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November 11, 2002

By UPS overnight mail

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

FEE RECEIVED
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SURFACE
TRANSPORTATION BOARD

Re: Docket No. AB-55 (Sub-No. 618), *CSX Transportation, Inc. -- Discontinuance -- at Memphis, in Shelby County, TN*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Petition For Reopening And Stay Of Decision Served October 28, 2002, for filing with the Board in the above referenced matter.

Also enclosed is a check in the amount of \$150 for the filing fee.

Kindly acknowledge receipt by date stamping the enclosed duplicate copy of this letter and return in the self-addressed stamped envelope.

Very truly yours,

Thomas F. McFarland
Attorney for Bolen-Brunson-Bell
Lumber Company, Inc.

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SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX TRANSPORTATION, INC. --) DOCKET NO. AB-55
DISCONTINUANCE -- AT MEMPHIS, IN) (SUB-NO. 618)
SHELBY COUNTY, TN)



**PETITION FOR REOPENING AND STAY
OF DECISION SERVED OCTOBER 28, 2002**

BOLEN-BRUNSON-BELL LUMBER COMPANY, INC.
3175 Johnson Avenue
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DUE DATE: November 12, 2002

TABLE OF CONTENTS

Page No.

FOREWORD 4

I. THE DECISION IS MATERIALLY ERRONEOUS -- BBB IS LIKELY TO PREVAIL ON THE MERITS 5

 A. Finding That Continued Operation Would Burden CSXT And Interstate Commerce 5

 1. Finding That Future Profitability Is Limited And Speculative 6

 2. Reliance On Cost For Bridge Replacement 9

 3. Overstated Cost Of Bridge Rehabilitation 10

 4. Subsidy Year Payment 11

 B. Finding Regarding Harm To BBB From Discontinuance 12

 C. The Balancing Process 13

II. A STAY IS WARRANTED UPON A BALANCING OF THE EQUITIES 13

 A. CSXT Would Not Be Substantially Harmed By A Stay 13

 B. BBB Would Be Irreparably Harmed Without A Stay 14

 C. The Public Interest Favors A Stay 15

CONCLUSION AND REQUESTED RELIEF 15

CERTIFICATE OF SERVICE 17

BEFORE THE
SURFACE TRANSPORTATION BOARD



CSX TRANSPORTATION, INC. --) DOCKET NO. AB-55
DISCONTINUANCE -- AT MEMPHIS, IN) (SUB-NO. 618)
SHELBY COUNTY, TN)

**PETITION FOR REOPENING AND STAY
OF DECISION SERVED OCTOBER 28, 2002**

Pursuant to 49 C.F.R. §§ 1152.25(e)(2), (4) and (7)(ii), BOLEN-BRUNSON-BELL LUMBER COMPANY, INC. (BBB) hereby petitions for reopening of the Board's decision served October 28, 2002 on the ground of material error, and petitions for stay of the effective date of that decision pending disposition of the petition for reopening.

FOREWORD

The Board's decision is legally unsound, as demonstrated in the following pages. However, apart from legal principles, this is a rail line that should be operated as a matter of basic economics. The rail line is highly profitable. The forecast year profit found in the decision provides a rate of return of 46.6 percent per year on CSXT's net investment base in the rail line. That is over three times a cost-of-capital return on value. It is 10 times CSXT's systemwide rate of return of 4.6 percent in 2001. It is plenty enough to amortize the cost of bridge repair, with enough left over each year to still provide for more than a cost-of-capital return. There is no rational basis for a finding that discontinuance of rail service on this money-making rail line is permitted by public convenience and necessity.

ARGUMENT

I. THE DECISION IS MATERIALLY ERRONEOUS -- BBB IS LIKELY TO PREVAIL ON THE MERITS

The argument in this section is intended to support both BBB's petition for reopening of the decision served October 28, 2002, and the first decisional standard applicable to BBB's petition for stay, i.e., that BBB is likely to prevail on the merits of its petition for reopening.

A. Finding That Continued Operation Would Burden CSXT And Interstate Commerce

In finding that continued operation of the line would be burdensome, the Board made the following ultimate finding (decision at 9):

Rehabilitation and replacement of the Cypress Creek bridge would require an expenditure that cannot be justified by limited and speculative future profitability.

Each element of that finding is erroneous. As will be shown, the cost of bridge rehabilitation is erroneously overstated in the decision. The Board's reliance on a cost for bridge replacement is erroneous because there are neither findings in the decision nor substantial evidence in the record to support either a need for bridge replacement or the cost thereof. The most serious error is the finding that future profitability is limited and speculative, which is flatly contrary to the Board's own substantive regulations on that subject matter. The decision appears to erroneously treat a "subsidy year payment" occasioned primarily by a rehabilitation cost as an element of burden from continued rail line operation. The collective effect of those erroneous subsidiary findings is to render the ultimate finding materially erroneous. The Board's erroneous subsidiary findings are treated hereafter in the order of their gravity.

1. **Finding That Future Profitability Is Limited And Speculative**

Pursuant to substantive Board regulations, future profitability of a rail line is to be determined by the result of forecast year operations. The Board's regulation defining the forecast year is explicitly designed to result in a determination of future profitability, viz. (49 C.F.R. § 1152.2[h], emphasis added):

Forecast year means the 12-month period, beginning with the first day of the month in which the application is filed with the Board, for which future revenues and costs are estimated.

By virtue of a Board regulation governing the content of applications for abandonment or discontinuance, the forecast year is the sole basis on which future revenues, costs and return on value are to be estimated. See 49 C.F.R. § 1152.22(d)(2).

When the Board's predecessor adopted the forecast year concept, it was made clear that thereafter the forecast year operating result would replace the base year operating result as the surrogate for future expectations. *Abandonment Regulations - Costing*, 5 I.C.C.2d 123, 127 (1988). In *Aban. and Discon. of R. Lines under 49 U.S.C. 10903*, 1 S.T.B. 894 (1996), the Board emphasized that the forecast year continues to be the indicator of future rail line profitability, viz. (at 896, emphasis added):

. . . The Board's primary measures of financial condition are operations in the Base Year and Forecast Year which recognize the current and future viability of the line segment . . .

The Board has treated the presumption of future profitability arising from the forecast year operating result as virtually conclusive. Thus, in *Union Pacific R.R. Co. - Aban. - Wallace Branch, ID*, 9 I.C.C.2d 325 (1992), the Board refused to take into account a projection of future traffic and revenues because the time frame for development of that traffic fell outside the

forecast year designated by virtue of the Board's regulations (at 344). In *Central Michigan Ry. Co. - Abandonment*, 7 I.C.C.2d 557 (1991), the Board refused to redefine a forecast year period for fear that in future cases the forecast year would become a constantly rolling target subject to revision whenever changes in traffic levels occurred (at 564).^{1/}

As particularly pertinent here, the forecast year regulations provide the measure of a rail line's future profitability in the context of determining whether a rehabilitation expense is justified. Where a rail line requires rehabilitation, the Board must decide whether the rehabilitation expense is justified by "the future prospects for traffic and revenues." *Illinois Central Gulf R. Co. - Abandonment*, 363 I.C.C. 729, 731 (1980). In *Abandonment Regulations - Costing, supra*, the ICC made it clear that such "future prospects" are to be measured by the forecast year operating result, as applied to the amortized cost of the rehabilitation, viz. (5 I.C.C.2d at 127):

... The applicant would be required to support fully all dollar amounts shown in the Forecast Year ... Also, ... any rehabilitation necessary on the branch during the Forecast Year would be capitalized and depreciated in accordance with our accounting rules.

Agency regulations have the force and effect of law. *Paul v. United States*, 371 U.S. 245, 255 (1963); *Ainslie Corp. v. Middendorf*, 381 F.Supp. 305, 308 (D., Mass. 1974). It follows as a matter of law that the forecast year operating profit of \$40,371 derived in accordance with the Board's forecast year regulations was required to be used as the basis for the finding regarding the future profitability of the rail line.

^{1/} In light of unusual delay in that proceeding, the Board permitted forecast year operating results to be based on traffic actually transported during the forecast year instead of traffic earlier estimated to be transported during that period (at 564-565). That did not result in a deviation from the forecast year regulations.

Agency action that is not in accord with the agency's own regulations is not in accord with law. *Derecktor of RI, Inc. v. Goldschmidt*, 506 F.Supp. 1059, 1063 (D., R.I. 1980); *Bradley v. Weinberger*, 483 F.2d 410, 414, n.2 (1st Cir. 1973). It was erroneous as a matter of law, therefore, for the Board to find that the future profitability of the line is limited and speculative on the ground that it cannot be assumed that BBB will remain in business for the 10-year life of the rehabilitated bridge, nor that BBB will make as much use of the rail line during that period as in the forecast year. Under the forecast year regulations, it definitely is presumed that a rail user will remain in business after the forecast year, and that its future rail line use will mirror its forecast year use.^{2/} Ironically, while the forecast year concept is designed to take speculation and guesswork out of determinations of future profitability, the Board's erroneous finding reintroduces speculation into that subject matter. Therefore, it is not the future profitability of the line, but rather the Board's finding on future profitability, that is unduly speculative.

In developing evidence regarding future profitability of the rail line, BBB was entitled to rely on the force and effect of the Board's forecast year regulations. There was no regulation nor prior decision that could have reasonably alerted BBB to a need to prove in addition that it will remain in business for at least 10 years and that its rail use in the next 10 years will equal or exceed its forecast year use. It follows that it was unfair and unlawful for the Board to have determined future profitability on the latter basis instead of in accordance with its forecast year regulations.

^{2/} There is no occasion for the Board here to determine circumstances under which the presumption may be rebutted. Cf. *Abandonment Regulations - Costing, supra*, 5 I.C.C.2d at 127, note 16. There was no claim by CSXT, let alone evidence, that BBB might go out of business after the forecast year, nor that BBB's use of the rail line was likely to decline after the forecast year.

This record contains evidence that future annual profits determined in accordance with the Board's regulations are sufficient to amortize even CSXT's overstated cost of bridge rehabilitation, with enough profit left over each year to provide a return on the line's net investment base that would be in excess of CSXT's cost of capital (BBB Protest, Appdx. 3), viz:

Future annual profit	\$ 40,371
Annual amortization payment for rehabilitation	<u>\$ 27,442</u>
Profit left over each year	\$ 12,929
Annual cost-of-capital return	<u>\$ 8,209</u>
Yearly profit in excess of cost-of-capital return	\$ 4,720

That is to say that when the Board's error regarding future profitability is corrected, there is no basis for a finding that continued operation of the line would burden CSXT or interstate commerce in any respect.

2. Reliance On Cost For Bridge Replacement

There are no subsidiary findings in the decision that purport to provide support for the Board's reliance on a cost for future bridge replacement (in addition to a cost for current bridge rehabilitation). There is no finding in the discussion of line condition and rehabilitation at pages 5-7 of the decision that the bridge will require replacement at any particular time in the future. There is no cost for future bridge replacement in the Appendix of the decision.

There is no substantial evidence in the record to support either a need for future bridge replacement or the cost thereof. There is no identification nor explanation of any of the components that make up the alleged cost of future bridge replacement. There is no evidence of a need for replacement of the bridge in 10 years. The only record evidence is to the contrary. The cost put forth by CSXT for current bridge rehabilitation is for replacement of all bridge components except pilings. (Applic., Vol. 1 at 46-47). CSXT acknowledges that bridge

components such as new caps, stringers, deck, etc. will have useful lives of 40 to 50 years. (*Id.* at 45). That contradicts a need to replace those components once again only 10 years after their installation.

It is thus apparent that the Board's reliance on a cost for future bridge replacement is entirely lacking in supporting findings and substantial evidence. Such an unsupported finding cannot stand. *Olenhouse v. CCC*, 42 F.3d 1560 (10th Cir. 1994) (no findings of fact); *First Girl, Inc. v. Regional Manpower Adm'r of US*, 499 F.2d 122 (7th Cir. 1974) (no evidence).

3. Overstated Cost Of Bridge Rehabilitation

Even giving credence to the Board's finding that CSXT's inspection identified bridge components that require rehabilitation better than BBB's inspection, the Board nevertheless substantially overstated bridge rehabilitation costs for the following reasons that have nothing to do with the relative quality of the bridge inspections:

(1) the Board erroneously accepted CSXT's costs for replacement of 120 stringers when only 84 stringers existed in the bridge, and by CSXT's own admission only 36 of those 84 require replacement (CSXT Rebuttal at 41).^{3/} An upgrade of the bridge to 120 stringers was not shown to be necessary to permit efficient operations over the bridge, inasmuch as it will handle only an average of 3 carloads per train (198 cars, 65 train trips per year). See 49 C.F.R. § 1152.32(m)(1); *Southern Pacific Transp. Co. - Abandonment*, 360 I.C.C. 128, 144 (1979) ("Southern Pacific's desire to rehabilitate to

^{3/} The resulting overstatement of cost was \$46,200 (120-36 = 84 x \$550 = \$46,200). See Applic., Vol. 1 at 47.

(an upgraded) level cannot govern where more broadly based considerations of public convenience and necessity are paramount . . .”).

(2) the Board erroneously accepted CSXT’s costs for replacing the entire bridge deck. Contrary to CSXT’s contention, the bridge deck does not require removal for replacement of stringers and caps. The bridge deck need only be raised during that replacement process. That would not damage the bridge deck nor necessitate its replacement.^{4/}

4. Subsidy Year Payment

The Board erred to the extent that it found that an alleged subsidy year payment of \$182,610 (occasioned primarily by the rehabilitation cost) constitutes an element of burden from continued operation (decision at 9, appdx. line 19). This is a discontinuance case under 49 U.S.C. § 10903, not a subsidy case under 49 U.S.C. § 10904. A payment that might be appropriate in subsidy does not necessarily translate to a cost to be taken into account in a discontinuance case. *See Illinois Commerce Comm’n v. ICC*, 776 F.2d 355, 359 (D.C. Cir. 1985). It may be appropriate in subsidy to require payment of a rehabilitation cost up front because by statute involuntary subsidy is limited to no more than one year. *See* 49 U.S.C. § 10904(f)(4)(B). In contrast, in abandonment and discontinuance cases it is settled that a rehabilitation cost cannot be charged against a rail line in one year. *See Louisville and Nashville R. Co. - Abandonment*, 366 I.C.C. 1, 22 (1981) (“We agree with UTU that rehabilitation costs must be amortized over a period of years and that it is incorrect to assume that the rehabilitation cost will be recovered in a single projected year operation”); *Illinois Central Gulf R. Co. -*

^{4/} The resulting cost overstatement was \$21,600. *See* *Applic.*, Vol. 1 at 47.

Abandonment, supra, 363 I.C.C. at 731 (“We also agree, as a matter of policy, that this [rehabilitation] expenditure cannot be charged against the branch in 1 year”); *Abandonment Regulations - Costing, supra*, 5 I.C.C.2d at 127.

B. Finding Regarding Harm To BBB From Discontinuance

The Board summarized BBB’s evidence of harm from discontinuance in a noncommittal manner at page 9 of the decision. It then attempted to finesse that evidence as follows (*id.*):

... (T)he burden that the discontinuance will impose on BBB and the community is less clear (than harm to CSXT from continued operation) given BBB’s transportation alternatives.

That is the same kind of “entirely unsatisfactory discussion” of shipper harm that caused the Court in *Busboom Grain Co., Inc. v. ICC*, 856 F.2d 790 (7th Cir. 1988), to set aside the ICC’s decision in that case. The Board’s statement quoted above is not a finding at all. There was actually more in the ICC’s inadequate treatment of shipper harm in the *Busboom* case than there is on that subject in the present case. The Board’s treatment of shipper harm here will not pass the judicial scrutiny typified by the decision in the *Busboom* case.

The Board is required to determine whether transportation alternatives available to BBB are logistically and economically feasible. *Georgia Public Serv. Com’n v. United States*, 704 F.2d 538, 545 (11th Cir. 1983). The Board made no effort to do so in the present case. That is reversible error. *Id.* at 546-547.

The record shows that the loss of nearly \$100,000 per year as a result of discontinuance identified by BBB takes into specific account the transportation alternatives suggested by CSXT. (BBB Protest at 76-78). That is a significant loss for a small family-owned lumber company. It

is harm that is required to be taken into account in the balancing process to determine the merits of the proposed rail line discontinuance.

C. The Balancing Process

The Board found that harm to BBB from discontinuance is outweighed by harm to CSXT and interstate commerce from continued operation of the line (decision at 9-10). As demonstrated above, the findings in support of both elements of that balancing are erroneous. As a result, the balancing process itself is erroneous.

Upon reopening, the Board should find that continued operation would not burden CSXT or interstate commerce in any respect. That being the case, the discontinuance application is required to be denied for failure of CSXT to sustain its burden of proof that the present or future public convenience and necessity permits discontinuance. That is so without regard to harm to local interests from discontinuance. The demonstrated harm to BBB from discontinuance bolsters the conclusion that discontinuance of service on this rail line is not in the public interest.

II. A STAY IS WARRANTED UPON A BALANCING OF THE EQUITIES

The argument in this section is intended to show that issuance of a stay is warranted upon consideration of the remaining three decisional criteria, sometimes referred to as a balancing of equities.

A. CSXT Would Not Be Substantially Harmed By A Stay

CSXT would not be harmed in any respect if the Board's decision were to be stayed pending disposition of this petition. CSXT would not suffer an operating loss during that period. The rail line is not being operated as a result of an embargo. The embargo will continue while a decision on this petition is pending. The line produces a healthy profit in any event.

CSXT would not suffer an opportunity cost during the period in question. Inasmuch as CSXT has sought discontinuance rather than abandonment, the rail line could not be removed and sold for investment purposes even if the discontinuance decision were to become effective. Even so, operation of the line produces a return well in excess of the cost of capital.

CSXT would not incur a rehabilitation cost during that period. There would be no need to rehabilitate the Cypress Creek bridge for safety reasons inasmuch as there would be no rail traffic or operations during the period in question. There is plenty enough profit to pay for rehabilitation in any event.

B. BBB Would Be Irreparably Harmed Without A Stay

BBB would be irreparably harmed unless a stay is entered because it would lose its opportunity to recover damages for CSXT's failure to provide rail transportation on reasonable request for the period on and after the effective date of the discontinuance decision. BBB has filed a complaint alleging that on or shortly after March 1, 2001 to date, and continuing, CSXT has failed to provide rail transportation to BBB's place of business on reasonable request in violation of 49 U.S.C. § 11101(a). *Bolen-Brunson-Bell Lumber Company, Inc. v. CSX Transportation, Inc.*, Finance Docket No. 34236, filed July 19, 2002. BBB has the opportunity to recover damages for that violation, but the damage-recovery period would end if the discontinuance decision were to become effective. Even if the decision were to be later set aside or reversed, it would be difficult if not impossible for BBB to recover damages for the period during which CSXT's failure to provide service was sanctioned by Board decision. Thus, the harm to BBB would be irreparable.

C. The Public Interest Favors A Stay

In light of the Board's disregard of its own forecast year regulations, the public interest favors a stay to permit correction of that error without affecting additional abandonment and discontinuance cases. The public should be able to have confidence that the Board will abide by its own substantive regulations. Entry of a stay would further that legitimate public interest consideration. Cf. *Nonoperating Motor Carriers - Collection of Undercharges*, 9 I.C.C.2d 35, 49-50 (1992). In addition, it would be contrary to the public interest for highly profitable rail lines like the one at issue to be abandoned or discontinued without sufficient cause.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, the Board should (1) reopen the decision served October 28, 2002 on the ground of material error; (2) stay the effective date of that decision pending disposition of this petition; and (3) issue a decision upon reopening denying the application for discontinuance for failure of CSXT to sustain its burden of proof that public convenience and necessity permits the discontinuance.

Respectfully submitted,

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Petitioner

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Attorney for Petitioner

DUE DATE: November 12, 2002

CERTIFICATE OF SERVICE

I hereby certify that on November 11, 2002, I served the foregoing document, Petition For Reopening And Stay Of Decision Served October 28, 2002, on Louis E. Gitomer, Ball Janik LLP, 1455 F Street, N.W., Suite 225, Washington, DC 20005; and on Natalie S. Rosenberg, CSX Transportation, Inc., 500 Water Street, J150, Jacksonville, FL 32202, by UPS overnight mail.

Thomas F. McFarland

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