

211414

BALL JANIK LLP

A T T O R N E Y S

1455 F STREET, NW, SUITE 225
WASHINGTON, D.C. 20005

www.balljanik.com

TELEPHONE 202-638-3307
FACSIMILE 202-783-6947

LOUIS E. GITOMER
OF COUNSEL
(202) 466-6532



lgitomer@dc.lp.com

June 22, 2004

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 700
Washington, D. C. 20423

ENTERED
Office of Proceedings

JUN 22 2004

Part of
Public Record

RE: Docket No. AB-55 (Sub-No. 631X), *CSX Transportation, Inc. —Abandonment
Exemption—in Summit County, OH*
✓ Docket No. 42086, *Terminal Warehouse, Inc. v. CSX Transportation, Inc.*

Dear Secretary Williams:

Enclosed are the original and 10 copies CSX Transportation, Inc.'s Response and three diskettes containing the file Response.doc.

Please time and date stamp the additional copy of this letter and the Response, and return them to our messenger. Thank you for your assistance.

If you have any questions, call or email me.

Sincerely yours,

Louis E. Gitomer
Attorney for CSX Transportation, Inc.

Enclosures

211414
ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. AB-55 (Sub-No. 631X)

CSX TRANSPORTATION, INC.-ABANDONMENT EXEMPTION
IN SUMMIT COUNTY, OH

✓ Docket No. 42086

TERMINAL WAREHOUSE, INC.

v.

CSX TRANSPORTATION, INC.

ENTERED
Office of Proceedings

JUN 22 2004

Part of
Public Record

RESPONSE OF CSX TRANSPORTATION, INC.
TO PETITIONS FOR RECONSIDERATION OF TERMINAL WAREHOUSE, INC.

Jonathan C. Gold, Esq.
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
(904) 366-4228

Louis E. Gitomer, Esq.
Ball Janik, LLP
1455 F Street, NW, Suite 225
Washington, DC 20005
(202) 638-3307

Attorneys for: CSX TRANSPORTATION,
INC.

Dated: June 22, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. AB-55 (Sub-No. 631X)

CSX TRANSPORTATION, INC.—ABANDONMENT EXEMPTION—
IN SUMMIT COUNTY, OH

Docket No. 42086

TERMINAL WAREHOUSE, INC.
v.
CSX TRANSPORTATION, INC.

RESPONSE OF CSX TRANSPORTATION, INC.
TO PETITIONS FOR RECONSIDERATION OF TERMINAL WAREHOUSE, INC.

CSX Transportation, Inc. (“CSXT”) responds in opposition to the two Petitions for Reconsideration filed on June 2, 2004 (the “Petitions”) by Terminal Warehouse, Inc. (“Terminal Warehouse”). CSXT respectfully requests the Surface Transportation Board (the “Board”) to deny the requested reconsideration.

The Petitions filed by Terminal Warehouse are the same and both seek reconsideration of the decision in *CSX Transportation, Inc.—Abandonment Exemption—in Summit County, OH*, Docket No. AB-55 (Sub-No. 631X) (STB served May 12, 2004)¹ (the “Decision”). The *Decision* also dismissed the complaint filed by Terminal Warehouse in *Terminal Warehouse, Inc. v. CSX Transportation, Inc.*, Docket No. 42086 (the “Complaint”). Because the proceedings were not consolidated, Terminal Warehouse filed a Petition for Reconsideration in each proceeding. The

¹ Referred to as the “Abandonment.”

Petitions are the same, therefore, for administrative convenience, CSXT is submitting one response. In the *Decision*, the Board correctly recited the facts of these proceedings, and CSXT will rely on those facts.

Terminal Warehouse seeks reconsideration of the Board's decision to not revoke the Abandonment exemption and to dismiss the Complaint. Terminal Warehouse wrongly argues that the *Decision* is based on material error. Terminal Warehouse's claim of material error is based on a misinterpretation of a portion of the *Decision* (Petitions at 4) and a mistaken belief that the Board overlooked the Affidavit of William K. Hanlon ("Hanlon VS"). Accordingly, CSXT respectfully requests that the Board deny the Petitions.

Terminal Warehouse states that "In this case, the Board implicitly acknowledged that if CSXT unlawfully or unreasonably embargoed the Line for all or part of the two-year period, then its certification that no traffic has moved over the line for a period of two years is false or misleading. *Decision* at 5." Petitions at 4. The Board implied no such conclusion. To the contrary, the Board clearly concluded that Terminal Warehouse's "argument is incorrect." *Decision* at 5. The Board further explained that "Terminal Warehouse might have a stronger case here if it or anyone else had even requested rail service from CSXT during the period at issue, but there is no record evidence." *Id.*

As the Board concluded, the simple fact is that neither Terminal Warehouse nor anyone else ever requested service on the line, much less used the line, for over two years. In a vain attempt to avoid this fact, however, Terminal Warehouse recites three paragraphs from the Hanlon VS that Terminal Warehouse claims the Board overlooked. The Board did not overlook the Hanlon VS; rather, the Board explicitly considered and rejected the issues raised in the Hanlon VS throughout the *Decision* at 4-6.

Moreover, the three paragraphs of the Hanlon VS cited by Terminal Warehouse are internally inconsistent. Paragraph 16 recalls a telephone conversation about damage to the bridge that took place in September 2001, while Mr. Hanlon later admits that the bridge was not damaged until February 2002 and not embargoed until August 2002. The Board should not give any weight to such inherently flawed "evidence".

Mr. Hanlon also admits that he knew the bridge had been removed in July or August 2002. Hanlon VS Paragraph 21. Despite this actual knowledge, Terminal Warehouse did nothing. Mr. Hanlon merely asserts that a CSXT employee told him that CSXT "would likely repair the rail line." Petitions at 5. From this, Terminal Warehouse claims that "Terminal Warehouse established that CSXT advised Mr. Hanlon that the line would be repaired." *Id.* Terminal Warehouse did no such thing; rather, it transforms a vague "would likely" to a definite "would". Moreover, although Terminal Warehouse now contends that Mr. Hanlon "expected that the rail line would be repaired," the Hanlon VS does not contain any statement to that effect.

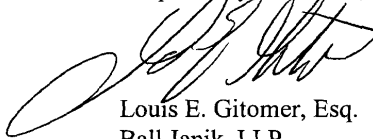
Terminal Warehouse also contends that it did not request service because it knew that service could not be provided and did not know that it needed to request service to "protect the return" of rail service. Petitions at 5. But Terminal Warehouse claims that it did not know the bridge was unusable until July or August 2002. Terminal Warehouse had not, however, used the line since January 2001, about 18 months *prior* to that time. In fact, Terminal Warehouse admits that it did not even have any potential need to use the line until December 13, 2003, when it received a request for a quote that possibly could have generated traffic over the line. In light of the evidence of the lack of any traffic over the line (much less the lack of a request for service over the line) for over two years, the Board properly concluded that CSXT made an economically rational decision to abandon the line.

Finally, Terminal Warehouse claims that it has established that it lost business because of CSXT's actions. CSXT disagrees. There is no evidence that Terminal Warehouse had any rail traffic to tender to CSXT. The only evidence proffered by Terminal Warehouse is that it was asked for a "quote to deliver goods." Hanlon VS paragraphs 29 and 30. Merely because Terminal Warehouse was asked to submit a quote for potential business does not guarantee that it would submit a successful quote, obtain the business, or ship the freight over CSXT's railroad line.

The Board's Decision did not involve material error. The Board fully considered the evidence and argument presented by CSXT and Terminal Warehouse, including the Hanlon VS, and correctly concluded that Terminal Warehouse had failed to carry its burden in the Abandonment and had failed to even present a prima facie case in the Complaint.

Accordingly, CSXT respectfully requests that the Board deny the Petitions.

Respectfully submitted,



Louis E. Gitomer, Esq.
Ball Janik, LLP
1455 F Street, NW, Suite 225
Washington, DC 20005
(202) 638-3307

Jonathan C. Gold, Esq.
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
(904) 366-4228

Attorneys for: CSX TRANSPORTATION,
INC.

Dated: June 22, 2004

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served upon counsel for
Terminal Warehouse, Inc., by express mail.



Louis E. Gitomer
June 22, 2004