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September 16, 2003

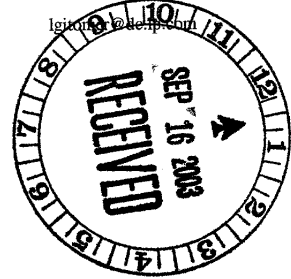
LOUIS E. GITOMER  
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Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Room 700  
Washington, D. C. 20423

**ENTERED**  
**Office of Proceedings**

**SEP 16 2003**

**Part of  
Public Record**



**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,

A handwritten signature in black ink, appearing to read "Louis E. Gitomer".

Louis E. Gitomer  
Attorney for CSX Transportation, Inc.

Enclosures

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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

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

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MOTION TO STRIKE SUPPLEMENTAL VERIFIED STATEMENTS OR IN THE  
ALTERNATIVE PERMIT A SUBSTANTIVE RESPONSE

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**Public Record**

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Attorneys for: CSX TRANSPORTATION,  
INC.

Dated: September 16, 2003

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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

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

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MOTION TO STRIKE SUPPLEMENTAL VERIFIED STATEMENTS OR IN THE  
ALTERNATIVE PERMIT A SUBSTANTIVE RESPONSE

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CSX Transportation, Inc. (“CSXT”) files this Motion to Strike the Supplemental Verified Statements with the Surface Transportation Board (the “Board”). In the alternative, CSXT seeks permission to respond. On September 11, 2003, Terminal Warehouse, Inc. (“Terminal”) filed Supplemental Verified Statements (the “Supplement”). CSXT respectfully moves to strike the Supplement under 49 C.F.R. § 1121.3(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”) and CSXT’s Motion to Strike Reply Memo or in the Alternative Permit a Substantive Response filed on August 25, 2003 (the “First Motion”). CSXT adopts those facts here and will briefly 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. 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. Terminal then filed a Reply Memo on August 12, 2003, to which CSXT replied with the First Motion.

### **ARGUMENT**

Now, again in violation of the Board’s rules, Terminal has filed the Supplement. The Supplement contains nothing new. The abandonment has been consummated. It is CSXT’s position that in light of the procedural posture of this proceeding, the presentation of documents in the Supplement that were available at the time Terminal filed the Petition, and the Board’s rules, that the Board should strike the Supplement. CSXT contends that the Board has adopted rules that all parties before it must comply with in order to foster efficient administrative proceedings, provide due process, and produce timely decisions. It is clear that Terminal has nothing new to add to the record and its serial pleading should not be allowed to continue.

Terminal has again violated the Board’s rules. “A party seeking revocation of ... a notice of exemption shall provide all of its supporting information at the time it files its petition.” 49

C.F.R. § 1121.3(c). In filing the Supplement over two months after the Petition, Terminal has violated this rule, and CSXT urges the Board to reject the Supplement.

The Supplement consists of two documents, an Affidavit by a Deputy Mayor of Akron, OH dated August 21, 2003 (the “Affidavit”), and a letter from the Ohio Rail Development Commission (“ORDC”) dated August 25, 2003 to the Board’s Secretary.

CSXT’s contends that the Affidavit could have and should have been filed with the Petition on July 8, 2003. The 15 paragraph Affidavit refers to 11 documents attached to the Affidavit, all of which are dated between February 3, 2003 and May 22, 2003, and draws its conclusions from those documents.

Terminal has not explained why the Affidavit and the documents attached to it could not have been filed with the Petition. The Affidavit could easily have been submitted in July. It makes no in-depth analysis. The Affidavit concludes, based only on a review of the documents attached to the Affidavit, that statements in the Environmental Report were misleading. The appropriate time to have raised concerns about the Environmental Report was on May 2, 2003, the date comments were due on the Environmental Assessment prepared by the Board’s Section of Environmental Analysis, not four months later.

The Affidavit also concludes that Terminal and its customers have been harmed and that CSXT should restore rail service at CSXT’s expense. A document notated Exhibit C is a copy of an email dated May 18, 2003 that fully supports CSXT, not Terminal when it states “the line ... was used last over 2 years ago deliveries to Akron’s Terminal Warehouse.” This statement fully supports CSXT’s position that it properly notified the Board that there had been no traffic over the Line for at least two years.

The other documents do not support Terminal's position. The last document by the Northeast Ohio Four County Regional Planning & Development Organization ("NEFCO") dated May 22, 2003, concedes that CSXT has abandoned the Line, and urges CSXT to communicate with affected property and business owners and consider reinstalling service from the north. NEFCO does not challenge the accuracy of the Notice, nor does NEFCO contend that the rail transportation policy requires revocation of the abandonment exemption. CSXT believes that Terminal is merely using the Affidavit as a device to introduce the 11 documents that were available to it when the Petition was filed. The Affidavit should have been available at the time the Petition was filed in light of the participation of the City of Akron's Mayor's Office of Economic Development in the earlier process with NEFCO. See Exhibit E to the Supplement. Since Mr. Phelps, the Director of the Mayor's Office of Economic Development, is the affiant, either he was, or should have been, aware of the Notice and been able to submit the Affidavit with the Petition.

It is also clear that CSXT took NEFCO's comments into account in preparing the Environmental Report from both the report and NEFCO's correspondence attached to the affidavit. If NEFCO thought its concerns were not being addressed, it should have submitted timely comments to the Environmental Assessment on May 2, 2003. It did not.

It also appears that the City of Akron has adopted inconsistent positions in this proceeding. As a result of the removal of the bridge over Eastwood Avenue, at CSXT expense, Akron was able to expand the width of Eastwood Avenue without incurring the expenses that it would have had to incur had the bridge remained in place. In the Supplement, the City of Akron is criticizing CSXT for removing the bridge. Akron is taking inconsistent positions in this proceeding by accepting the benefit of the bridge closing and then questioning the abandonment.

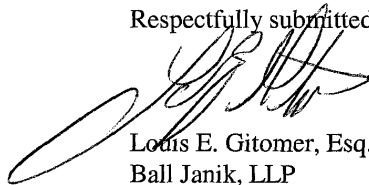
Even more egregious is Akron's claim that CSXT should pay to build a rail connection on a line where there has been no traffic for over two years. Akron was well aware of the bridge closing and at least tacitly concurred in the bridge removal. Akron was on actual notice of the bridge removal and if it was truly concerned about the effect on Terminal, could have acted in a timely manner to protect Terminal either before the Notice was filed or immediately after it was filed, not over five months later when the proceeding has ended and the abandonment been consummated.

The Affidavit is the only verified statement submitted by Terminal. The other document attached to the Supplement is the letter from ORDC, which is addressed to the Board and was presumably received by the Board. The ORDC letter is not verified. It does not address the content of the Notice. The ORDC letter also does not address whether the exemption should be revoked. It merely urges the Board to preserve "the rail corridor at issue for all present and future rail-dependent users." Again, Terminal has undercut its own position by the submission of ORDC's letter. As CSXT explained in the Response, Terminal is not rail dependent. A business that has not used rail service for over two years is not rail-dependent. Indeed, Terminal obviously does not even prefer rail transportation service to other transportation options.

## CONCLUSION

CSXT respectfully requests the Board to strike the Supplement filed by Terminal for violating 49 C.F.R. § 1121.3(c). In the alternative, CSXT requests the Board to accept its reply to Terminal, which demonstrates that the documents filed by Terminal support CSXT's position and are contrary to Terminal's arguments. Finally, CSXT respectfully requests the Board deny all relief sought by Terminal.

Respectfully submitted,



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Attorneys for: CSX TRANSPORTATION,  
INC.

Dated: September 16, 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

  
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Louis E. Gitomer  
September 16, 2003