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THOMAS F. McFARLAND

April 7, 2004

By UPS overnight mail

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
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Re: Docket No. AB-55 (Sub-No. 643X), *CSX Transportation, Inc. -- Abandonment Exemption -- in LaPorte, Porter and Starke Counties, IN*

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 Offeror

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BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX TRANSPORTATION, INC. --)
ABANDONMENT EXEMPTION -- IN) DOCKET NO. AB-55
LAPORTE, PORTER AND STARKE) (SUB-NO. 643X)
COUNTIES, IN)



MOTION TO STRIKE

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TOWN OF NORTH JUDSON, INDIANA
P.O. Box 56
North Judson, IN 46366

Offeror

THOMAS F. McFARLAND
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Attorney for Offeror

DATE FILED: April 8, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX TRANSPORTATION, INC. --)
ABANDONMENT EXEMPTION -- IN) DOCKET NO. AB-55
LAPORTE, PORTER AND STARKE) (SUB-NO. 643X)
COUNTIES, IN)

MOTION TO STRIKE

Pursuant to 49 C.F.R. § 1117.1, Offeror the Town of North Judson (the Town) hereby moves to strike the evidence and argument in CSX Transportation Inc.'s (CSXT) Response filed April 5, 2004 relating to the value of track materials in the rail line. The evidence sought to be stricken is the verified statement and exhibits of William R. Pemberton at Volume 1, pages 16-28 of the Response, except for the portion of the verified statement on "The Embankment Issue" on page 18. The argument sought to be stricken is that which relies on the evidence of Mr. Pemberton. The ground for the motion is that CSXT unfairly and prejudicially withheld the evidence submitted by Mr. Pemberton until the filing of the Response, thereby effectively insulating it from investigation and rebuttal by the Town.

BACKGROUND

The Town's offer of financial assistance (OFA) was filed on March 1, 2004. The OFA contained an offer to purchase the rail line for \$1,200,000. It was made clear in the OFA that the offer was based on the same valuation for track materials that was contained in CSXT's Petition for Exemption of abandonment, filed November 3, 2003, i.e., \$1,050,550.

In a decision served March 4, 2004, the Board accepted the Town's OFA for filing and provided until March 31, 2004 for the parties to attempt to negotiate the purchase price for the rail line. The Town's negotiator was its consultant, Mr. Gary E. Landrio. CSXT's negotiator was Ms. Bobbi League. Mr. Landrio confined his negotiation to the value of the land in the right-of-way. Mr. Landrio did not attempt to negotiate the value of track materials because the Town's offer contained a value for track materials that was the same value that CSXT had placed on those track materials in its abandonment filing. Ms. League never once mentioned during those negotiations that CSXT no longer adhered to the value that it previously placed on the track materials.

Negotiations to establish a purchase price were unsuccessful. On March 31, 2004, the Town filed a request that the Board establish the purchase price (Request). The price argued for in the Town's Request continued to be based on a value of \$1,050,550 for track materials. The Town continued to believe that such value corresponded to the value placed on the track materials by CSXT.^{1/} The Town had no reason to believe otherwise.

In its Response filed April 5, 2004, CSXT for the first time valued the track materials at \$1,952,288, an increase of 86 percent over the value contained in its abandonment petition filed on November 3, 2003. CSXT's Witness Pemberton stated that the value of track materials in the CSXT abandonment petition filed November 3, 2003 was based on "steel values from 2002" (Response at 17). Mr. Pemberton stated that the increased value of track materials in the Response is based on "steel values which CSXT obtained in the first quarter of 2004" (*id.*).

^{1/} Request at 4: "The Town continues to agree with CSXT's valuation of \$1,050,550 for track materials. Only land value is at issue . . ."

There is insufficient time for the Town to investigate and to attempt to rebut CSXT's new evidence of value of track materials. By statute, the Board is required to render its decision in scarcely three weeks.^{2/}

ARGUMENT IN SUPPORT OF MOTION

CSXT unfairly "sandbagged" the Town in this matter. CSXT unfairly led the Town to believe that CSXT valued track materials in the line at \$1,050,550, only to increase that valuation by 86 percent at the last minute, free from investigation and rebuttal. The Board should not permit that kind of unfair practice and procedure.

CSXT now says that the value of track materials in its November 3, 2003 petition was based on "steel values from 2002." That was nowhere stated nor shown in the petition. On the contrary, the valuation of track materials in that petition was dated August 4, 2003 (copy attached as Appendix 1). A person reading CSXT's November 3, 2003 filing would reasonably conclude that the August 4, 2003 valuation continued to be valid as of the November 3, 2003 filing date, in the absence of any statement to the contrary in the CSXT petition. Therefore, CSXT's petition led the Town to believe that the track materials had a value of \$1,050,550 as of November 3, 2003.

It became apparent to CSXT that the Town was valuing track materials on the basis of CSXT's own valuation when the Town referred to CSXT's valuation in offering \$1,050,550 for track materials in the Town's OFA filed March 1, 2004. However, even though CSXT says that in the first quarter of 2004 it obtained the steel values on which its increased value of track

^{2/} 49 U.S.C. § 10904(f)(1)(A): "the Board shall render its decision within 30 days (of the Request)."

materials is based, CSXT said nothing about those increased steel values during negotiations with the Town during the month of March, 2004.

That was unfair and prejudicial. Upon receipt of the Town's OFA on March 1, 2004, or shortly thereafter, CSXT should have provided evidence to the Town that a substantial increase in the value of track materials had occurred in the order of magnitude of 86 percent over the value contained in the November 3, 2003 petition. That would have permitted the Town to independently investigate the alleged increase in value and, if verified, to withdraw the OFA if the resulting price were deemed to be too high. As it is, however, CSXT was silent; the Town paid a filing fee of \$16,800 plus substantial professional fees for the Request to establish a purchase price; and CSXT only then provided the alleged increased valuation, too late to be effectively investigated and rebutted by the Town.

CSXT's action is fundamentally unfair. It should not be tolerated. The governing statute, 49 U.S.C. § 10904(b), recognizes that valuation information is readily available to the rail carrier who owns the line, but not to the offeror, and for that reason, the rail carrier is required to furnish such information "promptly" to the offeror. CSXT violated that cardinal principle here by withholding valuation information regarding track materials. As a result, CSXT has in effect, filed brand new evidence under an accelerated procedure that does not permit the Town to adequately investigate and rebut such evidence. Procedural fairness dictates that the new evidence filed by CSXT be stricken, and that track materials be valued on the basis of the only information furnished by CSXT on a timely basis.

CSXT may be expected to argue in response to this Motion that its evidence is required to be accepted notwithstanding the unfairness and lateness of its filing because such evidence

reflects the latest evidence of the fair market value of track materials, and because the Board is prohibited by 49 U.S.C. § 10904(f)(1)(B) from setting a purchase price below the fair market value of the line. However, striking the CSXT evidence would not violate that principle. Any such CSXT argument would beg the question whether CSXT's evidence accurately reflects the current fair market value of the track materials. Even acknowledging an increase in the value of track materials in recent months, it certainly is not self-evident that track materials in this rail line have gone up in value by 86 percent in the 7-month period since CSXT's prior valuation of such materials. The unfairness and lateness of CSXT's filing has prevented effective investigation and rebuttal of the facts in that regard. Thus, CSXT has only itself to blame for the inadmissibility of its evidence. CSXT's evidence should be stricken as inconsistent with the requirement of 49 U.S.C. § 10904(b) that the owner of the rail line furnish valuation evidence promptly to an offeror in order to permit such evidence to be effectively investigated and rebutted, if appropriate.

WHEREFORE, the verified statement and exhibits of William R. Pemberton should be stricken. The Town so moves.

Respectfully submitted,

TOWN OF NORTH JUDSON, INDIANA
P.O. Box 56
North Judson, IN 46366

Offeror

Thomas F. McFarland

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(312) 236-0204

Attorney for Offeror

DATE FILED: April 8, 2004

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2004, I served the foregoing document, Motion To Strike, by UPS overnight mail, on Jonathan Gold, Esq., CSX Transportation, Inc., 500 Water Street, J-150, Jacksonville, FL 32202 and Louis E. Gitomer, Esq., Ball Janik LLP, 1455 F Street, N.W., Suite 225, Washington, DC 20005.

Thomas F. McFarland

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