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October 7, 2003

Roger A. Berliner
Manatt, Phelps & Phillips, LLP
Direct Dial: (202) 463-4379
E-mail: rberliner@manatt.com

Client-Matter: 25693-030

BY MESSENGER

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Mercury Building, Room 700
1925 K St., N.W.
Washington, DC 20423



Re: **STB Docket No. AB-565 (Sub- No. 14X)**
~~STB Docket No. AB-55 (Sub- No. 629X)~~
Petition to Revoke Exemption

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding is an original and ten (10) copies of Cushing Stone Company, Inc.'s Petition to Revoke Exemption, with exhibits. We have also enclosed a check for \$150.00 to cover the applicable filing fee and an additional copy to be date stamped and returned through the enclosed self addressed stamped envelope.

We appreciate your consideration of Cushing Stone Company, Inc's Petition. Please feel to contact us at the above address should you need any additional information.

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**SURFACE
TRANSPORTATION BOARD**

Sincerely,

Roger A. Berliner
Counsel for Petitioner Cushing Stone, Inc.

Enclosures

cc: John A. Tesario, Jr.
President, Cushing Stone, Inc.

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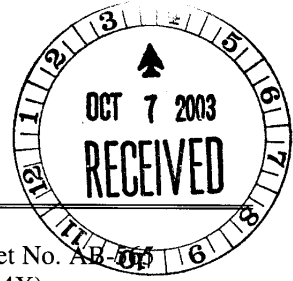
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SURFACE TRANSPORTATION BOARD



NEW YORK CENTRAL LINES, LLC —)
ABANDONMENT EXEMPTION — IN) STB Docket No. AB-55-
MONTGOMERY AND SCHENECTADY COUNTIES, NY) (Sub-No. 14X)
CSX TRANSPORTATION, INC. —)
~~DISCONTINUANCE OF SERVICE EXEMPTION — IN~~) STB Docket No. AB-55-
MONTGOMERY AND SCHENECTADY COUNTIES, NY) (Sub-No. 629X)

FILED

OCT - 7 2003

CUSHING STONE COMPANY, INC.'S PETITION TO REVOKE EXEMPTION

SURFACE
TRANSPORTATION BOARD

Pursuant to 49 C.F.R. 1152(d), Cushing Stone Company, Inc. ("Cushing Stone")

respectfully petitions the Surface Transportation Board ("Board") to immediately revoke the Notice of Exemption, filed by New York Central Lines, LLP ("NYCL") and CSX Transportation, Inc. ("CSX") with Board on February 28, 2003, and served and published in the Federal Register on March 25, 2003. Through this Notice of Exemption, NYCL and CSX sought and obtained an abandonment exemption ("Notice of Exemption") for 6.5 miles of railroad lines in Montgomery and Schenectady Counties, New York. Petitioner seeks to revoke this Notice of Exemption on the grounds that NYCL and CSX failed to comport with the requirements of 49 C.F.R. 1152.12 and falsely and/or misleadingly certified in its Notice of Exemption that such requirements had been met.

I. BACKGROUND

Petitioner Cushing Stone is an aggregate quarry, producing crushed stone and blacktop located on Route 5S in Pattersonville, Montgomery County, NY. Cushing Stone has 31 full time employees and supplies, *inter alia*, blacktop and stone to municipalities and the New York State Department of Transportation and stone used as base material for railroad tracks. See Affidavit of John Tesiero attached hereto as Exhibit A. The rail line at issue in the above referenced Notice of Exemption goes right up to Cushing Stone's facility as well as two other functioning

quarries located within one mile of Cushing Stone's facility. *Id.* Each of these quarries will be adversely affected by the proposed abandonment. *Id.*

On February 28, 2003, NYCL and CSX filed the Notice of Exemption with the Board seeking to discontinue service and abandon approximately 6.3 miles of railroad from milepost QGW 159.6 to milepost QGW 165.9, between South Amsterdam in Montgomery County and Rotterdam Junction in Schenectady County, NY. As part of its Notice of Exemption, NYCL and CSX certified that "[t]he Newspaper Notice required by 49 C.F.R. 1105.12 was published in the *Daily Gazette*, Schenectady, Schenectady County, New York on February 21, 2003." See Notice of Exemption at 6.

On March 18, 2003, the Board notified the public, through publication in the Federal Register, that NYCL and CSX had filed a Notice of Exemption ("Board Notice"). *New York Central Lines, LLC--Abandonment Exemption--In Montgomery and Schenectady Counties, NY*, STB Docket No. AB-565 (Sub-No. 14X); *CSX Transportation, Inc.--Discontinuance of Service Exemption--In Montgomery and Schenectady Counties, NY*, STB Docket No. AB-55 (Sub-No. 629X)(STB served March 25, 2003) (collectively "Board Notice"). The Board Notice specifically stated, that; "NYC and CSXT have certified that . . . the requirements at . . . 49 CFR 1105.12 (newspaper publication) . . . have been met." *Id.* The Board Notice also stated that "[i]f the verified notice contains false or misleading information, the exemptions are void *ab initio*." *Id.*

On April 25, 2003, the Notice of Exemption served and published in the Federal Register on March 25, 2003, was reopened and modified to the extent necessary to implement interim trail use/rail banking as set forth below. See *Surface Transportation Board Decision and Notice of Interim Trail Use or Abandonment -- New York Central Lines, LLC--Abandonment*

Exemption— in Montgomery and Schenectady Counties, NY, STB Docket No. AB-565 (Sub-No. 14X)(STB served on April 23, 2003).

III. ARGUMENT

The Board must revoke an abandonment exemption where the notice of exemption contained false or misleading information. If the notice of exemption contains false or misleading information, the exemption is void *ab initio* and the Board shall summarily reject the exemption notice. 49 C.F.R. 1152.50(d)(3).

The publication requirements contained in 49 C.F.R. 1105.12 provide that “[i]n every abandonment exemption case, the applicant shall publish a notice in a newspaper of general circulation in each county in which the line is located and certify to the Board that it has done this by the date its notice of (or petition for) exemption is filed. The notice shall alert the public to the proposed abandonment, to available reuse alternatives, such as trail use and public use, and to how it may participate in a Board proceeding.” (emphasis added) NYCL and CSX failed to comply with this requirement.

NYCL and CSX only published a notice in Schenectady County, and not in Montgomery County, even though the abandonment, as clearly indicated by the title of the Notice of Exemption, applied to Schenectady and Montgomery Counties in New York. Petitioner’s business, as noted, is in Montgomery County. The *Daily Gazette* of Schenectady is not a newspaper of general circulation in Montgomery County, New York. As has been affirmed by the Montgomery County Board of Supervisors, through a resolution adopted on January 7, 2003, the only newspapers with general circulation in Montgomery County, New York are *The Recorder* and *Courier-Standard Enterprise* newspapers. A true and correct copy of the Montgomery County Resolution Designating Newspapers to Publish County Matters for 2003 is attached hereto as Exhibit B.

By failing to comply with the Board's newspaper publication requirements as part of its Notice of Exemption, NYCL and CSX denied petitioner and similarly situated parties in Montgomery County, New York, the opportunity to comment on the proposed abandonment exemption, file a petition to stay pursuant to 49 CFR 1152.29 or tender an offer to purchase the rail line. The failure to properly publish the Notice of Exemption also denied Cushing Stone the opportunity to file a petition to reopen or request for public use conditions under 49 CFR 1152.28.

While it is true that the Board published its notice in the Federal Register, publication in the Federal Register alone is not sufficient to satisfy the notice requirements for abandonment exemptions. The newspaper publication requirements set forth in 49 C.F.R. 1105.12 are not discretionary. Nor is this absolute requirement waived or otherwise satisfied upon the Board's publication of a Notice of Exemption in the Federal Register. The local newspaper publication requirement serves an important purpose separate and apart from the Federal Register notice by ensuring that the communities most impacted by the abandonment are provided every opportunity to participate in the process.

Furthermore, the Board Notice clearly states that "[i]f the verified notice contains false or misleading information, the exemptions are void ab initio." The Board Notice does not state that failure to comply with the newspaper publication requirement may be waived or that a false or misleading certification that the newspaper publication was properly made can be cured through publication of the Board's Notice in the Federal Register.

The Petitioner and the Board have both the right and obligation to ensure that all of the abandonment exemption requirements are met. This is particularly true where substantive rights are at stake, as here. Because these requirements have not been met in this instant matter and

because NYCL and CSX falsely and/or misleadingly certified that they had been met, the Board must exercise its authority to declare the Notice of Exemption void *ab initio*.

III. CONCLUSION

For these reasons, Petitioner respectfully requests that the Board declare that the Notice of Exemption contains false and/or misleading information, declare use of the exemption void *ab initio* and summarily reject the Notice of Exemption.

Dated: October 7, 2003

Respectfully Submitted,

By: 

John J. Faso, Esq.
Roger Berliner, Esq.
Michael Brown, Esq.
MANATT, PHELPS & PHILLIPS, LLP
1501 M Street, N.W., Suite 700
Washington, DC 20005
(202) 463-4300 (phone)
(202) 463-4394 (fax)

*Counsel for Petitioner
Cushing Stone Company, Inc.*

CERTIFICATE OF SERVICE

In accordance with 49 C.F.R. §1152.50(d)(2), I certify that I have, on this 7th day of October, 2003, served a copy of the foregoing Petition to Revoke Exemption and Affidavit of John Tesiero, Jr., by first class mail, postage prepaid, on counsel for all parties of record in this proceeding, as stated in the above reference Notice of Exemption, at the following addresses:

Natalie S. Rosenberg, Esq.
Counsel
CSX Corporation, Inc.
500 Water Street.
Jacksonville, FL 32202



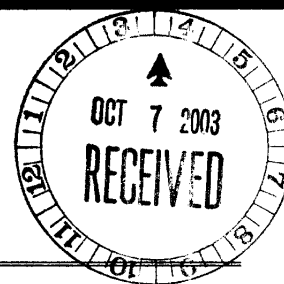
Michael T. Brown

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BEFORE THE
SURFACE TRANSPORTATION BOARD



NEW YORK CENTRAL LINES, LLC —	)
ABANDONMENT EXEMPTION — IN	) STB Docket No. AB-565
MONTGOMERY AND SCHENECTADY COUNTIES, NY	) (Sub-No. 14X)
	)
CSX TRANSPORTATION, INC. —	)
DISCONTINUANCE OF SERVICE EXEMPTION — IN	) STB Docket No. AB-55-
MONTGOMERY AND SCHENECTADY COUNTIES, NY	) (Sub-No. 629X)

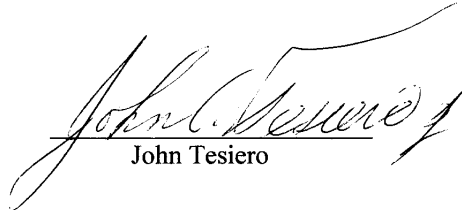
AFFIDAVIT OF JOHN TESIERO

I, John Tesiero, being first duly sworn, deposes and says as follows:

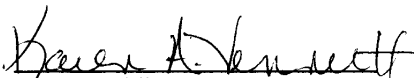
1. I am President of Cushing Stone Company, Inc. (Cushing Stone”), the Petitioner herein, and submit this Affidavit for the purpose of providing factual support for Cushing Stone’s Petition to Revoke the Notice of Exemption filed by New York Central Lines, LLP (“NYCL”) and CSX Transportation, Inc. (“CSX”) with Surface Transportation Board (“Board”) on February 28, 2003, and served and published in the Federal Register on March 25, 2003 (“Notice of Exemption”).
2. I have personal knowledge of the matters testified hereto and, if called before the Board would state as follows:
3. Cushing Stone is an aggregate quarry that produces crushed stone and blacktop and supplies, among other things, blacktop to municipalities and the New York State Department of Transportation and stone used as base material for railroad tracks.
4. Cushing Stone currently has 31 full time employees is located on Route 5S in Pattersonville, Montgomery County, NY. Cushing Stone has been in operation since 1921.

5. Cushing Stone's facility, as well as two other quarries located in Montgomery County, NY, is adjacent to, and served by, the rail line at issue in the above referenced Notice of Exemption.
6. The proposed abandonment at issue in the above-referenced Notice of Exemption will potentially have a detrimental impact on the operations of Cushing Stone and Cushing Stone and its employees. Cushing Stone requires rail access to maximize its quarry operations.
7. As a resident of Montgomery County, NY, Cushing Stone does not receive the *Daily Gazette* newspaper of Schenectady, NY, and was not notified of NYCL and CSX's proposed Notice of Exemption.
8. Had Cushing Stone received local notification of the Notice of Exemption, Cushing Stone would have either commented on the proposed abandonment exemption, filed a petition to stay pursuant to 49 CFR 1152.29, tendered an offer to purchase the rail line, or filed a petition to reopen the Notice of Exemption or requested public use conditions as part of NYCL and CSX's efforts to abandon the rail line at issue in the Notice of Exemption.

Further Affiant sayeth not:


John Tesiero

Subscribed and sworn to me this 6th day of October, 2003:


Notary Public

KAREN A. VENNETT
Notary Public, State of New York
No. 01VE6032833

My Commission expires on November 8, 2005
Qualified in Montgomery County