

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

August 25, 2003

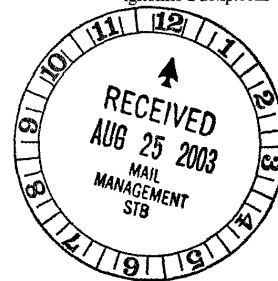
ENTERED
Office of Proceedings

AUG 25 2003

Part of
Public Record

208774

lgitomer@dc.lp.com



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

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. 631X), *CSX Transportation, Inc.—Abandonment Exemption—in Summit County, OH*

Dear Secretary Williams:

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

Please time and date stamp the additional copy of this letter and the Motion to Strike, 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

208774

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-55 (Sub-No. 631X)

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



MOTION TO STRIKE REPLY MEMO OR IN THE ALTERNATIVE PERMIT A
SUBSTANTIVE RESPONSE

ENTERED
Office of Proceedings

AUG 25 2003

Part of
Public Record

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: August 25, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-55 (Sub-No. 631X)

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



MOTION TO STRIKE REPLY MEMO OR IN THE ALTERNATIVE PERMIT A
SUBSTANTIVE RESPONSE

CSX Transportation, Inc. ("CSXT") files this Motion to Strike the Reply Memo with the Surface Transportation Board (the "Board"). In the alternative, CSXT seeks permission to respond. On August 12, 2003, Terminal Warehouse, Inc. ("Terminal") filed a Reply Memo (the "Reply Memo"). CSXT respectfully moves to strike the Reply Memo because a reply to a reply is not permitted under 49 C.F.R. § 1104.13(c).

BACKGROUND

The facts of this proceeding are set forth in CSXT's Response to Petition to Revoke filed on July 28, 2003 (the "Response"). CSXT adopts those facts here and will only recount the procedural history of this proceeding.

CSXT filed a Notice of Exemption under 49 C.F.R. 1152 Subpart F on March 26, 2003 (the "Notice") in order to abandon a 0.07-mile line of railroad known as the Lumber Lead between former Conrail mileposts 11.49 and 11.56, in Summit County, OH (the "Line").

In preparing to file the Notice, CSXT published a notice in The Akron Beacon Journal on March 14, 2003 pursuant to 49 C.F.R. § 1105.12. After the Notice was filed, the Board notified the public that CSXT had filed the Notice and that the Notice would become effective on May

15, 2003. *CSX Transportation, Inc.—Abandonment Exemption—in Summit County, OH*, STB Docket No. AB-55 (Sub-No. 631X) (STB served April 15, 2003) and 68 Fed. Reg. 18327-18328 (April 15, 2003). No pleadings in response to the newspaper notice or the Board’s notice were received by CSXT or filed with the Board.

Accordingly, the Notice became effective on May 15, 2003, and CSXT consummated the abandonment of the Line on May 23, 2003. A letter confirming CSXT’s consummation of the abandonment was filed with the Board on May 27, 2003.

On July 8, 2003, Terminal filed a self-styled Petition to Revoke (the “Petition”). Separately, a Request for Oral Argument and a Notice to Commence Discovery were filed on July 23, 2003. CSXT replied to all three pleadings on July 28, 2003.

ARGUMENT

1. CSXT respectfully requests the Board to reject the Reply Memo.

The Board has developed procedures to provide due process to the parties who come before it, to expedite the processing of its docket, and to efficiently complete the development of the record in ongoing proceedings. A key to preventing parties from continually filing pleadings is the rule that does not permit the filing of a reply to a reply. 49 C.F.R. § 1104.13(c). CSXT replied to Terminal’s Petition and other pleadings, and the record before the Board was complete. In CSXT’s view the record is compelling that Terminal did not justify rejection or revocation of the Notice.

To CSXT, it appears that Terminal is again arguing the same issues it argued in the Petition and is attempting to introduce evidence (the affidavit of Ms. Bonita L. Myers of B & F Polymers, Inc. (“B&F”) available to Terminal when the Petition was filed, but that Terminal chose not to file. Terminal provides no justification for its violation of the Board’s rules.

Having sat on its rights for almost three months from April 15, 2003, when the Notice was published in the Federal Register, until July 8, 2003, when Terminal filed the Petition, Terminal clearly had time to marshal all of the facts and arguments necessary to address the salient issues in this proceeding. Terminal does not appear satisfied with controlling the timing of this proceeding. Terminal obviously has decided that it did not make all of the arguments it had available or present all of the facts available, and now has filed the impermissible Reply Memo. Although in CSXT's view, Terminal is not making any new arguments or presenting any new facts, but merely repackaging the inadequate and irrelevant arguments from the Petition. Therefore, CSXT respectfully urges the Board to reject the Reply Memo under 49 C.F.R. § 1104.13(c).

2. CSXT respectfully requests leave to reply to the Reply Memo.

If the Board decides not to reject the Reply Memo, CSXT respectfully requests that the Board accept and consider the following response to the Reply Memo.

CSXT agrees with Terminal that the issue in this proceeding is whether the Notice contained false or misleading information. But that is the end of CSXT's agreement with Terminal. Omitting to tell the Board that the Line was embargoed did not violate the Notice of Exemption Rules and was not false and misleading. The Notice of Exemption Rules do not require a railroad to advise the Board whether a rail line has been embargoed.

There is no question that CSXT complied with the rules at 49 C.F.R. § 1152.50 (the "Notice of Exemption Rules") when it filed the Notice. CSXT complied with the notification requirements of 49 C.F.R. § 1152.50(d)(1) and 49 C.F.R. § 1105.7(b), .11, and .12. The Notice contained the certification required by 49 C.F.R. § 1152.50(b). The Notice also contained the information required by 49 C.F.R. § 1152.50(d)(2), which includes the name of the applicant,

whether the applicant is a common carrier, the relief sought, a detailed map, information concerning CSXT's representative, a list of the zip codes the Line passes through, a statement of whether the property is available for public use and any restrictions on the title to the property, the level of labor protection, and certifications of compliance with the notice requirements. All of that information is in the Notice, and Terminal has not pointed to one inaccuracy in that information.

Terminal complains that CSXT did not tell the Board that the bridge on the Line had been removed and that the Line was embargoed. CSXT again refers the Board to the Notice of Exemption Rules, which do not require such information.

As CSXT has stated before, the Board must determine whether CSXT's certification that no traffic had moved over the Line for two years was accurate. All of the evidence indicates that no traffic moved over the Line after January 2001. Terminal has presented no evidence to the contrary. After January 2001 no traffic moved over the Line and no request for rail transportation service over the Line was made to CSXT. It is also incontrovertible that no complaint was filed with the Board or a court of competent jurisdiction alleging a failure by CSXT to provide service. Terminal does not raise, much less dispute these critical facts, and so its request for relief must fail.

Terminal contends that the Board must weigh the reasonable cost of repairing or rebuilding the bridge. Terminal is wrong. Under the Notice of Exemption Rules, the Board is not seeking such information. The cost of repairs is not relevant so long as there was no traffic on the Line.

Terminal wrongly contends that CSXT had an obligation to restore rail service. There was no rail service to restore. There had been no request for rail service since January 2001.

CSXT had an obligation to provide rail service upon reasonable request. There was no request, reasonable or not. Terminal and B&F did not use or request rail service after January 2001. There is no evidence of a request to CSXT for rail service over the Line after January 2001 before the abandonment of the Line was consummated. Regardless of cost to repair the bridge, CSXT would violate several provisions of the rail transportation policy (49 U.S.C. § 10101(5, 8, and 9) if it repaired a bridge where CSXT did not expect any traffic, much less cover the cost of repairs. CSXT believes that the Board will not require a railroad invest in bridge repair where the railroad cannot earn a reasonable return on the investment. “Rehabilitation and replacement of the ... bridge would require an expenditure that cannot be justified by limited and speculative future profitability.” *CSX Transportation, Inc.—Discontinuance—at Memphis, in Shelby County, TN*, STB Docket No. AB-55 (Sub-No. 618) (STB served October 28, 2002), at 9.

Terminal argues that CSXT must spend \$60,000 to build a switch connection to serve Terminal. CSXT has no obligation to provide rail service where is no demand for rail service, as is the case here. CSXT would consider constructing a switch if Terminal and B&F were willing to guarantee a certain level of traffic or enter a take or pay contract to cover operating costs and the cost of construction.

Terminal urges the Board to ignore the verified statement of Ms. Bash as double-hearsay. But Terminal never says that Ms. Bash is wrong. Ms. Bash is responsible for CSXT’s plant rationalization program in Ohio, and in that capacity, Mr. Scott reported the events to Ms. Bash in the normal course of business. Ms. Bash and Mr. Scott are not the parties here. The party is CSXT and Ms. Bash and Mr. Scott are CSXT employees.

Terminal parses words and uses innuendo to claim that because Ms. Bash did not identify the Terminal employee Mr. Scott notified of the bridge damage, Mr. Hanlon, and by implication

Terminal, never received notification. CSXT had no obligation to notify Terminal of the bridge damage or CSXT's plans for the bridge. Terminal does not deny that it was notified. Moreover, since the bridge was not being used, any delay in a voluntary notice to Terminal is also irrelevant. CSXT had no obligation to notify Terminal of the bridge removal.

Terminal is wrong in claiming that it is a "significant shipper." Indeed, Terminal would be wrong even claiming to be a shipper. The Board defines a significant user of a rail line as a rail patron that originated and/or received traffic during the 12-month period preceding the abandonment filing. 49 C.F.R. § 1152.2(l). Terminal is not the shipper; B&F is the shipper. In numbered paragraph four of B&F's affidavit attached to the Reply Memo, B&F states that "Our company regularly receives shipments of raw product transported by rail car." Terminal has definitely not requested rail service since January 2001. It is not a shipper.

Terminal attempts to make much of CSXT's delay in issuing an embargo. The timing of the embargo was at CSXT's discretion and risk. Since there had been no request for service for over one year prior to the bridge being damaged, there apparently was no rush to issue an embargo.

Terminal makes the bizarre argument that CSXT claims Terminal's only remedy is to now file a complaint. Terminal completely misread CSXT's argument and *Exemption of Out of Service Rail Lines*, 366 I.C.C. 885 (1983). CSXT's point was that if Terminal had required rail service after the bridge was damaged, which it did not, and if Terminal had been diligent, which it was not, Terminal could have filed a timely complaint about CSXT's failure of service, which it did not. Had Terminal succeeded in its complaint, CSXT would not have been able to use the Notice of Exemption Rules. But Terminal did not file a complaint, Terminal was not diligent. Terminal did nothing formally until after CSXT consummated the abandonment. CSXT did not

suggest that Terminal complain now, merely that a diligent party who actively used rail service had a remedy.¹

In another irrelevant argument, Terminal claims that it has lost business, although Terminal admits that it is unable to quantify its losses. Terminal also claims that making a bid for business guarantees winning the business. CSXT cannot believe that Terminal is that naïve. Nor does CSXT believe that Terminal would want the business if it had to absorb transportation charges and lose money. CSXT never refused to provide service to Terminal. Terminal never requested service after January 2001. There can be no denial of service if there is no request for service, and Terminal exerted no efforts that could be the equivalent of a request for rail service. *Overbrook Farmers Union-Petition for Declar. Order*, 5 I.C.C.2d 316, 325 (1989). Terminal never even asked CSXT for a rate quote, much less service. The Board has refused to “find that one rate quote provided to a previously inactive shipper amounts to a refusal to provide service.” *Consolidated Rail Corporation—Abandonment Exemption—in Erie County, NY*, STB Docket No. AB-167 (Sub-No. 164X) (STB served October 7, 1998), at 10.

In arguing that it does not have to show material error, new evidence or substantially changed circumstances, Terminal is running away from its own self-styled Petition to Revoke. Terminal seems to have lost track of the relief it is seeking. Petition, page 9. Terminal is confusing the remedies of rejection and revocation. Terminal seeks to have the Notice rejected because it contains false or misleading information. In the alternative, Terminal seeks to have the Notice revoked for failing to comply with the rail transportation policy. Where a party seeks revocation of an effective exemption the Board requires revocation to be supported by material

¹ CSXT believes that even if Terminal filed a complaint, it would not have prevailed because there was no demand for service over the Line.

error, new evidence or substantially changed circumstances. *Track Tech, Inc.--Abandonment Exemption—in Adair and Union Counties, IA*, STB Docket No. AB-493 (Sub-No. 7X) (STB served November 1, 1999).

Terminal claims that the Board must consider the impact of the abandonment on rural and community development under 49 U.S.C. § 10903(d). Terminal misses the point that an abandonment under the Notice of Exemption Rules “is exempt from the provisions of 49 U.S.C. 10903.” 49 C.F.R. § 1152.50(a)(1). Terminal would have to justify the revocation of the exemption, which it has not even tried to do, in order for the Board to consider rural and community development under 49 U.S.C. § 10903(d).

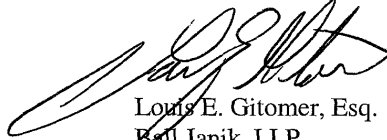
The Notice of Exemption Rules do not require acknowledgement of an embargo. The overriding fact, which is unchallenged by Terminal, is that there had been no rail service or demand for rail service for at least two years prior to the filing of the notice by CSXT.

In summary, the Notice complied with rules, the Line was out of service for at least two years before the Notice was filed, the Notice was not false and misleading, the unchallenged embargo was lawful, and Terminal has not used or requested rail service no more recently than January 2001.

CONCLUSION

CSXT respectfully requests the Board to reject the reply to reply filed by Terminal. In the alternative, CSXT requests the Board to accept its reply to Terminal. Finally, CSXT respectfully requests the Board deny all relief sought by Terminal.

Respectfully submitted,



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

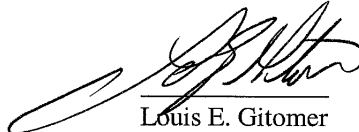
Attorneys for: CSX TRANSPORTATION,
INC.

Dated: August 25, 2003

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Motion in Docket No. AB-55 (Sub-No. 631X),
CSX Transportation, Inc.—Abandonment Exemption—in Summit County, OH was sent via
overnight delivery to:

Frank J. Reed, Jr., Esq.
88 East Broad Street, Suite 900
Columbus, OH 43215



Louis E. Gitomer
August 25, 2003