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July 1, 2014

236267

Ms. Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D. C. 20423

ENTERED
Office of Proceedings
July 1, 2014
Part of
Public Record

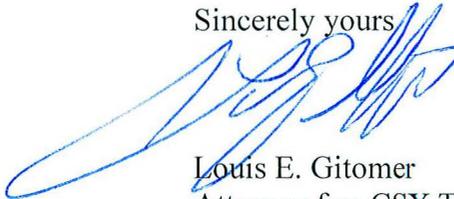
RE: Docket No. AB-55 (Sub-No. 712X), *CSX Transportation, Inc. –
Abandonment Exemption–in White County, IN*

Dear Ms. Brown:

Enclosed for e-filing is a Motion to Strike Reply in Opposition or in the
Alternative Permit a Substantive Response.

Thank you for your assistance. If you have any questions, please call or email
me.

Sincerely yours



Louis E. Gitomer
Attorney for: CSX Transportation, Inc.

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. AB-55 (Sub-No. 712X)

CSX TRANSPORTATION, INC.—ABANDONMENT EXEMPTION—WHITE COUNTY, IN

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

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Dated: July 1, 2014

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. AB-55 (Sub-No. 712X)

CSX TRANSPORTATION, INC.—ABANDONMENT EXEMPTION—WHITE COUNTY, IN

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

CSX Transportation, Inc. (“CSXT”), pursuant to 49 C.F.R. 1104.8 respectfully moves the Surface Transportation Board (the “Board”) to strike Monticello Farm Service, Inc.’s (“MSF”) Reply in Opposition filed on June 20, 2014 (the “Second Reply”). In the alternative, CSXT seeks permission to respond and provide an analysis of the “facts” in the Second Reply. CSXT does not provide additional evidence in this pleading.

CSXT filed a Petition for Exemption on February 4, 2014 (the “Petition”), contending that abandonment of an approximately 9.67-mile rail line on its Monticello Industrial Track, Monon Subdivision, between Monon, milepost 0QA 88.33, and Monticello, milepost 0QA 98.00, in White County, Indiana (the “Line”), would allow CSXT to avoid costs that would be incurred by the continued ownership and operation of the Line.

In response to the Petition, 16 unverified comments were filed. Only the comment filed by MFS (which was also unverified), raised any issue with the data presented by CSXT in the Petition. The MFS Comment contends that abandonment by CSXT (1) would decrease the value of the MFS property and (2) would transfer the financial burden to MFS from CSXT because MFS would use alternate transportation. MFS also contends that it has increased its use of rail service by receiving 26 carloads of fertilizer between October 31, 2013 and March 4, 2014 and

that MFS has a supply plan that will increase rail receipts to between 90 and 120 carloads in the next 12 months.

In *CSX Transportation, Inc.-Abandonment Exemption-in White County, Ind.*, Docket No. AB 55 (Sub-No. 712X) (served May 23, 2014) (the “*May Decision*”), the Board stated that MFS’s statement

calls into question the validity of CSXT’s forecast year data and indicates a significant increase in carload traffic over the 13 carloads that CSXT states moved in the base year (October 30, 2012—October 30, 2013). CSXT has indicated that in 2012, when 42 carloads were handled on the Line, the revenues generated from the traffic were not significantly below the costs of operating the Line. Twenty-six carloads in four and one-half months would annualize to approximately 69 carloads. Therefore, MFS’s actual increase in traffic could be material to the Board’s analysis. We also note that MFS anticipates rail shipments to be between 90-120 railcars in the 12 months following its March 2014 letter.

The Board then directed CSXT to file an amended petition within 10 days of the date of the *May Decision* to “addresses the issues raised by MFS’s filing and makes any necessary adjustments to its evidentiary presentation, including its forecast year data.” *Id.* at 2. The *May Decision* did not provide for replies to amended petition.

On June 2, 2014, CSXT filed an Amended Petition for Exemption (the “Amended Petition”). The Amended Petition demonstrates that exemption of CSXT’s abandonment of the Line under 49 U.S.C. §10502, from the prior approval requirements of 49 U.S.C. §10903 meets the statutory requirements and is warranted.

ARGUMENT

Motion to Strike. CSXT requests that the Board strike MFS’s Second Reply because MFS has not provided justification for the Second Reply. MFS cites 49 C.F.R. 1117.1 as the basis for the Board to permit the Second reply, but does not provide good cause or any other justification as to why the Second Reply should be accepted. Section 1117.1 deals with the filing

of petitions for relief not otherwise covered by the Board's rules. MFS is not filing a petition seeking relief not otherwise covered by the Board's rules; MFS is seeking to improperly file a reply to an Amended Petition for Exemption that was filed at the direction of the Board.

Petitions for Exemption to abandon are covered by the Board's rules at 49 C.F.R. 1152.60 and the general rules for exemption are at 49 C.F.R. 1121. Neither of these sections provide for a Second Reply. Under the more general Rail Exemption Procedures at 49 C.F.R. 1121.4(c) "the Board may, in its discretion: (i) Direct that additional information be filed; or (ii) Publish a notice in the Federal Register requesting public comments." In this proceeding, the Board published a notice in the Federal Register on February 24, 2014, requesting public comments by March 17, 2014. *CSX Transportation, Inc.-Abandonment Exemption-in White County, Ind.*, Docket No. AB 55 (Sub-No. 712X) (served February 24, 2014) (the "*February Decision*"). MFS filed its unverified comments. In response to MFS's unverified comments, the Board directed CSXT to file an Amended Petition for Exemption. Unlike the *February Decision*, the *May Decision* did not provide for an opportunity to file a reply to the Amended Petition.

The abandonment regulations at 49 C.F.R. 1152.25 provide for additional replies from protestants. Under 49 C.F.R. 1152.25(a) "Protests shall include all evidence and argument in support of protestant's position." All of the arguments raised, the costs for transloading provided, and the traffic specifics provided by MFS in the Second Reply were available at the time it filed its original unverified comments, and they should have been included there.

Instead, MFS filed the Second Reply, which is unauthorized and unjustified, containing argument and information that was readily available when the unverified MFS Comments were filed on March 10, 2014. The Board has consistently rejected cumulative replies, especially when the contents were readily available when the prior pleading was filed. *Grenada Railway, LLC-*

Acquisition and Operation Exemption-Illinois Central Railroad Company and Waterloo Railway Company, slip op. at 2, Docket No. 35247 (served November 13, 2013) (“the evidence must be stated briefly and must not appear to be cumulative, and an explanation must be given why it was not previously offered”); *Western Coal Traffic League-Petition for Declaratory Order*, Docket No. FD 35506, slip op. at 4, fn. 11 (served July 25, 2013) (“This is a matter that clearly should have been raised in the opening evidence, and AECC has not justified its failure to raise the issue earlier. The remainder of AECC’s rebuttal is cumulative of matters covered by other parties.”). The argument on pages 3-12 of the Second Reply should have been included in the MFS Comments. Indeed, the MFS Comments should also have included the detail contained in the Second Reply so that the Board could have determined that of the 90-120 cars that MFS planned to receive in the next 12 months, only 16 of those carloads would move within the one-year time period. MFS concealed the facts disputing its projections until they were included in the Second Reply. Indeed, MFS must be so certain that its factual presentation is deficient, that it spent a page and a half of the Second Reply lecturing the Board not to let CSXT respond.

Consistent with Board precedent prohibiting cumulative, untimely, and unjustified replies, CSXT respectfully urges the Board to strike the Second Reply.

Alternative Response to the Second Reply. If the Board does not strike the Second Reply, CSXT respectfully requests that in the alternative, the Board permit the following argument as a substantive response to the Second Reply.

In both the Petition and Amended Petition, CSXT included Exhibit 1 calculating avoidable costs in accord with the regulations at 49 CFR 1152 Subpart D, as testified to by Mr. Scaggs in his verified statement on page 12 of the Petition, which was filed in support of Exhibit 1. As the Board knows, Mr. Scaggs has prepared and submitted the same exhibit in numerous

CSXT abandonment filings, and is very familiar with the preparation of the exhibit. The MFS Comments said nothing about the lack of supporting evidence and did not seek discovery of the supporting evidence. Instead, MFS makes those arguments in the unauthorized and unjustified Second Reply.

The Second Reply argues about Exhibit 1 in CSXT's Petition or Amended Petition, but it does not provide any contradictory evidence, and indeed does not question Mr. Scaggs Verified Statements. The Second Reply merely raises questions, which CSXT would have supplied if MFS had simply requested discovery from CSXT under 49 C.F.R. 1121.2. However, instead of seeking discovery, MFS tries to present its questions as evidence to justify denying CSXT's abandonment request.

In an attempt to show the Line is profitable without providing any actual data, MFS points to CSXT's operating ratio of 71.1 percent in 2013 across its system as proof that the MFS fertilizer traffic is compensatory. This argument is not viable on its face. As a common carrier, CSXT must take all traffic tendered to it on its lines, whether or not it is profitable. The system wide operating ratio cannot be applied to individual movements as far as a gross number for operating ratios. Every line has its own unique characteristics that affect its operating costs. Indeed, 49 U.S.C. §10904 and 49 C.F.R. 1152, Subpart D require costing in abandonments to be based on individual factors, not just the application of an operating ratio to the traffic at issue.

The Burroughs Verified Statement explains the operating characteristics that contribute to the operating costs associated with serving the Line. Nevertheless, in a footnote to the Second Reply, MFS tries to dismiss the Burroughs Verified Statement by expressing the opinion that the train movement necessary to reach MFS is a routine movement. MFS does not contest that the movement of rail cars to serve it is inefficient or costly, merely that it is routine elsewhere. MFS

has provided no evidence that contradicts CSXT verified evidence that operating trains to serve MFS loses money.

In Mr. Timmons verified statement, attached to the Second Reply, MFS claims that it will incur cost increases from transloading (pages 1-2) and that it will receive 108 carloads (page 3).

MFS selects one of the locations noted by Ms. Burroughs because the closer locations are operated by competitors of MFS. MFS does not explain why Wilson's Fertilizer is not a competitor. More importantly, if MFS and Wilson's Fertilizer have a cooperative relationship (as is hinted at by MFS at page 1 (not a competitor) of Mr. Timmons Verified Statement), then Mr. Timmons has clearly demonstrated that MFS has a nearby alternative location to receive deliveries and another point for distribution to its customers, thus avoiding the need and cost of transloading.

In addition, MFS is only a receiver of freight; it does not have any outbound shipments. It is telling that according to CSXT's records for the shipments made to MFS, the shippers pay the freight, not MFS. MFS obviously enter contracts to purchase its commodities as evidenced by Exhibit TT-1 attached to Mr. Timmons Verified Statement. Exhibit TT-1 is a Sales Confirmation Document (the "SCD") between MFS and Koch Nitrogen International Sarl ("Koch").¹ Koch is a large supplier of Liquid Nitrogen. However the SCD, at page 2, under the heading "Delivery Terms," provides "FOB Delivery Point. All transportation costs incurred prior to the Delivery Point shall be paid by Seller." The cost of shipping does not fall on MFS. All the transportation costs for shipments received by MFS are paid by the shipper, whether rail or truck is used.

MFS projects that it will receive 108 carloads in the next year generating at a minimum \$4,000 per carload in revenue for CSXT. If this were true, then CSXT would be willing to

withdraw the abandonment and continue to serve MFS if MFS entered a take or pay contract with CSXT guaranteeing a minimum revenue of \$4,000 per car for a minimum of 108 cars. Since MFS does not pay for transportation, such a contract should have no risk for MFS. However, based on the Timmons Verified Statement, CSXT has no confidence that MFS will ship anywhere near the projected 108 carloads in the coming year.

The only potential shipper that has provided documentation is Koch. The only documentation for the other shippers is telephone numbers. CSXT urges the Board to accord no weight to traffic projections where the proof is a telephone number instead of a Bill of Sale or Contract.

MFS projects 40 carloads of Liquid Nitrogen from Koch. However, the SCD is only for 490 tons of Liquid Nitrogen and it expires December 31, 2014. It does not require 40 rail cars to transport 490 tons of Liquid Nitrogen and the SCD terminates on December 31, 2014. At 100 tons per car this would amount to only **5** cars. MFS is at best engaging in puffery in traffic projections in the Second Reply.

MFS claims that it will receive 28 carloads of Potash. To justify this claim, MFS states that it has a purchase order for 10 carloads, but does not provide the purchase order, only a telephone number. MFS also states that one carload is “currently in transit,” but again only provides a phone number in support. There is no support for the remaining 17 carloads projected by MFS.

MFS projects that 20 cars of Ammonium Sulfate will be rerouted to MFS’s facility for transloading for an apparent competitor of MFS. MFS does not give any explanation for a

¹ The SCD is not a contract since it has not been executed by MFS.

competitor to reroute its traffic to MFS when MFS will not use nearby competitors for transloading. In addition, again the only support for the proposed traffic is a phone number.

MFS claims that it currently receives Monoammonium Phosphate (“MAP”) by motor carrier. It asserts that it will now receive 20 cars of MAP by rail. The only explanation for diverting traffic from truck to rail is that it “is in furtherance of MFS’s supply plan for receipt of dry fertilizer.” Timmons Verified Statement at 3. The justification for receiving 20 carloads of MAP does not even include a phone number, much less documentary evidence. MFS has not shown that any MAP carloads have moved by rail.

MFS has at best justified **16** carloads of rail traffic in the next year by the barest scintilla of evidence. However, MFS has not justified the transport of 108 carloads. CSXT urges the Board to reject the traffic projected in the Second Reply as unsubstantiated and rely upon the traffic projections in the Amended Petition.

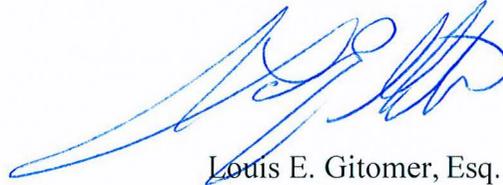
CONCLUSION

CSXT respectfully request the Board to strike the Second Reply. If the Board does not strike the Second Reply, CSXT urges the Board to accept this filing as a substantive response to the Second Reply.

As demonstrated in the Petition, the Amended Petition, and this pleading, application of the regulatory requirements and procedures of 49 U.S.C. §10903 to the abandonment of the Line proposed by CSXT is not required to carry out the rail transportation policy set forth in 49 U.S.C. §10101, will not result in the abuse of market power, and is of limited scope.

Accordingly, CSXT respectfully requests the Board grant an exemption for the proposed abandonment of the Line.

Respectfully Submitted,



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Dated: July 1, 2014

CERTIFICATE OF SERVICE

I hereby certify that I have caused this pleading in Docket No. AB-55 (Sub-No. 712X),
CSX Transportation, Inc.—Abandonment Exemption—in White County, IN, to be served via pre-paid first class postage on July 1, 2014, on the following parties of record:

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