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October 6, 2004

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



ENTERED  
Office of Proceedings

OCT 08 2004

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Public Record

212182

RE: Finance Docket No. 34495, *Buckingham Branch Railroad Company-Lease-  
CSX Transportation, Inc.*

Dear Secretary Williams:

Enclosed are the original and 10 copies of the Response CSX Transportation, Inc.  
to the Motion for Declassification and three computer diskettes in containing the  
Response.

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

If you have any questions please call or email me.

Sincerely yours

Louis E. Gitomer  
Attorney for: CSX Transportation, Inc.

Enclosures

2/2/82

CSXT-10

ORIGINAL

BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34495

BUCKINGHAM BRANCH RAILROAD COMPANY—LEASE—  
CSX TRANSPORTATION, INC.

RESPONSE OF CSX TRANSPORTATION, INC. TO MOTION FOR DECLASSIFICATION

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Counsel for CSX Transportation, Inc.

Dated: October 6, 2004

BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34495

BUCKINGHAM BRANCH RAILROAD COMPANY—LEASE—  
CSX TRANSPORTATION, INC.

RESPONSE OF CSX TRANSPORTATION, INC. TO MOTION FOR DECLASSIFICATION

CSX Transportation, Inc. (“CSXT”) opposes the Motion of the Brotherhood of Maintenance of Way Employees for Declassification of BMW Exhibit 5 or Alternatively for Leave to File Supplemental Evidence (the “Motion”). The Brotherhood of Maintenance of Way Employees (the “BMW”) has requested the declassification of Exhibit No. 5 to BMW-8.

CSXT contends that BMW has not only failed to comply with the Protective Order<sup>1</sup> served by the Surface Transportation Board (“Board”) but has blatantly violated *Decision No. 1*.

In response to a Petition filed on May 26, 2004, by CSXT and the Buckingham Branch Railroad Company (“BB”), the Board served *Decision No. 1*. CSXT produced certain documents to BMW in discovery, which were labeled Confidential and Highly Confidential, in conformity with *Decision No. 1*. Of relevance to the Motion are two documents produced by CSXT to BMW.

CSXT numbered the first document 0448-0458, and on page 0448, in the upper-left, the document is identified as FRA No. CSX 2002-68(TS) with a date of July 18, 2002 (referred to as “68(TS)”). BMW included 68(TS) in BMW-8, Confidential Exhibits to the Comments of the

<sup>1</sup> *Buckingham Branch Railroad Company—Lease—CSX Transportation, Inc.*, STB Finance Docket No. 34495 (STB served June 4, 2004) (“*Decision No. 1*”).

Brotherhood of Maintenance of Way Employees as **Exhibit 4**. See BMW-6, page 5, describing “(Doc. #448 – 458, BMW Ex. 4).”

CSXT numbered the second document 0305-0313, and on page 0305, in the upper-left, the document is identified as FRA No. CSX 2002-88(TS) with a date of October 23, 2002 (referred to as “88(TS)”). BMW included 88(TS) in BMW-8, Confidential Exhibits to the Comments of the Brotherhood of Maintenance of Way Employees as **Exhibit 5**. See BMW-6, page 7, describing “(Doc. #305 – 313, BMW Ex. 5).”

By letter dated August 11, 2004, in response BMW’s request to declassify certain documents CSXT stated: “CSXT has carefully reviewed your request to reclassify to public the FRA reports that CSXT has classified as confidential. We have decided not to reclassify the documents. Under the Protective Order full use of confidential documents is permitted in a confidential filing.” See Attachment 1. On August 24, 2004, BMW filed BMW-6 and BMW-8, produced under seal documents 68(TS) and 88(TS) and referenced and argued about issues it believed were raised by these documents.

On October 1, 2004 BMW filed the Motion specifically requesting the declassification of **Exhibit No. 5** (see page 1, line 3; page 2, lines 3, 5, and the next to last line) and only Exhibit No. 5. BMW served the Motion on “all parties of record.” Motion at 3. Attached to the Motion is 68(TS), which is Exhibit No. 4, not Exhibit No. 5.

Paragraph 10 of the Protective Order states: “No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to the Board, unless the pleading or other document is submitted under seal, in a package clearly marked on the outside as ‘Confidential Materials Subject to Protective Order.’” The Motion was not filed under seal. Indeed, it was broadcast to the public through service to parties on the service list.

However, few parties on the service list have submitted the Undertakings required by Protective Order. For example, no representative of the State of Virginia, Norfolk Southern Railway Company, the United States Department of Justice, or United States Department of Transportation has submitted an undertaking to CSXT or BB. In addition, the Amtrak attorney who BMWWE faxed the Motion to, has not executed any Undertaking. See Attachment 2, Fax cover sheet of BMWWE.

Counsel for BMWWE did execute the Undertaking required by the Protective Order for Confidential Material, which in relevant part states:

I further agree not to disclose any ... Confidential Documents ... obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof ....

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/or other **equitable relief** as a remedy for any such breach.

See Attachment 3. BMWWE has violated Paragraph 10 of the Protective Order and the Undertaking by broadcasting 68(TS) to the public.

BMWWE seeks declassification of Exhibit No. 5, 88(TS). But BMWWE attached to the Motion Exhibit No. 4, 68(TS), not Exhibit No. 5. BMWWE claims that it obtained Exhibit No. 5 from the Federal Railroad Administration ("FRA") under the Freedom of Information Act ("FOIA"), but it attached 68(TS) to the Motion. BMWWE has not produced the letter it sent to FRA or the response from FRA. There is no evidence that BMWWE obtained either 68(TS) or 88(TS) from FRA.

The violation by BMWWE is even more egregious because 68(TS) is not the document that BMWWE is seeking to declassify. As BMWWE stated **four** times in the Motion, it is seeking to

declassify the document in Exhibit No. 5. BMWE identified its own Exhibits in BMWE-6.

BMWE agreed to be bound by the Protective Order.

The legislative and regulatory deregulation of the rail industry since 1980 has created a problem for the Board and the parties litigating issues before the Board concerning access to sensitive information from the railroads. The Board has developed the Protective Order as a means of making sensitive information available while protecting the confidences of the producing party. The Protective Order has worked well in assisting the Board in developing a complete record expeditiously in many proceedings. Parties before the Board have come to rely on the Protective Order as a guarantor of confidentiality and therefore been willing to produce confidential information and documents in discovery.

Now comes BMWE and violates the terms of a Protective Order and potentially the trust of the Board's constituents who have accepted the use of the Protective Order.<sup>2</sup> CSXT contends that the principle and credibility of the Protective Order must be defended by the Board and that the only way to do that in this proceeding is to sanction BMWE.

Not only has BMWE violated the Protective Order, but BMWE has not made a case for the declassification of Exhibit No. 5. The criteria the Board uses in deciding whether to declassify confidential information is:

We resolve any doubts as to the need for confidentiality in favor of protecting the asserted confidentiality unless the opposing party can show that the removal of the designation is necessary for it to make its case, to argue an appeal adequately, or to satisfy a statutory goal.<sup>3</sup>

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<sup>2</sup> Violation of the Protective Order is not the first time that BMWE has ignored BB's and CSXT's legal rights in this proceeding. In conducting an inspection of the BB and CSXT, BMWE entered private property without permission.

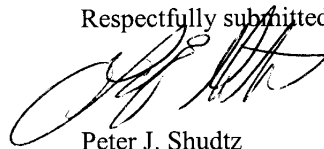
<sup>3</sup> CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company --Control and Operating Leases/Agreements--Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket no. 33388, Decision No. 68 (STB served February 23, 1988), at 4.

BMWE has already made its case using Exhibit No.5. Moreover, BMWE has not obtained Exhibit No. 5 from an independent source. BMWE is not arguing an appeal. No statutory goal has been implicated by BMWE. BMWE's stated reason to declassify Exhibit No. 5 is to make it part of the public record. In addition, CSXT contend<sup>4</sup>s that Exhibit No. 5 is not relevant to this proceeding under the criteria of 49 U.S.C. § 11324(d). CSXT objected to producing 68(TS) and 88(TS) on grounds that they were not relevant. See BMWE-8, Exhibit No. 1 containing the CSXT/BB Response to BMWE's First Set of Requests for the Production of Documents, Responses Nos. 3 and 4 on pages 5-6. Without waiving the relevance objection, CSXT produced the requested documents to avoid delays in this proceeding.

In the alternative BMWE seeks to introduce what it calls Exhibit No. 5 into the record at this late date as supplemental evidence simply so that it would become part of the public record for some unexplained reason. BMWE has produced no evidence other than its assertion that it has obtained Exhibit No. 5 or any other document from FRA. BMWE has not proven that it could not have obtained this document earlier in this proceeding. Nor has BMWE shown that CSXT would not be prejudiced by declassifying Exhibit No. 5.

BMW has failed to meet the relevant standards for declassifying documents. Of more importance, BMW has violated the Protective Order in this proceeding, warranting the imposition of sanctions by the Board. CSXT respectfully suggests the Board sanction BMW by denying the Motion, striking from the record Exhibit Nos. 4 and 5 and all references and arguments made by BMW referring to those two Exhibits, and admonish BMW to comply with the Board's Protective Orders in the future.

Respectfully submitted,



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Counsel for CSX Transportation, Inc.

Dated: October 6, 2004

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served upon the following parties by first class mail pre-paid.

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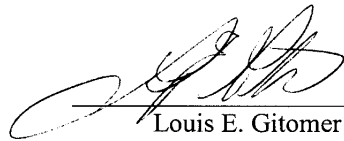
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October 6, 2004