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June 1, 2004

VIA FEDERAL EXPRESS

Timothy Cambridge
Surface Transportation Board
1925 K Street NW, Room 700
Washington, DC 20423-0001



Re: **NOR 42086-0**

Terminal Warehouse, Inc. v. CSX Transportation, Inc.

CSX Transportation, Inc.—Abandonment Exemption, Summit County, Ohio

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

211180

Dear Mr. Cambridge:

Enclosed please find a check in the amount of \$400.00 to cover the filing fees in the above-referenced matters.

Thank you for your assistance in this matter. Should you have any questions, please feel free to contact me at the above-listed number.

Very truly yours,

BENESCH, FRIEDLANDER,
COPLAN & ARONOFF LLP

Linda S. Lee, Paralegal

Enclosure

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**SURFACE
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STB Docket No. AB-55 (Sub-No. 631X)

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BEFORE THE
SURFACE TRANSPORTATION BOARD

TERMINAL WAREHOUSE, INC.

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

STB Docket No. 42086

211180

COMPLAINANT'S PETITION FOR RECONSIDERATION

FILED

JUN 02 2004

SURFACE
TRANSPORTATION BOARD

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Dated: 05/28/2004

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SURFACE
TRANSPORTATION BOARD

I. MOTION FOR RECONSIDERATION

Now comes Terminal Warehouse, Inc. ("Terminal Warehouse"), pursuant to 49 CFR § 1115.3, by and through the undersigned counsel, and submits this Petition for Reconsideration of the Surface Transportation Board's Decision in this matter served on May 12, 2004. Terminal Warehouse contends that the Board's action, as described below, involves material error making reconsideration appropriate pursuant to 49 CFR § 1115.3(b)(2).

II. INTRODUCTION

On May 10, 2004, for administrative convenience, the Surface Transportation Board ("Board") issued one decision ("Decision") in which it, *inter alia*, took the following action: (1) denied Terminal Warehouse's July 8, 2003 Petition to Revoke the exemption from the normal abandonment procedures previously granted to CSX Transportation Inc. ("CSXT") in Case No. AB-55 (Sub-No. 631X); (2) denied Terminal Warehouse's request to proceed with discovery in Case No. AB-55 (Sub-No. 631X); and (3) dismissed Terminal Warehouse's February 12, 2004 Complaint seeking damages and reinstitution of service over an unlawfully embargoed line in Case No. AB-55 (Sub-No. 631X). The Board's Decision was served on May 12, 2004.

The Board expressly noted that the two cases had not been consolidated, but that it was issuing one decision for administrative convenience. Accordingly, also for administrative convenience, Terminal Warehouse will address both cases in this Petition for Reconsideration. Because the cases have not been consolidated, however, Terminal Warehouse is separately filing this Petition for Reconsideration in both cases.

III. LAW AND ARGUMENT

A rail carrier may abandon or discontinue operation only if the Board concludes that the "present or future public convenience and necessity require or permit the abandonment or

discontinuance.” 49 U.S.C. § 10903(d). Congress has provided that a railroad may be exempt from the normal abandonment procedures if it certifies that it meets certain conditions. 49 U.S.C. § 10502. Under the exemption procedures, the rail carrier is not required to notify users of the line it proposes to abandon. In order to qualify for the exempt procedure, the rail carrier must certify, *inter alia*, that “no local traffic has moved over the line for at least two years” 49 CFR § 1152.50(b). If the notice of exemption contains false or misleading information, however, the carrier’s notice of an exempt abandonment void *ab initio*, and the Board is required to summarily reject the exemption notice. 49 CFR § 1152.50(d)(3). Moreover, the Board will revoke an exemption if the notice of an exempt abandonment contained false or misleading information, or if necessary to carry out the rail transportation policy set forth in 49 U.S. § 10101. 49 U.S.C. 10502(d); 49 CFR § 1152.50(d)(3).

A line is considered “out-of-service” when no traffic has originated or terminated on the line for at least two years. *Exempt of Out of Service Rail Lines*, 2 I.C.C.2d 146 (1986) (Exemption) *aff’d sub nom. Illinois Commerce Comm’n v. I.C.C.*, 848 F.2d 1246 (D.C.Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989). When it is shown that a carrier falsely certifies that no traffic moved on a line, the notice of exemption is declared void *ab initio* under 49 CFR 1150.50(d)(3). *See The St. Lois Southwestern Railway Company—Abandonment Exemption—In Gasconade, Maries, Osage, Miller, Cole, Morgan, Benton, Pettis, Henry, Johnson, Cass and Jackson Counties, MO*, Docket No. AB-39-(Sub-No. 18X), (ICC served April 1, 1994); *Southrail Corporation—Abandonment Exemption—Between Laurel and Bay Springs, MS, in Jones and Jasper Counties, MS*, Docket No. AB-301 (SubNo. 2X) (ICC served Jan. 27, 1989). A railroad cannot engage in an unlawful or unreasonable embargo of a line, and then simply

abandon a rail line. See *GS Roofing Products Co., Inc. v. Surface Transportation Board*, 143 F.3d 387 (1998) ("*GS Roofing I*").

In this case, the Board implicitly acknowledged that if CSXT unlawfully or unreasonably embargoed the Line for all or part of the two-year period, then its certification that no traffic has moved over the line for a period two years is false or misleading. Decision at 5. The Board, went, however, to rule that the embargo at issue herein was not illegal because no shipper had requested service over the line:

But unlike this case, in *GS Roofing I*, in which the court held that there was an illegal embargo, the shipper clearly wanted to ship, asked to ship, and was turned down by the carrier. Here—although it submitted testimony from a shipper that wanted to use the Line, but apparently stopped doing so several months *before* the bridge went out of service—the record does not show that any shipper requested service from CSXT during the 2-year out-of-service period. Any inquiry about CSXT's duty to repair the Line would have to be predicated upon CSXT's having received a reasonable request for service. * * *

Petitioner points out that CSXT did not issue the embargo until August 2, 2002, which was 2 months after the Bridge had been removed and 6 months after it was allegedly damaged beyond repair. But it appears that there was no rush to issue an embargo because there had been no request for service for more than a year prior to the damage to the Bridge.

Id. (emphasis in original).

Significantly, however, the Board overlooks the Affidavit of William K. Hanlon ("Hanlon"), which was submitted with Terminal Warehouse's Petition to Revoke. In that Affidavit, Hanlon stated:

16. In approximately September, 2001, I had a telephone conversation with Jim Scott who is the yardmaster for CSX Transportation. Mr. Scott's office is located at 479 N. Arlington Street, Akron, Ohio 44305.

17. Mr. Scott informed me that earlier in the summer, AT & T had been installing a cable along the rail line right-of-way and damaged the rail trestle owned and operated by CSX. The rail trestle passes over Eastwood Avenue near the intersection of Eastwood and Home Avenues in Akron, Ohio.

18. Mr. Scott informed me that CSX had declared this rail line corridor unsafe, due to the damage, and would likely repair the rail line.

Hanlon Affidavit at 2-3, ¶¶ 16-18 (emphasis added).

Thus, Terminal Warehouse established that CSXT advised Hanlon that the line would be repaired, a representation upon which Hanlon relied. Because Hanlon knew he could not accept rail freight until it was repaired, which might take some time, he did not tender any such freight, but rather advised proposed customers that Terminal Warehouse's "Home Avenue facility was *temporarily* without rail service." Hanlon Affidavit at 4, ¶¶ 29 & 30 (emphasis added). He fully expected that the rail line would be repaired and service fully restored after a reasonable length of time. He did not know, and had no reason to know, that, in order to protect the return of rail service, he and his customers had to go through the useless exercise of tendering freight to the railroad that everyone knew the railroad could not handle.

Furthermore, because CSXT failed to notify Terminal Warehouse that the bridge had been removed, or that CSXT had filed a Notice of Exemption to abandon the line, Hanlon Affidavit at 3, ¶¶ 22, 25, Terminal Warehouse was unaware that CSXT intended to abandon the line until after the process was over. Hanlon Affidavit at 3, ¶ 25.

In failing to address this portion of Hanlon's Affidavit, the Board committed a material error by ignoring facts in favor of Terminal Warehouse that supported claims for relief contained in both its Petition to Revoke and in its Complaint—both of which involve this inquiry into the "request for service" that the Board considers so central to the resolution of those claims.

The Board compounded this error by denying Terminal Warehouse's request for discovery in the revocation case, and by dismissing its separate Complaint just as the parties were proceeding with discovery pursuant to an agreed proposed procedural schedule. This discovery would likely provided Terminal Warehouse with additional factual evidence to support

its contentions. This ruling deprived Terminal Warehouse of the opportunity to develop facts supporting its claims and to show that CSXT acted improperly, and perhaps fraudulently, with respect to the abandonment proceedings and its dealing with Terminal Warehouse. Terminal Warehouse is entitled to the opportunity to show that it did not tender freight or otherwise request rail service over the line because Hanlon reasonably relied on his conversation with Scott indicating that the railroad intended to fix the line. Evidence obtained through discovery may very well establish that CSXT always intended to remove the line and that it, in fact, had no interest in engaging in the necessary repairs.

Terminal Warehouse, a viable small business employing 69 individuals, Hanlon Affidavit, 1, ¶¶ 2-3, established in its Petition for Revocation and the evidence submitted therewith, that it lost business as a result of the illegal embargo the Line, Hanlon Affidavit at 3-4, ¶¶ 28-30, which provides exclusive rail access to Terminal Warehouse's Home Road facility. Hanlon Affidavit at 3, ¶ 27. It will continue to lose business unless and until service is properly restored on the Line.

IV. CONCLUSION

For all these reasons, Terminal Warehouse respectfully requests the Board reconsider its Decision, served on May 12, 2004, on the basis that the prior action involves material error.

Respectfully submitted,



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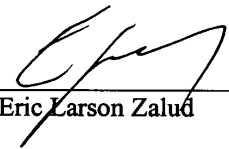
Counsel for Petitioner Terminal Warehouse, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by prepaid overnight delivery service this 28th day of May, 2004, upon the following:

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

Attorney for Respondent


Eric Larson Zalud