

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-1010

CSX TRANSPORTATION, INC.–ADVERSE ABANDONMENT–
IN SHELBY COUNTY, TN

RESPONSE TO PETITION FOR RECONSIDERATION

Steven C. Armbrust, Esq.
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
(904) 359-1229

Attorney for: CSX TRANSPORTATION, INC.

Dated: November 19, 2007

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CSX Transportation, Inc. (“CSXT”) responds to the Petition for Reconsideration filed on October 30, 2007 (the “Petition”) by the Memphis Community Connector (the “MCC”). CSXT opposes MCC’s request that the Surface Transportation Board (the “Board”) reconsider its denial of a waiver of the requirements of 49 C.F.R. §1152.22(b) that an applicant for abandonment describe the condition of the railroad properties.

BACKGROUND

MCC is proposing to file an adverse abandonment application seeking to force CSXT to abandon a 13.44-mile line of railroad that it owns known as the Memphis to Cordova Branch, extending from railroad milepost ONI 224.00 near Memphis, TN to railroad milepost ONI 210.66 near Cordova, in Shelby County, TN, including the station of Cordova at milepost ONI 210.66 (the

“Line”). CSXT has already been granted authority to abandon the Line¹ and is negotiating for interim trail use/rail banking with MCC.²

MCC contends that the information on the condition of the property is not available to MCC, would require extensive discovery from CSXT, would be costly and time consuming, is not relevant because CSXT has been granted an exemption to abandon the Line, is contrary to precedent, and is not a predicate for MCC’s proposed abandonment. CSXT contends that MCC is wrong. MCC would bear the burden of proof in an adverse abandonment proceeding and would not be able to rely on the condition of the Line as a burden on CSXT or interstate commerce if it did not produce some evidence to that end.

Not only is MCC wrong, but MCC’s request is moot since CSXT has obtained authority to abandon the Line and is engaged in interim trail use/rail banking negotiations with MCC. MCC can obtain no further relief in the adverse abandonment proceeding. At this point, MCC’s continued prosecution of the proposed adverse abandonment is the most inefficient, expensive and time consuming activity involving the proposed abandonment of the Line, and CSXT contends that such activities should be discouraged.

ARGUMENT

CSXT will briefly respond to each of MCC’s contentions.

There is substantial information available as to the condition of the Line in the previous abandonment proceeding.³ Moreover, an inspection of the Line from the adjoining public property would lead to additional information.

¹ *CSX Transportation, Inc.–Abandonment Exemption–in Shelby County, TN*, STB Docket No. 55 (Sub-No. 684X) (STB served September 27, 2007).

² *CSX Transportation, Inc.–Abandonment Exemption–in Shelby County, TN*, STB Docket No. 55 (Sub-No. 684X) (STB served October 26, 2007).

An inspection of the Line would provide more information to MCC. MCC has not even asked CSXT if it would voluntarily permit an inspection, which CSXT has done in the past.⁴ Nor has MCC sought discovery from CSXT on the condition of the Line. It is MCC's inertia that has caused its own problem.

MCC contends that an inspection of the Line would be costly. But with all of the background information available, CSXT fails to see the great expense that MCC fears. Indeed, MCC did not quantify that expense. Because of the background material available and the length of the Line, it should take less than a day to inspect. Other costs in preparing the analysis could be limited by MCC's efficiency and resourcefulness. Hence, determining the physical condition of the Line should be less of a burden on MCC than prosecuting the moot adverse abandonment proceeding.

If the condition of the Line is not relevant because CSXT has been granted an exemption to abandon the Line, then the entire adverse abandonment proceeding proposed by MCC is not relevant because CSXT has been granted abandonment authority. However, if the proposed adverse abandonment is relevant, then the condition of the Line is relevant as to the burden and benefits to CSXT.

Requiring a party seeking adverse abandonment to provide information on the condition of the Line is not contrary to precedent -- only to the precedent that MCC cites. The Board has stated "[i]n appropriate instances, such as situations involving adverse applications, the Board, and its

³ *CSX Transportation, Inc.—Abandonment Exemption—(Between Memphis and Cordova) in Shelby County, TN*, STB Docket No. AB-55 (Sub-No. 590X) (STB served December 12, 2001); and *CSX Transportation, Inc.—Discontinuance—at Memphis, in Shelby County, TN*, STB Docket No. AB-55 (Sub-No. 618) (STB served October 28, 2002), reopening denied in decision served on May 15, 2003.

⁴ *Id.* At 6.

predecessor agency, the Interstate Commerce Commission, has waived inapplicable and unneeded portions of the abandonment regulations.⁵ There is no blanket waiver of Section 1152.22(b) as MCC suggests.

The Board's denial of the waiver of Section 1152.22(b) was not based on a materially incorrect assumption. The condition of the Line was a predicate for MCC's proposed adverse abandonment in the Petition for Waiver and Exemption (the "Waiver Petition"). In the Waiver Petition, MCC contended that the Line "is so degraded that a return of rail service along the line would entail extensive and costly rehabilitation" (Waiver Petition at 4) and "6 years of neglect have contributed to the degraded state of the line" (Waiver Petition at 8). At the same time that MCC made these allegations it claimed that it was a "third party applicant" and "is unable to provide any further description of the line condition" (Waiver Petition at 8) as justification for the waiver of 49 C.F.R. §1152.22(b). If MCC is going to use the condition of the Line as justification for the adverse abandonment, then MCC should be required to submit the evidence required by the regulations under section 1152.22(b). If MCC cannot submit evidence supporting its claims, in fairness, MCC should be precluded from raising the condition of the Line.

⁵ See *CSX Corporation and CSX Transportation, Inc. —Adverse Abandonment Application— Canadian National Railway Company and Grand Trunk Western Railroad Inc.*, STB Docket No. AB-31 (Sub-No. 38) (STB served March 2, 2002) at 2; *Chelsea Property Owners-Abandonment-Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY*, ICC Docket No. AB-167 (Sub-No. 1094) (ICC served July 19, 1989); *City of Rochelle, Illinois - Adverse Discontinuance - Rochelle Railroad Company*, STB Docket No. AB-549 (STB served June 5, 1998).

CONCLUSION

CSXT respectfully requests the Board to deny the Petition.

Respectfully submitted,



Steven C. Armbrust, Esq.
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
(904) 359-1229

Attorney for: CSX TRANSPORTATION, INC.

Dated: November 19, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have caused this Response to Petition for Reconsideration to be served by DHL overnight mail and via electronic mail on the following party of record to this proceeding.

Nicholas J. DiMichael
Thompson Hine LLP
1920 N Street, NW, Suite 800
Washington, DC 20036-1600

A handwritten signature in black ink, appearing to read 'Steven C. Armbrust', is written over a horizontal line.

Steven C. Armbrust
November 19, 2007