal
1	9733.31	22522.50	9733.31	22522.50	204766.69
2	10755.31	21500.50	20488.62	44023.00	194011.38
3	11884.62	20371.19	32373.24	64394.19	182126.76
4	13132.50	19123.31	45505.74	83517.50	168994.26
5	14511.41	17744.40	60017.15	101261.90	154482.85
6	16035.11	16220.70	76052.26	117482.60	138447.74
7	17718.80	14537.01	93771.06	132019.61	120728.94
8	19579.27	12676.54	113350.33	144696.15	101149.67
9	21635.09	10620.72	134985.42	155316.87	79514.58

10	23906.78	8349.03	158892.20	163665.90	55607.80
11	26416.99	5838.82	185309.19	169504.72	29190.81
12	* 29190.81	3065.04	214500.00	172569.76	0.00

*The final payment has been adjusted to account for payments having been rounded to the nearest cent.

Amortization Calculator

This page requires forms and table support. You may want to find out [more about this calculator](#) or look at some [Frequently Asked Questions](#) and their answers. Comments, complaints, or compliments to [Bret Whissel](#) by [sending mail here](#), but please review the FAQ before asking questions.

Almost any data field on this form may be calculated. Enter the appropriate data in each slot, leaving blank (or zero) the value that you wish to calculate, and then activate "Calculate" to update the page.

☐ Show Amortization Schedule

Principal:	360000.00	Payments per Year:	1
Annual Interest Rate:	10.2000	Number of Regular Payments:	50
Balloon Payment:		Payment Amount:	37007.88

Principal borrowed: \$360000.00

Annual Payments: 1 Total Payments: 50

Annual interest rate: 10.20% Periodic interest rate: 10.2000%

Regular Payment amount: \$37007.88 Final Balloon Payment: \$0.00

Note: the following numbers are estimates. See the amortization schedule for more accurate values.

Total Repaid: \$1850394.00

Total Interest Paid: \$1490394.00

Interest as percentage of Principal: 413.998%

Payment	Principal	Interest	Cum Prin	Cum Int	Prin Bal
1	287.88	36720.00	287.88	36720.00	359712.12
2	317.24	36690.64	605.12	73410.64	359394.88
3	349.60	36658.28	954.72	110068.92	359045.28
4	385.26	36622.62	1339.98	146691.54	358660.02
5	424.56	36583.32	1764.54	183274.86	358235.46
6	467.86	36540.02	2232.40	219814.88	357767.60
7	515.58	36492.30	2747.98	256307.18	357252.02
8	568.17	36439.71	3316.15	292746.89	356683.85
9	626.13	36381.75	3942.28	329128.64	356057.72

10	689.99	36317.89	4632.27	365446.53	355367.73
11	760.37	36247.51	5392.64	401694.04	354607.36
12	837.93	36169.95	6230.57	437863.99	353769.43
13	923.40	36084.48	7153.97	473948.47	352846.03
14	1017.58	35990.30	8171.55	509938.77	351828.45
15	1121.38	35886.50	9292.93	545825.27	350707.07
16	1235.76	35772.12	10528.69	581597.39	349471.31
17	1361.81	35646.07	11890.50	617243.46	348109.50
18	1500.71	35507.17	13391.21	652750.63	346608.79
19	1653.78	35354.10	15044.99	688104.73	344955.01
20	1822.47	35185.41	16867.46	723290.14	343132.54
21	2008.36	34999.52	18875.82	758289.66	341124.18
22	2213.21	34794.67	21089.03	793084.33	338910.97
23	2438.96	34568.92	23527.99	827653.25	336472.01
24	2687.73	34320.15	26215.72	861973.40	333784.28
25	2961.88	34046.00	29177.60	896019.40	330822.40
26	3264.00	33743.88	32441.60	929763.28	327558.40
27	3596.92	33410.96	36038.52	963174.24	323961.48
28	3963.81	33044.07	40002.33	996218.31	319997.67
29	4368.12	32639.76	44370.45	1028858.07	315629.55
30	4813.67	32194.21	49184.12	1061052.28	310815.88
31	5304.66	31703.22	54488.78	1092755.50	305511.22
32	5845.74	31162.14	60334.52	1123917.64	299665.48
33	6442.00	30565.88	66776.52	1154483.52	293223.48
34	7099.09	29908.79	73875.61	1184392.31	286124.39
35	7823.19	29184.69	81698.80	1213577.00	278301.20
36	8621.16	28386.72	90319.96	1241963.72	269680.04

37	9500.52	27507.36	99820.48	1269471.08	260179.52
38	10469.57	26538.31	110290.05	1296009.39	249709.95
39	11537.47	25470.41	121827.52	1321479.80	238172.48
40	12714.29	24293.59	134541.81	1345773.39	225458.19
41	14011.14	22996.74	148552.95	1368770.13	211447.05
42	15440.28	21567.60	163993.23	1390337.73	196006.77
43	17015.19	19992.69	181008.42	1410330.42	178991.58
44	18750.74	18257.14	199759.16	1428587.56	160240.84
45	20663.31	16344.57	220422.47	1444932.13	139577.53
46	22770.97	14236.91	243193.44	1459169.04	116806.56
47	25093.61	11914.27	268287.05	1471083.31	91712.95
48	27653.16	9354.72	295940.21	1480438.03	64059.79
49	30473.78	6534.10	326413.99	1486972.13	33586.01
50	* 33586.01	3425.77	360000.00	1490397.90	-0.00

*The final payment has been adjusted to account for payments having been rounded to the nearest cent.