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May 16, 2007

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

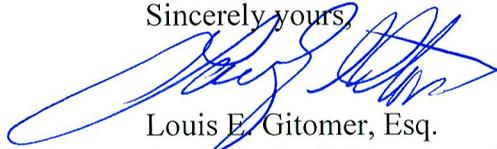
**Re: Docket No. AB-1010, CSXC Corporation, Adverse Abandonment in  
Shelby County, Tennessee**

Dear Secretary Williams:

CSX Corporation is efilng a Response to Petition for Waiver and Exemption in the above-entitled proceeding.

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

Sincerely yours,



Louis E. Gitomer, Esq.  
Attorney for CSX Corporation

Enclosures

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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DOCKET NO. AB-1010

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CSX CORPORATION—ADVERSE ABANDONMENT—  
IN SHELBY COUNTY, TN

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RESPONSE TO PETITION FOR WAIVER AND EXEMPTION

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Counsel for:  
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Dated: May 16, 2007

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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DOCKET NO. AB-1010

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CSX CORPORATION—ADVERSE ABANDONMENT—  
IN SHELBY COUNTY, TN

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RESPONSE TO PETITION FOR WAIVER AND EXEMPTION

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CSX Corporation (“Respondent”) responds to the Petition for Waiver and Exemption filed on April 26, 2007 (the “Petition”) by the Memphis Community Connector (the “MCC”). Contrary to MCC’s statement, the Surface Transportation Board (the “Board”) has not “consistently found, much of the information that the Board’s regulations otherwise require in an abandonment proceeding is largely inapplicable or irrelevant to an application for adverse discontinuance or abandonment.” Petition at 4. Instead, the Board has stated “In appropriate instances, such as situations involving adverse applications, the Board, and its predecessor agency, the Interstate Commerce Commission, has waived inapplicable and unneeded portions of the abandonment regulations. *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 Finance Docket No. AB-549 (STB served June 5, 1998). Respondent urges the Board to consider the actual language of its decisions in ruling on the Petition in lieu of the unquoted language relied upon by Petitioner.

## **BACKGROUND**

CSX Transportation, Inc. (“CSXT”), a non-party to this proceeding, sought 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”). The Petition for exemption filed by CSXT was opposed and denied by the Board.<sup>1</sup>

Abandonment over 12.24 miles of the Line had not been opposed. In light of the lack of that opposition and the future potential of the 12.24-mile rail line portion of CSXT’s Midwest Region, Nashville Division, Memphis Terminal between milepost ONI 222.9, east of Memphis, TN and milepost ONI 210.66 near Cordova, TN, at the end of the line all in Shelby County, TN (the “12.24-mile Line”), CSXT filed a Petition for Exemption to discontinue service. The Board granted the unopposed Petition for Exemption.<sup>2</sup>

CSXT then filed an Application to discontinue service over the 1.10-mile portion of its Midwest Region, Nashville Division, Memphis Terminal between milepost ONI 224.0, at

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<sup>1</sup> *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) (the “*Abandonment Denial*”).

<sup>2</sup> *CSX Transportation, Inc.—Discontinuance Exemption—(Between East of Memphis and Cordova) in Shelby County, TN*, STB Docket No. AB-55 (Sub-No. 615X) (STB served July 17, 2002).

Memphis, TN and milepost ONI 222.9 east of Memphis, TN, all in Shelby County, TN (the “1.10-mile Line”). Over the objection of one protestant, the Board granted CSXT’s application.<sup>3</sup>

MCC, an entity unknown to Respondent, intends to file an application with the Board seeking approval of an adverse abandonment of the Line. MCC claims that it wants to convert the line into a trail. However, MCC has not established a proper interest in the abandonment proposal. Indeed, as will be described, the relief it seeks in the Petition is contrary to its professed goal of establishing trail use.

### **SUMMARY OF WAIVERS AND EXEMPTIONS SOUGHT**

MCC seeks waiver of the following provisions:

- 49 C.F.R. §1152.20(a)(2)(i), Service of Notice of Intent on significant users.
- 49 C.F.R. §1152.20(a)(2)(xii), Service of Notice of Intent on labor representatives.
- 49 C.F.R. §1152.20(a)(3), Posting of Notice of Intent at stations.<sup>4</sup>
- 49 C.F.R. §1152.21, Content of Notice of Intent
- 49 C.F.R. §1152.10-.14 and .24(e)(1), System Diagram Map publication.
- 49 C.F.R. §1152.22(a)(4), Detailed map.
- 49 C.F.R. §1152.22(a)(5), System Diagram Map reference.
- 49 C.F.R. §1152.22(b-d), Condition of Properties, Service Provided, Revenue and Cost Data.
- 49 C.F.R. §1152.22(i), Federal Register Notice.
- 49 C.F.R. §1152.29(e)(2) and (f), Consummation Notice.

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<sup>3</sup> *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.

<sup>4</sup> MCC erroneously contends that there are no stations on the Line. Petition at 6. The Board stated that there is a station at Cordova in the *Abandonment Denial*.

49 C.F.R. §1152.27, Offer of Financial Assistance.

49 C.F.R. §1152.28, Public Use Procedures.

49 C.F.R. §1152.29, Interim Trail Use.

MCC also seeks an exemption from 49 U.S.C. §§10904 and 10905 relating to the offer of financial assistance and public use provisions.

### **ARGUMENT**

Respondent contends that MCC must provide the maximum notice possible prior to filing the adverse abandonment application and must provide information in the abandonment application that is either in its possession or is readily attainable from public files.

MCC relies substantially on a recent Board waiver decision.<sup>5</sup> However, the facts underlying the *NS Waiver* are clearly distinguishable. The most important difference is that the railroad that owns the Line in *NS Waiver* does not oppose the adverse abandonment. Second, it is clear that the parties seeking the adverse abandonment in *NS Waiver* are publicly known religious, charitable or educational institutions, compared to MCC, whose goals and identity are completely unknown. The opponent of the adverse abandonment in *NS Waiver* is a non-carrier seeking to operate over the unused rail line without an agreement with the owner. Because the identities and motives of the moving parties in *NS Waiver* are known and appropriate, their requests are entitled to more weight than those of an unknown entity such as MCC. Especially in this instance where MCC provides very little if any independent justification for the waivers and exemptions it seeks.

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<sup>5</sup> *Norfolk Southern Railway Company—Adverse Abandonment—St. Joseph County, IN*, STB Docket No. AB-290 (Sub-No. 286) (STB served October 26, 2006) (the “*NS Waiver*”).

It should be noted that MCC only requests waiver of the Board's regulations concerning compliance with Service of Notice of Intent on significant users, Posting of Notice of Intent at stations, and the System Diagram Map ("SDM") requirements. In addition to being requirements in the Board's rules, these items are also statutory requirements: Service of Notice of Intent on significant users (49 U.S.C. §10903(a)(3)(D)), Posting of Notice of Intent at stations (49 U.S.C. §10903(a)(3)(B)), and the SDM requirements (49 U.S.C. §10903(c)(2)). Since these requirements are statutory and MCC has not sought exemption of these provisions, much less justified exemption, Respondent urges the Board to deny the waivers as being ineffectual since MCC would still be required to comply with the statutory requirements.

Respondent objects to the waiver of the service of notice on the headquarters of all duly certified labor organizations that represent employees on the affected rail line as required by 49 C.F.R. §1152.20(a)(2)(xii). Pursuant to 49 U.S.C. §10903(b)(2), the Board is required to impose on the abandoning railroad provisions to protect the interests of the railroad's employees. The conditions that must be imposed may create some rights in the employees. The employees should receive notice through their designated representatives in order to be apprised of their rights, if any. Moreover, service on the labor organization headquarters is not a burden. Therefore, Respondent respectfully requests the Board to deny the waiver of 49 C.F.R. §1152.20(a)(2)(xii).

MCC seeks waiver of 49 C.F.R. §1152.22(a)(4) so that it does not have to file the detailed map required by the Board. Waiver is not warranted. First, maps with the detail required by the Board's regulations may be obtained from map services readily available on the internet. Second, MCC has demonstrated some knowledge of the filings in the *Abandonment Denial*, which

contained an appropriate map. It should be a minimal burden for MCC to obtain a map from the publicly available docket in the *Abandonment Denial* proceeding. The map is neither inapplicable nor unneeded. Further the map is not a burden for MCC to obtain. Respondent respectfully requests the Board to deny the waiver of 49 C.F.R. §1152.22(a)(4).

MCC contends that the Line “is so degraded that a return of rail service along the line would entail extensive and costly rehabilitation” (Petition at 4) and “6 years of neglect have contributed to the degraded state of the line” (Petition at 8). At the same time that MCC makes these allegations it claims that it is a “third party applicant” and “is unable to provide any further description of the line condition” (Petition at 8) as justification for the waiver of 49 C.F.R. §1152.22(b-d). 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.

MCC seeks a waiver of the one year period for consummating the abandonment and for the filing a notice of consummation of abandonment under 49 C.F.R. §1152.29(e)(2) and (f). Respondent urges the Board to deny these waiver requests. Neither requirement is burdensome. In addition, the requirement of a consummation notice is a Board regulation that can be extended by the Board in its discretion. If the Board grants the adverse abandonment and MCC cannot obtain a court judgment compelling abandonment within one year, then, as provided in the Board’s rules, MCC can seek an extension of the consummation deadline. If the adverse abandonment is granted by the Board and MCC is successful in obtaining a judgment adverse to the owner of the railroad, MCC should be required to notify the Board of the consummation of the abandonment so that it is

clear in the Board’s records that the Line has been abandoned. Respondent urges the Board to deny the waiver of 49 C.F.R. §1152.29(e)(2) and (f) sought by MCC.

MCC seeks waiver and exemption of the procedures governing Offers of Financial Assistance (“OFA”), Public Use, and Interim Trail Use. Respondent urges the Board to deny the waivers and exemptions of these provisions. MCC has not justified the waivers, must less an exemption under 49 U.S.C. §10502. MCC has not identified itself as a public agency. Certainly if MCC were a public agency, there would be no need to hide its identity. It would be contrary to the Board’s precedent to waive the OFA, Public Use and Trail Use procedures when there is no demonstrated public purpose.

With regard to the OFA, Board precedent is to address a request for exemption from the OFA process in the final decision.<sup>6</sup> Respondent urges the Board to follow its proper precedent in this proceeding and deny the waiver and exemption request concerning the OFA process.

The waiver and exemption request concerning interim trail use/rail banking is bizarre considering MCC’s purported proposal to convert the Line to trail use. Petition at 1. In addition, interim trail use is governed by 16 U.S.C. §1247(d). Although the Board’s exemption authority is broad, it is limited to “the application in whole or in part of a provision in this part.” 49 U.S.C. §10502(a) (emphasis added). “[T]his part” clearly refers to 49 U.S.C. Part A–Rail. Respondent contends that the Board’s exemption authority does not convey jurisdiction to the Board to exempt a proceeding from the interim trail use statute. It is also curious that MCC seeks waiver and

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<sup>6</sup> See, e.g. *CSX Transportation, Inc.–Abandonment Exemption–in Genesee County, MI*, STB Docket No. AB-55 (Sub-No. 633X) (STB served April 26, 2007).

exemption from the interim trail use/rail banking provisions when it claims to want to establish a trail. MCC does not claim that CSXT owns the real estate in fee simple free from reversionary interests that would enable MCC to establish a trail. Nor does MCC claim to be an entity that can use eminent domain to reassemble the Line as a corridor for trail purposes. Respondent urges the Board to view with great caution MCC's claims based on the inconsistency of its stated position when considered in light of the waiver and exemption of the trail use provision it seeks.

Respondent respectfully requests the Board to deny the waiver of 49 C.F.R. §§1152.27, .28, and .29, and deny the exemptions 49 U.S.C. §§10904 and 10905 and 16 U.S.C. §1247(d).

Respondent objects to MCC's proposed modifications to the Contents of the Notice of Intent as required by 49 C.F.R. §1152.21. As explained above, Respondent contends that the public be given the option of filing an OFA, public use request, or interim trail use/rail banking request in the event the adverse abandonment is granted. The Notice of Intent is the vehicle used by the Board to alert the public to these opportunities. Since MCC has not justified the waiver or exemption of these provisions, the Board should not permit MCC to modify the Notice of Intent to deprive the public of such notice of the OFA, public use and trail use opportunities.

In addition, MCC proposes to indicate that there are no stations on the Line (Petition at 12), even though there is a station, albeit inactive at this time. MCC also proposes to delete the reference to provisions for the protection of employees. Petition at 14. Since the Board is required to provide employee protection if the adverse abandonment is granted, it should provide employees, if any, appropriate notice. Finally and most objectionably, MCC proposes that the Notice state "an application to compel the abandonment." Petition at 12. Here, MCC diverges from the standard it has attempted to use to justify its waivers and exemptions, the *NS Waiver*. The language approved

in NS Waiver for the Notice was “an application seeking the adverse abandonment.” MCC is wrong when it states that “such relief is consistent with the Board’s decision[] in ... [NS Waiver].” Petition at 5. Respondent urges the Board to deny the waiver and specific language sought by MCC.

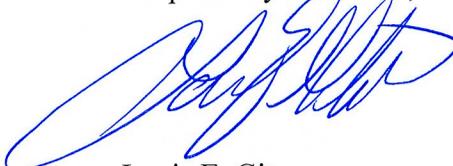
The waiver of 49 C.F.R. §1152.22(i), Federal Register Notice, sought by MCC suffers from the same infirmities as the waiver of the Notice. Respondent urges the Board to deny the Federal Register waiver and require MCC to retain the language concerning OFAs, public use, and trail use. In addition, MCC should be required to accurately reflect the station on the Line, provide an opportunity for employees to comment, and be consistent with *NS Waiver* by denying the request to state “an application to compel the abandonment.” Petition at 18.

The owner of the railroad line is not seeking to abandon this line. If the adverse abandonment is granted, the owner of the railroad may incur numerous costs that it would not otherwise incur. The Board must ensure that MCC is financially responsible so that it can reimburse the owner of the Line for those costs.

## CONCLUSION

Respondent respectfully requests the Board to deny or modify the waiver and exemption requests of MCC as discussed in this Response.

Respectfully submitted,



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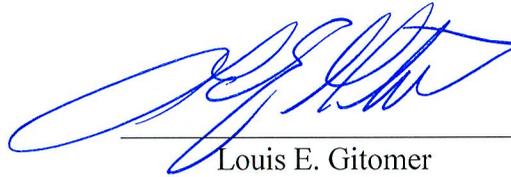
Counsel for:  
CSX CORPORATION

Dated: May 16, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have caused this Response to Petition for Waiver and Exemption to be served by first class mail, postage pre-paid on the following party of record to this proceeding.

Nicholas J. DiMichael  
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Louis E. Gitomer  
May 16, 2007