



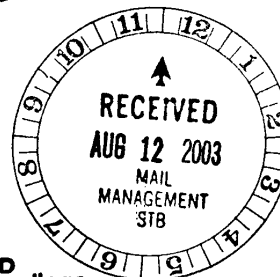
Frank J. Reed, Jr.
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August 8, 2003

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

Re: Docket No. AB-55 (Sub-No. ^{631X}~~361X~~), CSX Transportation, Inc. – Abandonment
Exemption – in Summit County, Ohio

Dear Sir:

I am enclosing an original and ten (10) copies of a Reply Memo in Support of the Petition to Revoke CSX's Notice of Exemption from Abandonment Procedures Based Upon False and/or Misleading Information for filing in the above-referenced proceeding. An additional copy is enclosed for date stamp and return to our office. I have enclosed a self-addressed, stamped envelope for your convenience.

If you have any questions or need any additional information, please do not hesitate to contact me.

Very truly yours,


Frank J. Reed, Jr.

FJR/mja

Enclosures

Cleveland: 2300 BP Tower ► 200 Public Square ► Cleveland, Ohio 44114-2378 ► Phone: (216) 363-4500 ► Fax: (216) 363-4588
Columbus: 88 East Broad Street ► Suite 900 ► Columbus, Ohio 43215-3506 ► Phone: (614) 223-9300 ► Fax: (614) 223-9330

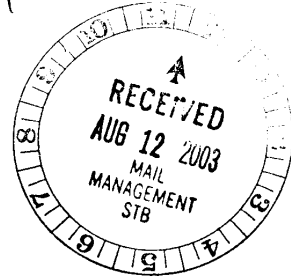
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BEFORE THE
SURFACE TRANSPORTATION BOARD

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

CSX TRANSPORTATION, INC. -
ABANDONMENT EXEMPTION -
IN SUMMIT COUNTY, OHIO



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REPLY MEMO IN SUPPORT OF THE
PETITION TO REVOKE CSX'S NOTICE OF EXEMPTION FROM ABANDONMENT
PROCEDURES BASED UPON FALSE AND/OR MISLEADING INFORMATION

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Frank J. Reed, Jr. (Ohio Atty. Reg. No. 0055234)
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Counsel for Petitioner Terminal Warehouse, Inc.

Dated: August 8, 2003

A. Introduction

The sole issue before this Board is whether or not CSX's Notice of Exemption contained false and/or misleading information such that the original Notice granting CSX permission to be exempt from the normal rail abandonment procedures be immediately revoked.

CSX has tried to confuse and avoid this sole issue. In reality, CSX does not deny that it failed to notify the various governmental entities and this Board of the true facts which give rise to its notice. CSX failed to disclose that the bridge had been damaged, embargoed the rail line, and then removed the bridge. CSX failed to disclose that therefore the two-year period in which no local traffic crossed this line was not because there was a lack of demand. The true reason no traffic crossed this line was because the rail line and bridge had been removed as of February 11, 2002, 13 months prior to the application for Exemption.

B. Legal Argument

First, it is undeniable that at some point (either in 2001 or 2002), this bridge suffered damage. What is not clear, however, is whether or not the bridge was damaged beyond repair. CSX offers no expert testimony on the extent of damage, nor the estimated costs to repair the bridge. Further, it seems clear that any costs to repair the bridge would have been covered by AT&T, and CSX would not be out of pocket any costs whatsoever. But, CSX ignores these facts and tries to persuade this Board that the bridge was damaged "beyond repair." After admitting CSX removed the bridge, CSX later suggests in a footnote that the bridge "collapsed."

Another important fact that CSX ignores is contained in the first two-page Exhibit that CSX attached to its response. This is a facsimile memo from City of Akron Engineer Stephen Dubetz to CSX Engineer Bill Loar. The very last line of this memo references a "proposed drawing for a switch location that would make [replacement of] the bridge unnecessary." Thus, it is clear CSX is trying to avoid the issue of the reasonable cost to restore rail service.

Terminal Warehouse believes that if this Board permits discovery in this matter, the evidence will show that the cost to install this switch will be a modest amount, perhaps \$60,000, a cost which AT&T has probably already paid to CSX when it damaged the bridge.

CSX makes reference in its response to one of its employees, Jim Scott. But mysteriously, CSX fails to submit a verified statement from Mr. Scott. Instead, CSX tries to introduce evidence of what Mr. Scott said by the double-hearsay statements of Heidi Bash. And, not surprisingly, CSX's version of the facts are quite different than the Petitioner's.

CSX next argues that during the first two weeks of June, 2002, the bridge was removed "because it was too unstable." CSX then claims that Mr. Scott verbally "notified Terminal Warehouse" (although Ms. Bash's verified statement does not identify who) before the bridge was removed. Bill Hanlon's affidavit states that in fact what happened is that Mr. Scott did not advise Mr. Hanlon about the damage to the bridge until several weeks after the damage had occurred. Further, Mr. Hanlon states that no one notified Terminal Warehouse about the plan to remove the bridge, and it was not until Mr. Hanlon drove his own vehicle down Eastwood Avenue and saw for himself what had happened that he had any knowledge of removal of this bridge.

Even more mysteriously, CSX did not "embargo" the bridge until August 2, 2002 (two months after the bridge had already been removed, and 6 months after the bridge was supposedly damaged beyond repair). As a significant shipper who regularly used this rail line, Terminal Warehouse has the right (and reserves the right at perhaps some point in the future) to file a complaint alleging that this embargo was illegal. However, the present petition to revoke the exemption is focused on whether or not the petition failed to mention the rail damage, removal of

the bridge, and subsequent embargo. CSX's failure to include these critical facts was obviously false and misleading.

CSX implies that Terminal Warehouse's only remedy under *Exemption of Out of Service Rail Lines*, 366 I.C.C. 885 (1983) is to file a complaint with this Board alleging that CSX engaged in an illegal embargo. CSX would like this Board to ignore the false and misleading information that CSX submitted to this Board in support of its notice of exemption. The reason is simple. CSX does not want to have to answer objections from Terminal Warehouse or other shippers about the shippers' past and future use of this particular line. (See Affidavit from B & F Polymers; Exhibit attached and labeled "C"). Further, CSX does not seem to care to meet its obligation to provide reasonable transportation service upon request. CSX is convinced that operation of this line is not profitable, and simply wants this Board to ignore the false and misleading information it submitted in order to get exemption from the normal abandonment procedures.

To further advance this argument, CSX tries to discount the fact that Terminal Warehouse has lost business as a result of the embargo and proposed abandonment of this rail line. CSX argues that there is a difference between "being asked to bid on business, and being tendered the business." This is nonsense. Terminal Warehouse lost business. We do not honestly know how much business Terminal Warehouse lost. It is possible that shippers learned that this line was subject to an embargo or saw that CSX had filed a notice of embargo with the American Railroad Association and therefore sent their shipping/warehouse business needs to other locations. But, we do not even need to speculate. Terminal Warehouse submitted documentary evidence of two separate shippers who wanted to ship goods to Terminal

Warehouse by rail, but were refused service because of CSX's actions and failure to timely repair the line.

The fact that Terminal Warehouse did not submit an official request to CSX for rail service on these two occasions does not cure the fact that CSX's notice contained false and misleading information.

What is perhaps most disconcerting is that CSX attempts to argue that this Board does not have jurisdiction to hear a petition to revoke the Exemption unless there is material error, new evidence or substantially changed circumstances. This is simply not an accurate statement of the law. As submitted in our original petition, this Board has jurisdiction to revoke the exemption where the notice contained false or misleading information. If the notice of exemption contains false or misleading information, the use of the exemption is void *ab initio* and the Board shall summarily reject the exemption notice. 49 CFR 1152.50(d)(3).

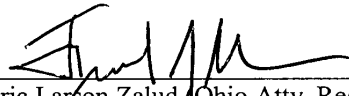
Terminal Warehouse, Inc. employs 69 people and has operated its Home Avenue facility since approximately 1989. Company records indicate that the facility has received regular railroad traffic for several years, at least since the mid-1960's. This Board must consider whether the abandonment or discontinuance will have a "serious, adverse impact on rural and community development." 49 U.S.C. 10903(d). Terminal Warehouse and its customer shippers have been harmed and will continue to suffer harm if this rail abandonment is not revoked by this Board, and rail service is not eventually restored.

Once a rail line is allowed to be abandoned and removed, chances are it will never be replaced. For the most part from 1920 until 1976, Congress set no limits for rail abandonments. United States Supreme Court Justice William Brennan remarked, "In 1920, the Nation's railway system reached its peak of 272,000 miles; [in 1990] only about 141,000 miles [were] in use, and

experts predict that 3,000 miles will be abandoned every year through the end of this century [1900-1999].” *Preseault v. ICC* (1990), 494 U.S. 1, 110 S.Ct. 914. Justice Brennan’s predictions have proven true. This Board should not ignore its duty to revoke exemptions when it is warranted.

For all these reasons, Petitioner respectfully requests that this Board declare that the Notice of Exemption contains false and/or misleading information, declare use of the exemption void *ab initio*, and summarily reject the exemption notice pursuant to 49 CFR 1152.50(d)(3). Moreover, under 49 U.S.C. 10502(d), Petitioner requests that the Board find that the continued existence of this line is necessary to carry out the rail transportation policy set forth in 49 U.S. 10101, and therefore immediately revoke the exemption.

Respectfully submitted,



Eric Larson Zalud (Ohio Atty. Reg. No. 0038959)

Frank J. Reed, Jr. (Ohio Atty. Reg. No. 0055234)

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Counsel for Petitioner Terminal Warehouse, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by ordinary U.S. mail, postage prepaid, this 8th day of August, 2003, upon the following:

Louis E. Gitomer
Ball Janik LLP
1455 F Street, N.W., Suite 225
Washington, D.C. 20005

Natalie S. Rosenberg
CSX Transportation
Law Department
500 Water Street (J150)
Jacksonville, FL 32202

Attorneys for Respondent



Frank J. Reed, Jr.

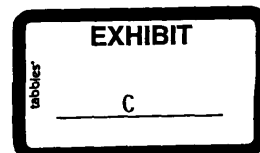
AFFIDAVIT

State of Ohio

Summit County, SS:

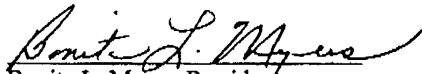
Now comes Bonita L. Myers, President and owner of B & F Polymers, who after being duly sworn according to law, deposes and states the following from her personal information and belief.

1. I, Bonita L. Myers, am the President and owner of B & F Polymers, a broker and distributor of formulated polymers. The company headquarters is located at 1907 Brookwood Drive Akron, Ohio 44313.
2. Our company has had a business relationship with Terminal Warehouse, Inc. for the last several years.
3. In approximately November, 1999, the B & F Polymers Company entered into a monthly contract with Terminal Warehouse. The contract called for the temporary storage of two rail "hopper" cars, owned by B & F Polymers, to be placed on the rail siding owned by Terminal Warehouse. The rail siding is adjacent to the East side of the Home Avenue facility, and runs parallel to the rail spur extending from the Eastwood Avenue trestle.
4. Our company regularly receives shipments of raw product transported by rail car.
5. Our company normally receives approximately one rail car of product every other month. The raw product is usually polyethylene plastic pellets, and is delivered in what is known as a "hopper" rail car.
6. It had always been our company's plan to deliver this product by rail car directly to Terminal Warehouse, and temporarily store the product in one of our two rail cars located on the siding owned by Terminal Warehouse until the customer is ready to accept delivery.
7. One rail car holds approximately four truckloads of product. Based upon my experience, we believe it more efficient and less expensive to deliver this product by rail than by truck.
8. At some point, I learned that the only rail access to Terminal Warehouse had been damaged, and that rail cars could not travel to Terminal Warehouse.
9. As such, our company could only ship to other warehouses in the Akron area. Currently, our shipment is delivered to a warehouse in Akron, Ohio known as Cotter Merchandise Storage Company of Ohio located at 1564 Firestone Parkway, Akron, Ohio, 44301.

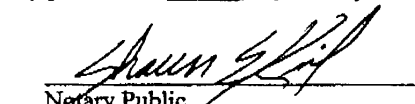


10. Once the shipment of raw product arrives by hopper rail car, our company hires a "hopper" tractor-trailer to unload the product, and then deliver the raw product to the two rail cars currently located on the siding adjacent to the track that CSX proposes to abandon. This method of delivery is more expensive than if we could ship our product directly by rail car to Terminal Warehouse.
11. Once I learned that the Eastwood Avenue bridge/rail trestle had been damaged, and then removed, my company lost any ability to deliver raw product by train car to our rail cars. Furthermore, we lost the ability to move our rail cars for the purposes of the transportation of goods.
12. If the rail line is permitted to be abandoned, neither B & F Polymers nor Terminal Warehouse will ever have the ability to move or otherwise use these two hopper cars for anything other than perpetual storage.
13. Terminal Warehouse and B & F Polymers has utilized rail traffic for several years. B & F Polymers and Terminal Warehouse and our customer shippers have been harmed and will continue to suffer harm if this rail abandonment is not revoked by this Board, and rail service is not eventually restored.
14. As such, B & F Polymers joins Terminal Warehouse and respectfully requests that the Surface Transportation Board declare that the Notice of Exemption contains false and/or misleading information, declare use of the exemption void *ab initio*, and summarily reject the exemption.

Further, Affiant sayeth naught.


Bonita L. Myers, President
B & F Polymers, Inc.

Sworn to and subscribed before me, a notary public, this 5 day of August, 2003.


Notary Public



SHAUN E. KIEL
Resident Summit County
Notary Public, State of Ohio
My Commission Expires April 6, 2008