

Voting Conference, May 3, 2005

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CSX Transportation, Inc.—Abandonment Exemption—In Summit County, OH
STB Docket No. AB-55 (Sub-No. 631X)

Terminal Warehouse, Inc. v. CSX Transportation, Inc.
STB Docket No. 42086

Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey, good morning.

In a decision served on May 12, 2004, the Board (1) denied Terminal Warehouse's petition to revoke a 2-year out-of-service class exemption authorizing abandonment of a 0.7-mile portion of a rail line, on which a bridge had become damaged and unsafe, and (2) dismissed a separate, but related, complaint alleging that the embargo of the line was unlawful. After carefully considering Terminal Warehouse's arguments, the Board found that Terminal Warehouse had failed to support its revocation petition or embargo complaint because it did not show that any traffic had moved over the line during the 2-year out-of-service period or that any shipper had requested rail service from CSXT during that time. Terminal Warehouse filed a petition for reconsideration, which the draft decision before you addresses.

Under the Board's regulations, a petition for reconsideration will be granted only upon a showing of material error, new evidence, or substantially changed circumstances. Terminal Warehouse alleges that the Board committed material error by overlooking certain statements by Terminal Warehouse's president alleging that a CSXT employee informed him that the damaged bridge on the line "would likely" be repaired and that Terminal Warehouse relied on those statements. The draft decision addresses the class exemption and embargo separately, as we will do here.

To comply with the Board's class exemption rules, CSXT certified, among other things, that no local traffic had moved over the line for at least 2 years. Terminal Warehouse does not directly challenge CSXT's certification, even though it can only have the exemption revoked if it shows that CSXT's notice of exemption contained false or misleading statements. Instead, it argues that had it not been lulled into inaction by the statement made by CSXT's employee, it would have requested service during the 2-year out-of-service period. Yet, the only evidence of potential traffic on the line was an email request from a potential customer near the end of the 2-year out-of-service period to store 6 cars at Terminal Warehouse's facility. Thus, the draft decision finds that Terminal Warehouse has not shown that the exemption should be revoked.

Terminal Warehouse also claims that the Board wrongly dismissed its embargo complaint. The Board generally addresses several factors in determining whether an embargo is considered reasonable, including, among others, the cost of repairs, cost of providing alternative access to rail service, and level of traffic on the line. Terminal Warehouse failed to address most of those factors, and where it addressed them, it failed to support its complaint.

Finally, Terminal Warehouse contends that the Board acted improperly by not allowing discovery to show it had been misled by CSXT. However, the evidence that it needed to support its case – its need for rail service – was evidence within its control for which it did not need discovery.

The draft decision therefore finds that Terminal Warehouse has not shown that reconsideration is warranted under the Board's governing standards. I should point out that,

even if Terminal Warehouse were to succeed in having the abandonment exemption revoked and the service complaint reinstated, thus forcing CSXT to file a petition for exemption or abandonment application, the evidence it has put into the record would not support the relief it seeks. Under these circumstances, there would be no evident benefit in forcing the parties to expend additional funds to pursue these matters further when the outcome of such a process is already clear.

We would be happy to address any questions you might have. Thank you.