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September 20, 2002

By UPS overnight mail
(Monday delivery)

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

ENTERED
Office of Proceedings

SEP 23 2002

Part of
Public Record



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 Motion to Strike, for filing with the Board in the above referenced matter.

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

Very truly yours,

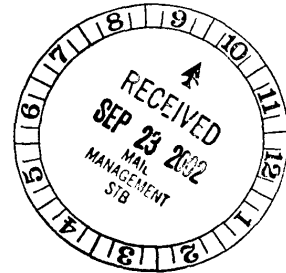
Tom McFarland

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

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BEFORE THE
SURFACE TRANSPORTATION BOARD

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



MOTION TO STRIKE

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BOLEN-BRUNSON-BELL LUMBER COMPANY, INC.
3175 Johnson Avenue
P.O. Box 11205
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Protestant

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DATE FILED: September 23, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD



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

MOTION TO STRIKE

Pursuant to 49 C.F.R. § 1117.1, Protestant BOLEN-BRUNSON-BELL LUMBER COMPANY, INC. (BBB) hereby moves that the Board strike the following evidence submitted by Applicant CSX Transportation, Inc. (CSXT) in its Rebuttal filed on September 10, 2002:

<u>Rebuttal Page No.</u>	<u>Matter To Be Stricken</u>
18	The third sentence of the second paragraph of the Rebuttal Verified Statement of Ellen M. Preslar
19-20	Section B of Ms. Preslar's Rebuttal Verified Statement
23	Revised Exhibit 1, Lines 6a, 7 and 17 to the extent that they include costs shown on page 33 of the Rebuttal
33-34	Workpapers showing off-branch costs based on Section B of Ms. Preslar's Rebuttal Verified Statement
58-59	The Rebuttal Verified Statement of Greg Wallen

The ground for this Motion is that the identified matter constitutes new evidence on rebuttal, which is prohibited under 49 C.F.R. § 1112.6: "Rebuttal statements shall be confined to issues raised in the reply statements to which they are directed."

BBB's reply statements did not raise any issue regarding the manner in which CSXT transports traffic for which it receives switching charges. Therefore, Mr. Wallen's testimony describing how that traffic is transported from the Memphis yards of other carriers to CSXT's Leewood Yard in Memphis, and Ms. Preslar's testimony ascribing off-branch costs to that traffic, are not directed at any issue raised in BBB's reply statements. Instead, the testimony of Mr. Wallen and Ms. Preslar in that respect constitutes new evidence designed to resurrect CSXT's case-in-chief after CSXT belatedly realized that the substantial forecast year operating profit acknowledged in its opening statement dooms its application for discontinuance.

A motion to strike new evidence on rebuttal was sustained in *SKWR Operating Co. -- Aban. Exempt. -- in Cochise County, AZ*, 1997 STB LEXIS 286 (STB Docket No. AB-441 [Sub-No. 2X], decision served Nov. 12, 1997), under circumstances essentially indistinguishable from those involved in the present case. A party in that case submitted an analysis of operating expenses in its opening statement. Thereafter, that party retained a different analyst who submitted a more comprehensive new analysis of operating expenses in the party's rebuttal statement. That analysis was not responsive to any evidence submitted by the opposing party. In sustaining a motion to strike the new evidence on rebuttal, the Board said (1997 STB LEXIS 286 at *4-5):

We will grant the motion to strike. Mr. Stern's evidence and arguments are simply not responsive to those in SWKR's reply. If CLC had problems with any of the information provided or not provided to it by the railroad for use in preparing its August 29 submission, it should have raised that issue at that point in time or even earlier. To now allow this new evidence and argument to be introduced into the record as part of CLC's rebuttal would be improper and would prejudice SWKR. Accordingly, we will not do so. The Stern statement will be stricken from the record.

Accord: Malone Freight Lines, Inc. v. United States, 204 F.Supp. 745 (ND, Ala., SD, 1962), at 755 (“We hold that such evidence was not in rebuttal of any facts appearing in any statements but served merely to aid plaintiff’s case in chief after its deficiencies had been pointed out by protestants. Under the Commission’s General Rules of Practice (footnote omitted) it was proper to strike such evidence”); *see, also, Illinois Central Gulf R. Co. - Abandonment*, 354 I.C.C. 448, 453 (1977).

The principle against new evidence on rebuttal has added importance in rail abandonment - discontinuance cases because of the accelerated time frame for processing such cases. An applicant’s entire case-in-chief must be filed with the abandonment or discontinuance application; protestant’s evidence is due 45 days after the application is filed; applicant’s rebuttal evidence is to be filed 60 days after the application is filed; and the Board’s decision on the merits is to be issued only 110 days after the application is filed. *See Aban. and Discon. of R. Lines and Transp. under 49 U.S.C. 10903*, 1 S.T.B. 894, 896 (1996). If the Board is to have sufficient time after the close of the record to prepare a reasoned decision on the merits, the already-abbreviated 50-day period for preparation of a decision cannot be further shortened to allow for the filing and consideration of surrebuttal evidence. Yet the opportunity to file surrebuttal evidence is an essential requirement of procedural due process if new evidence filed on rebuttal is to be given consideration.

Inasmuch as the time frame for processing abandonments is based on statutory requirements that prevent its extension,^{1/} the principle against new evidence on rebuttal is to be

^{1/} The 110-day time period for a decision on the merits is based on the 4-month period after the filing of an abandonment application for the filing of an offer to subsidize or
(continued...)

enforced in abandonment cases by striking the new evidence, rather than by providing for surrebuttal. It is a consistent Board practice in cases involving petitions for exemption of abandonment to strike rebuttal evidence (which is not provided for in the procedural rules) rather than to provide for surrebuttal, in view of a similar abbreviated time frame for processing such petitions. See, e.g., *Boston & M. Corp. - Aban. Exempt. -- in Hartford and New Haven Counties, CT*, 1996 STB LEXIS 361 at *13-14 (STB Docket No. AB-32 [Sub-No. 75X], decision served Dec. 31, 1996); and *Central R. Co. of Ind. -- Aban. Exempt. -- in Dearborn, Decatur, Franklin, Ripley and Shelby Counties, IN*, 1998 STB LEXIS 121, at * 5 (STB Docket No. AB-459 [Sub-No. 2X], decision served May 4, 1998).

CSXT is being unduly generous with the Board's limited time for preparing a decision in suggesting (1) "a short period" for BBB to respond to the new evidence on rebuttal and (2) yet another rebuttal filing by CSXT (Rebuttal at 4). BBB will not rise to that bait. BBB would be entitled under procedural due process to the same adequate time to respond to that new evidence as any other evidence (i.e., 45 days), not the "short period" suggested by CSXT. Neither should the Board be taken in by CSXT's ploy, which would unduly shorten the time for preparation of a reasoned decision on the merits. CSXT's suggestion would stand orderly practice and procedure on its head.

For all of these compelling reasons, the new evidence on rebuttal should be stricken.

Alternatively, if that evidence is not stricken and sufficient time for surrebuttal is not provided, it should be found that CSXT's new evidence is not entitled to weight in determining

^{1/}(...continued)
purchase the rail line (49 U.S.C. § 10904[c]), minus 10 days to prepare such offer.

the merits of the discontinuance application. CSXT's new evidence establishes only that for its own operating convenience, CSXT takes traffic that has arrived at other rail carriers' yards in Memphis on a 446-mile trip to Nashville and back, rather than transporting that traffic, or arranging for its transportation, a very few miles crosstown between railyards in Memphis. No wonder CSXT waited until its position on the merits became desperate before putting forth evidence of that kind of unconventional operating practice! Without question, the off-branch costs associated with the numerous extra miles involved in that operation are not "just and reasonable" and "exceed those (costs) necessary for an . . . efficient operation," within the meaning of those terms in 49 C.F.R. § 1152.32. That being the case, those off-branch costs are not "eligible for inclusion in the calculation of avoidable costs" of operating the rail line. (*Id.*). That is to say that such off-branch costs are not entitled to weight in determining the merits of the discontinuance application.

The effect of either alternative is to eliminate from consideration the additional off-branch costs for switch moves shown on page 33 of CSXT's Rebuttal. The effect of that elimination is to come back to a significant forecast year operating profit of a magnitude similar to that acknowledged in CSXT's Application and refined in BBB's Protest. Thus, there would be an avoidable forecast year operating profit of \$33,867 on Line 17 of CSXT's Revised Exhibit 1 when off-branch costs on Line 6a are corrected to account for elimination of the additional costs for switch moves. *See* Rebuttal at 23.^{2/} That magnitude of operating profit is ample to

^{2/} The calculation is as follows: Line 4 total revenue of \$129,995 minus corrected Line 7 total cost of \$96,128 equals total operating profit of \$33,867. Line 7 is corrected by subtracting the difference between Line 6a as shown in Revised Exhibit 1 and Line 6a as shown in original Exhibit 1, from Line 7 as shown in Revised Exhibit 1, i.e., \$167,278 - (\$136,773 - \$65,623 = \$71,150) = \$96,128.

support all of the arguments made at pages 16-22 of the Protest to the effect that continued operation of the rail line would not be burdensome in any respect.^{3/}

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, CSXT's new evidence on rebuttal should be stricken, or, if not stricken, it should be found that such evidence is not entitled to weight in determining the merits of the application.

Respectfully submitted,

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Protestant



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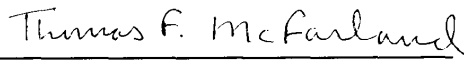
Attorney for Protestant

DATE FILED: September 23, 2002

^{3/} The avoidable forecast year operating profit would be \$40,371 as shown in BBB's Protest at page 8 when on-branch freight car costs other than ROI on Line 5g are developed on the basis of CSXT's car costs in accordance with 49 C.F.R. § 1152.32(g) as they were in Application, Vol. 2 at 52, instead of on the basis of rail industry car costs as they are at pages 29-31 of CSXT's Rebuttal, using numbers of car-days for which there is no support in the workpapers or in any prior testimony.

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2002, I served the foregoing document, Motion to Strike, 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 (Monday delivery).



Thomas F. McFarland