

May 25, 2007

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, S W., Suite 1260
Washington, DC 20423-00001

219389

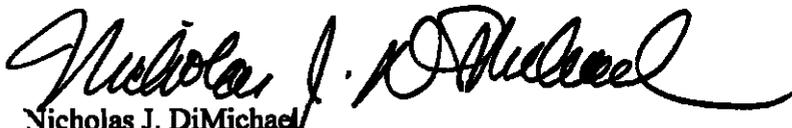
Re: Docket No. AB-1010
*Notice of Shelby County, Tennessee Joinder to Proceeding as Co-Petitioner
CSX Corporation, Adverse Abandonment in Shelby County, Tennessee*

Dear Secretary Williams:

Enclosed please find attached the Memphis Community Connector's Reply to Motion to Dismiss to be filed in the above referenced proceeding.

Should you have any questions, please do not hesitate to contact me.

Sincerely,


Nicholas J. DiMichael
Attorney for Memphis Community Connector

ENTERED
Office of Proceedings

MAY 25 2007

Part of
Public Record

cc: Louis Gitomer
Other parties served with Petition for Waiver

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB 1010

CSX CORPORATION

ADVERSE ABANDONMENT IN SHELBY COUNTY TENNESSEE

REPLY TO MOTION TO DISMISS

Memphis Community Connector (“MCC”), applicant in the above captioned adverse abandonment proceeding,¹ hereby replies to the Motion to Dismiss filed by CSX Corporation (“CSXC”) on May 9, 2007, requesting dismissal with prejudice of the Petition for Waiver and Exemption filed by MCC on April 26, 2007 (the “Petition”), termination of this proceeding with prejudice, and that this docket number be stricken from the Board’s records. CSXC bases its requests upon the fact that the rail line that is the subject of this proceeding (“the Line”) is owned by CSX Transportation, Inc. (“CSXT”), a wholly-owned subsidiary of CSXC, and not by CSXC itself. MCC objects to CSXC’s motion as unnecessary because CSXC is not now, nor has it ever been, a party to this proceeding.

MCC initiated this proceeding by filing the Petition on April 26, 2007 against CSXT. Although MCC concedes that it mistakenly named CSXC in the caption of the docket, MCC unequivocally refers to CSXT throughout the substantive text of the Petition, and no where refers to CSXC. In addition, the certificate of service shows that MCC served the CSXT Law

¹ By separate letter also being filed with the Board today, the Board is being informed that Shelby County, TN has joined with MCC as an applicant in this proceeding.

Department and Louis E. Gitomer, as outside counsel for CSXT. MCC did not serve any representative of CSXC. Furthermore, MCC began sending out environmental review letters on May 1, 2007, eight days prior to CSXC's Motion to Dismiss, that expressly identify CSXT as the proper party to this adverse abandonment request. *See Ex. A.* These facts leave no doubt that CSXT is, and always has been, the intended party to this proceeding even though it was not identified in the caption.

MCC recognizes, however, that the reference to CSXC in the caption could create some confusion as to whether or not CSXC also is an intended party. Therefore, for the purpose of clarifying the record, MCC requests that the caption to this docket be corrected to substitute CSXT for CSXC, so that the caption conforms with the substance of the Petition and the party actually served. In addition, while MCC does not believe this is necessary, MCC does not object to a Board order dismissing CSXC as a party to this proceeding, if the Board deems such action necessary to eliminate any uncertainty that CSXC is not in fact a party.

CSXC's other requests for dismissal of the Petition, termination of this proceeding, and deletion of this docket are inappropriate and over-reaching. CSXC has not demonstrated any harm to itself absent this relief, except to make unsupported assertions that somehow CSXC otherwise will be tarred forever as a railroad and will incur substantial costs to "remove any cloud" that it is a railroad. As already demonstrated, CSXC's name does not appear anywhere, except in the caption of the docket, and MCC has requested the Board to substitute CSXT's name for that of CSXC. Moreover, if CSXC's name in the caption of an STB docket is enough to cloud its status as a rail carrier, then its status was in doubt long before MCC initiated this proceeding. *See CSX Corp and CSX Transp. Inc., et al.—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corp.*, STB Finance Docket No. 33388;

CSX Corp. and CSX Transp., Inc —Adverse Abandonment—Canadian National Ry. Co and Grand Trunk Western R.R. Inc., Docket No. AB 31 (Sub No. 38); CSX Corp—Control—Chessie System, Inc and Seaboard Coast Line Industries, Inc., Finance Docket No. 28905. Because CSXC's requests for dismissal of the Petition, termination of the docket, and expungement of the docket number are based upon preposterous and unsupported assertions, those requests should be denied.

CSXC relies solely upon *CSX Corp. and CSX Transp. Inc.—Adverse Abandonment Application—Canadian National Ry. Co. and Grand Trunk Western R R. Inc.,* STB Docket No. AB-31 (Sub-No. 38) (served Feb. 1, 2002), to support its Motion. That decision, however, at best supports only dismissal of CSXC as a party to this docket. In that adverse abandonment proceeding, Canadian National ("CN"), which was an intended party, asked to be dismissed as a party because it did not own the subject rail line. The applicants, CSXC and CSXT, did not object. CN did not ask to terminate the proceeding with prejudice or to expunge the docket number from Board records, as CSXC has requested, nor did the Board take such action. Rather, the Board merely granted an unopposed motion by CN to be dismissed as a party. Thus, CSXC's other requests clearly are over-reaching and unsupported by any precedent.

Even though MCC consents to dismissal of CSXC if the Board deems that necessary (which MCC does not believe), CSXT clearly remains a party to this proceeding, despite not being identified in the caption. Other than the caption reference to CSXC, the Petition clearly is directed at, and was served upon, CSXT. A mere clerical error in the caption does not alter those facts. To hold otherwise would allow the tail to wag the dog. The Board can continue to consider the merits, as presented, under the corrected caption.

Neither CSXC nor CSXT can claim prejudice, because they are represented by the same counsel. Indeed, the best example of this is the fact that CSXC filed a complete and timely reply to the Petition on May 16, 2007, despite not being the owner of the Line. CSXC clearly chose to file the Reply under its name, even though the Petition had in fact been served upon CSXT, in order to preserve the procedural arguments raised in the Motion to Dismiss. But this merely demonstrates the “gamesmanship” in which CSXC and CSXT are engaged. If CSXC and/or CSXT were truly confused as to whom MCC had directed the Petition, they could and should have contacted MCC’s counsel for clarification. Instead, they chose not to make any inquiry so that they might pretend ignorance for possible procedural gain. The Board should not sanction such behavior.

WHEREFORE, MCC respectfully requests that the Board:

1. deny CSXC’s Motion to Dismiss; and
2. substitute CSXT for CSXC in the caption of this docket.

Respectfully submitted,



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May 25, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May, 2007, copies of the foregoing "Reply to Motion to Dismiss" were served by electronic delivery and first class mail upon counsel for CSX Corporation and CSX Transportation, Inc. at the following address:

Louis E Gitomer
The Adams Building, Suite 301
600 Baltimore Avenue
Towson, MD 21204-4022

This Reply is also served on all persons served in the Petition for Waiver submitted by Memphis Community Connector on April 26, 2007.


Nicholas J. DiMichael