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VIA E-FILING

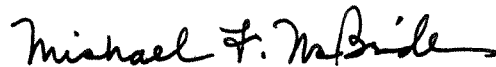
Mr. Vernon A. Williams, Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: *STB Finance Docket No. 33388 (Sub-No. 101);*
In re: CSX Transportation, Inc.

Dear Mr. Williams:

Enclosed for filing is the "Reply of Frank Vitale and Francis Vitale in Opposition to CSX Transportation, Inc.'s Motion for Leave to Reply, Reply and Motion for Procedural Schedule" filed December 11, 2007.

Respectfully submitted,



Michael F. McBride
Attorney for Frank Vitale and Francis Vitale

Enclosure

cc (w/encl.): Kim Bongiovanni, Esq.
Louis E. Gitomer, Esq.

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388 (Sub-No. 101)

*In re: CSX TRANSPORTATION, INC.
Petitioner.*

**REPLY OF FRANK VITALE AND FRANCIS VITALE
IN OPPOSITION TO CSXT'S MOTION FOR LEAVE TO FILE REPLY-TO-REPLY
AND IN OPPOSITION TO CSXT'S MOTION FOR PROCEDURAL SCHEDULE**

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SURFACE TRANSPORTATION BOARD

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AND IN OPPOSITION TO CSXT’S MOTION FOR PROCEDURAL SCHEDULE**

Respondents Frank Vitale and Francis Vitale (the “Vitales”) respectfully submit this Reply (a) in opposition to CSX Transportation, Inc.’s (“CSXT”) Motion for Leave to File a Reply to the Vitales’ Reply to the Petition (“Reply-to-Reply”), and (b) in opposition to CSXT’s Motion for Procedural Schedule (the “Discovery Motion”), which were filed herein by CSXT on December 11, 2007.

INTRODUCTION AND SUMMARY

The record before this Board is complete. CSXT’s Petition offered no evidence to support its claim that there will be any interference with railroad operations if CSXT is required to fulfill its contractual obligations to sell the Property to the Vitales, subject to a Railroad Easement, in accordance with the Final Judgment already entered against the Railroad. The Vitales’ Reply¹ makes clear that there is no such evidence, because there will be no interference

¹ We respectfully refer this Board to (1) the Vitales’ November 21, 2007 Reply, (2) the affidavit of Gene A. Davis, (3) the affidavit of Francis Vitale, and (4) the supplemental affidavit of Francis Vitale, each with the exhibits annexed thereto. Terms defined in the Vitales’ November 21, 2007 Reply are also employed in this Reply in Opposition.

with railroad operations—and because the Railroad is fully protected by the continuing contractual right to approve specific construction plans. CSXT’s Petition should therefore be denied.

In violation of 49 CFR § 1104.13(c), CSXT has proffered a Reply-to-Reply, and has made a Discovery Motion, which seeks to delay disposition of the Petition for 200 days. The Vitales respectfully request that CSXT be denied leave to file its Reply-to-Reply, and that CSXT’s Discovery Motion be denied.

Leave to file the Reply-to-Reply should be denied because it would not make the record more complete, and because it would prejudice the Vitales. The Discovery Motion should be denied because CSXT does not even attempt to explain what discovery is required. If CSXT had made a reasoned determination that performance of the Agreement will interfere with railroad operations, CSXT would have had in its possession the facts supporting such determination well before commencing a proceeding before this Board. Indeed, the nature of the claim—interference with railroad operations—is such that if there were any such evidence, it would be in the possession of CSXT, not the Vitales. CSXT was unable to offer any facts in support of its assertion of interference in its initial Petition (or even now, in its proffered Reply-to-Reply). There is no reason to believe CSXT would be able to muster such evidence after another 200 days elapse.

**1. CSX SHOULD BE DENIED LEAVE TO FILE ITS
PROFFERED REPLY-TO-REPLY**

CSXT’s Reply-to-Reply should be stricken because 49 CFR 1104.13 (c) explicitly provides that, in proceedings of this nature, “[a] reply to a reply is not permitted,” and CSXT has

offered no good cause for the Board to waive that rule.² This Board has only waived that rule where the filing would add to a more complete record, and would not prejudice other parties to the proceeding, *see, e.g., Norfolk Southern Railway Company—Petition for Declaratory Order—Interchange with Reading Blue Mountain & Northern Railroad Company*, STB Docket No. 42078, slip op. at fn. 1 (STB Served Apr. 29, 2003). Here, CSXT does not come close to meeting that standard.

A. CSXT’s Reply-to-Reply Does Not Make the Record More Complete

CSXT’s proffered Reply-to-Reply offers no evidence in support of the Petition’s vague and unsubstantiated hypotheses of possible interference with railroad operations. Rather, it offers a series of spurious arguments that do not provide any justification for disregarding 49 CFR 1104.13(c).

For example, as the Vitales pointed out in their Reply, CSXT represented to the New York State Department of Transportation (“NYSDOT”) in CSXT’s Section 18 Application (Vitales’ Reply, Ex. A) that its Agreement with the Vitales “will not unreasonably interfere with the operation of trains...” In its Reply-to-Reply CSXT cannot, and does not, deny that it made that representation. Instead, CSXT merely argues that it was compelled to make such statement by the Arbitration Award (CSXT Reply-to-Reply at 6-9). But that is not so, for two reasons. *First*, the Arbitration Award did not compel CSXT to make any statement that the Agreement “will not unreasonably interfere with the operation of trains...” Instead, the Arbitration Award merely directed CSXT to “cooperate in obtaining any required Section 18 Release from the

² Counsel for CSXT neither requested the consent of the Vitales to its Motion for Leave to file a Reply to the Vitales’ Reply nor provided any advance notice that a Reply-to-Reply would be submitted to this Board.

Department of Transportation by filing separate applications for each of the three parcels in the property” (Vitales’ Reply, Ex. L at 10). In response to that direction, CSXT submitted three separate applications for Section 18 Releases which explicitly stated that there would be no interference with railroad operations. **Second**, CSXT did not contest the Arbitrator’s direction to file the Section 18 Applications. (Vitales’ Reply at 19 – 20). If CSXT believed that the Agreement would interfere with railroad operations, it should have contested the Arbitrator’s direction that it file the Section 18 Applications, and it should have asked the New York courts to stay its obligation to do so. It did neither. Instead, CSXT affirmatively represented to NYSDOT that there would be no interference. That is a matter of undisputed fact, based on CSXT’s Section 18 Application (Vitales’ Reply, Ex. A). The Reply-to-Reply does not illuminate that issue.

As an additional example, CSXT’s Reply-to-Reply argues that it should be excused from having to show a possible interference with railroad operations because the affidavit of Gene Davis, a railroad operations expert retained by the Vitales, does not state that he reviewed the Vitales’ construction plans (CSXT Reply-to-Reply at 10). But the Agreement (§§ 4(b), 8(b)) is already part of the record before this Board (Petition, Ex. 1), and the Agreement explicitly provides that CSXT retains the contractual right to disapprove particular construction plans if they would interfere with railroad operations. CSXT’s speculation that particular construction plans might interfere with railroad operations adds nothing to the record, and is irrelevant to CSXT’s efforts to terminate the Agreement. If particular construction plans would present a problem, CSXT has the contractual right to disapprove those plans and require the Vitales to present plans that do not interfere with railroad operations. CSXT attempts to denigrate those provisions of the Agreement with the motto that the “Agreement is a contract, not a guaranty” (CSXT Reply-to-Reply at 11). But the Agreement is, indeed, an enforceable contract, and if the

Vitales present plans that would interfere with railroad operations, CSXT can disapprove those plans and thus prevent the construction from going forward.³ The possibility that proposed plans might present a problem is not a legal basis for CSXT to seek to terminate the Agreement as a whole.

As a final example of how the Reply-to-Reply adds nothing to the record, CSXT offers the bizarre argument that Mr. Davis did not state that he had read the Agreement (CSXT Reply-to-Reply at 10). Mr. Davis' affidavit made numerous and explicit references to the Agreement and specific terms thereof (at ¶¶ 2, 8, 12, 17, 19, 20, 26, 31, 33 and 34). It is apparent from Mr. Davis's affidavit that, in fact, he did read the pertinent terms of the Agreement and explicitly referenced the relevant provisions of the Agreement in his affidavit. In any event, the Agreement is part of the record before this Board, and this Board can review its terms. Mr. Davis's affidavit was not presented to construe the meaning of the Agreement. It instead was presented to place before the Board hard evidence relating to the actual rail Line with which CSXT alleges interference. That undisputed evidence shows that the Line at issue has existing clearances that are narrower and shorter than the ample 75 foot wide and 22 foot high clearances mandated by the Agreement, negating the unsupported assertion in the Petition that the Agreement would create a "choke point" or "bottleneck" on the Line. CSXT's efforts in the Reply-to-Reply to make baseless allegations against Mr. Davis merely demonstrate that CSXT is unable to rebut what Mr. Davis demonstrated:

31. Based on the Railroad Easement to which the Vitales' property would be subject, their plans for a mixed use residential and commercial development built on a platform over the Line, and the extensive protections in

³ The Agreement (at ¶20 and Schedule C, ¶6, Petition Ex. 1) provides that in the event of any dispute between the parties concerning the Vitales' construction on the Property, such dispute shall be determined by arbitration.

the Agreement ensuring that the railroad engineers must approve construction plans, it is apparent that the building the Vitales intend to construct will not interfere with railroad operations or maintenance whatsoever. Not only will there be ample clearance, side-to-side, because of the seventy-five (75) foot easement, but there will also be twenty-two (22) feet of vertical clearance (ample even for double-stack trains). The New York State vertical clearance standard is only 20 feet. Obviously, the Railroad Easement was reserved by Conrail so that trains could continue to operate on the Line.

32. Railroads reserve easements for their needs, as Conrail did in this situation, which are designed to be adequate for present and potential, future railroad operations. In my opinion, the Railroad Easement applicable to the property that the Vitales intend to purchase would be more than adequate for railroad transportation needs over the Line. Indeed, the Railroad Easement provided under this Agreement provides for a wider and higher clearance than is provided by many existing overpasses along the Line.

(Davis Aff't ¶¶ 31, 32).

B. The Legal Arguments in CSXT's Reply-to-Reply Are Without Basis

Not only does CSXT use its Reply-to-Reply as an improper basis to present new legal arguments, but the arguments that it presents are without basis. Two examples suffice.

First, CSXT asserts that it is not bound by the conduct of its predecessor and that it unilaterally terminated the Agreement long ago (CSXT Reply-to-Reply at 11). That is not so. During the Arbitration, counsel for CSXT unequivocally stated that “[t]here is no disagreement that CSX[T] succeeded to Conrail’s rights” (*NY Central v. Vitale*, Arbitration, Transcript, June 15, 2004, pp. 8, l. 13-15, Reply Ex. C), negating the assertion that the conduct of CSXT’s predecessors is irrelevant. As set forth at length in the Vitales’ Reply (at 8, 16-17), the first time that CSXT ever notified the Vitales that the Agreement was supposedly terminated on grounds of interference with railroad operations was when it commenced this proceeding in late 2007, *after*

the Vitales resumed court proceedings in New York to compel compliance with the Judgment obligating CSXT to arbitrate the issues arising from the partial condemnation of the Property.⁴

Second, CSXT argues that it is not significant that, in all the years of litigation and arbitration between CSXT and the Vitales, CSXT never once took the position that the Agreement was terminated (CSXT Reply-to-Reply at 12). To the contrary, to obtain the relief that it seeks from this Board, CSXT is not only required to document how the Agreement will interfere with railroad operations (which it has not done) but also must show that its assessment is *bona fide*, and not a mere pretext for termination of the Agreement after entry of a Judgment specifically enforcing the Agreement (which it also has not done). Accordingly, CSXT's failure to make this claim until now is indeed telling and is properly considered by this Board, as it demonstrates that this entire proceeding is based on a pretext.

C. The Vitales Will Be Prejudiced If CSXT Is Permitted to File Its Reply-to-Reply

In addition, the Vitales will be prejudiced if the Reply-to-Reply is permitted. CSXT was obliged to set forth its full position—on the facts and on the law—in its Petition, so that the Vitales could make a full response in their Reply. CSXT chose to cast its Petition in only the most general terms, alleging that there might be potential interference with railroad operations, but not stating in any way what that supposed interference would be. The Vitales' Reply responded in detail, documenting that there would be no interference. If CSXT is now permitted

⁴ Contrary to its assertions in the Petition, CSXT now admits that the purported notice of termination of the Agreement (Petition, Ex. 3) did not actually terminate the Agreement on grounds of interference with railroad operations (CSXT Reply-to-Reply at 11). Not surprisingly, it cites no legal authority supporting its argument that its assertion that the contract was non-binding in 2002 (for reasons having nothing to do with interference with railroad operations) prior to the start of the Arbitration should now be treated as a termination on grounds of interference with railroad operations.

to submit a Reply-to-Reply, which speculates about possible interference, but again offers no evidence thereof, then the Vitales are deprived of the opportunity to fully respond to CSXT's allegations (however flimsy they may be).

2. CSXT'S DISCOVERY MOTION SHOULD BE DENIED`

While CSXT now purports to seek discovery, the Discovery Motion fails to set forth what, if any, discovery is required.

If there were any basis for CSXT's claim of interference with railroad operations, the facts relating thereto would be wholly within the Railroad's own control, and CSXT would not need to obtain such facts through discovery from the Vitales. Moreover, even if CSXT had made a showing of factual matters requiring discovery—which it has not done—CSXT's Petition instituting this proceeding clearly requested *declaratory relief*, which does not require a formal hearing and thus does not entitle CSXT to discovery. *See, e.g., The Quaker Oats Company, Transportation within Texas and California, Petition for Declaratory Order*, 4 I.C.C.2d 1052, 1053 (1988) (finding that the declaratory order proceeding was not a formal proceeding and that, consequently, discovery would not be permitted).

CSXT attempts to justify its efforts to delay disposition of the Petition by asserting that it had merely asked the Board “to institute a proceeding, not enter a final decision at this time” (CSXT Reply-to-Reply at 6). But that is not so: The Petition explicitly “requests the Board *to issue a declaratory order* that the termination of the Agreement by CSXT is in accord with the preemption provisions of 49 U.S.C. § 11321.” (Petition at 15) (emphasis added). In its Petition, CSXT sought affirmative relief, not just the institution of a proceeding. If CSXT needed discovery—which it does not—it could have sought the institution of a proceeding. CSXT's

belated attempt to switch gears by seeking a protracted schedule for discovery and further written submissions to this Board over the next half-year is a tacit acknowledgement that the record now before this Board demonstrates the absence of any factual support for CSXT's attempt to terminate the Agreement.

CSXT, therefore, should not be permitted to commence a proceeding such as this with no evidence whatsoever to support its claims in the hope that protracted discovery might yield some evidence in support of the speculation and unsupported assertions set forth in the Petition.

Westinghouse Electric Corporation v. The Alton & Southern Railway Company, et al., 1 I.C.C. 2d 182, 185 (1984) (denying discovery on the basis that Board is "clearly empowered to limit discovery in cases before it in order to facilitate efficient case management and to prevent discovery abuse"). Indeed, even in the proffered CSXT Reply-to-Reply, CSXT still has not submitted any evidence in support of its allegations of interference. Nor has CSXT alleged (either in the Petition, which made no reference to seeking discovery or subsequent submissions to this Board, or in its proffered Reply-to-Reply), that it needs discovery from the Vitales in order to support the conclusion that it supposedly already reached that the Agreement must be terminated. If CSXT is not presently in possession of any facts supporting its assertion of interference justifying its purported termination of the Agreement, it certainly will not be able to obtain such information through protracted discovery from the Vitales. *See CSX Transportation, Inc.--Petition for Declaratory Order*, STB Finance Docket No. 34662, slip op. at 5 (STB served Mar. 14, 2005) (denying discovery because record before Board provided information needed to reach its legal conclusion).

3. **THIS BOARD SHOULD EXERCISE ITS AUTHORITY UNDER
49 U.S.C. § 11701(b) TO DISMISS THE PETITION**

CSXT brazenly asserts (without citation to any authority) that, although the Petition requests declaratory relief, the principles underlying the dismissal of a complaint proceeding apply equally here. (CSX Reply-to-Reply at 13). But the law is to the contrary. In accordance with 49 U.S.C. § 11701(b), this Board is expressly authorized to dismiss a complaint if it determines that it does not state reasonable grounds for investigation and action (although it cannot “dismiss a complaint made against a rail carrier providing transportation . . . under this part because of the absence of direct damage to the complainant”). Thus, the STB is limited in its discretion to dismiss or otherwise refuse to rule on a *complaint against a rail carrier* (which this proceeding, needless to say, is not), but this Board has broad discretion to decide if it will even entertain a *petition for declaratory relief*. *Maryland Transit Administration--Petition for Declaratory Order*, STB Finance Docket No. 34975, slip op. at 4 (STB served Oct. 9, 2007) (citing *Intercity Transp. Co. v. United States*, 737 F.2d 103 (D.C. Cir. 1984); *Delegation of Authority--Declaratory Order Proceedings*, 5 I.C.C.2d 675 (1989)).

When a petition is unsupported by any evidence and is based wholly on speculation and conjecture, such as CSXT’s Petition in this case, it is appropriate for this Board to exercise its discretion not to entertain a petition for declaratory relief.

In addition, while CSXT claims that the Board must look at the facts in the light most favorable to the complainant when deciding whether to dismiss a complaint (Reply at 13), this standard is inapplicable here: CSXT is not a complainant but is, rather, a petitioner for declaratory relief, and there is no pending motion to dismiss. STB precedent unequivocally establishes that the *petitioner*—here, CSXT—bears the burden of demonstrating that it is entitled

to declaratory relief. *The TJX Companies, Inc.—Petition for Declaratory Order—Certain Rates and Practices of Sweeney Transportation, Inc., and Knickerbocker East-West, Inc.*, STB Motor Carrier Docket No. 41192, slip op. at 5 (STB served Sept. 20, 2002).

Finally, CSXT's invocation of 49 U.S.C. § 11701 (b) is nonsensical. (CSXT Reply-to-Reply at 13). That provision allows for filing of complaints with the Board *against rail carriers*, based upon violations by rail carriers. The Vitales, obviously, are not a rail carrier and are not alleged to have violated any provision under this Board's jurisdiction, and this proceeding is not a complaint alleging a violation of the Interstate Commerce Act or any other provision by a rail carrier: it is a petition for declaratory relief filed by CSXT, in response to which the Vitales have merely presented detailed evidence that demonstrates the utter absence of any basis for CSXT's last-ditch attempt to evade compliance with the Judgment compelling performance of the Agreement. That is exactly the procedure contemplated by the applicable rules for petitions seeking declaratory relief by this Board, and CSXT cannot be heard to complain that the Vitales, in response to the Petition, submitted a Reply and supporting evidence demonstrating the absence of evidence to support the Petition's allegations. And, as discussed above, under such circumstances this Board is fully authorized to exercise its discretion to dismiss a petition unsupported by any facts. *Cf. Maryland Transit Administration--Petition for Declaratory Order*, STB Finance Docket No. 34975, slip op. at 4 (STB served Oct. 9, 2007) (citing *Intercity Transp. Co. v. United States*, 737 F.2d 103 (D.C. Cir. 1984); *Delegation of Authority—Declaratory Order Proceedings*, 5 I.C.C.2d 675 (1989)).

CONCLUSION

CSXT, as petitioner in this proceeding seeking the extraordinary relief of unilateral termination of an Agreement that it has already been ordered to perform by a court of law, bears the burden of substantiating its claim that performance of the Agreement will interfere with railroad operations on the Line. 5 U.S.C. § 556(d). Having failed to adduce *any evidence* in support of this assertion, CSXT should not be permitted to delay these proceedings, and abuse the jurisdiction of this Board, in an effort to avoid its legal obligations.

For all the foregoing reasons, the Vitales respectfully request that this Board deny CSXT's motion for leave to file its Reply-to-Reply, deny CSXT's Discovery Motion, determine the Petition upon the record now before the Board, and upon such record, either dismiss the Petition or deny all relief sought in the Petition.

Dated: December 20, 2007

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SURFACE TRANSPORTATION BOARD

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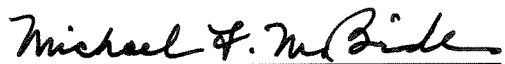
*In re: CSX TRANSPORTATION, INC.
Petitioner.*

CERTIFICATE OF SERVICE

I hereby certify that I have served this 20th day of December 2007, one copy of the foregoing "Reply of Frank Vitale and Francis Vitale in Opposition to CSX Transportation, Inc.'s Motion for Leave to Reply, Reply and Motion for Procedural Schedule" via first-class mail and electronic means upon the following counsel:

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