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BMWE -14

BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34495

BUCKINGHAM BRANCH RAILROAD CO.  
-Lease--  
CSX TRANSPORTATION, INC.



ENTERED  
Office of Proceedings  
OCT 7 2004  
Filing of  
Petition for Recapture

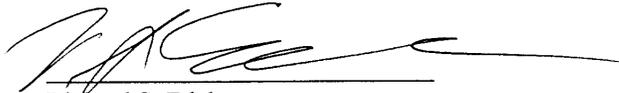
**MOTION FOR LEAVE TO FILE REPLY OF THE  
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES  
TO RESPONSE OF CSX TRANSPORTATION, INC.  
TO MOTION FOR DECLASSIFICATION OF  
BMW EXHIBIT 5 OR ALTERNATIVELY FOR LEAVE TO  
FILE SUPPLEMENTAL EVIDENCE**

The Brotherhood of Maintenance of Way Employees (“BMWE”) hereby moves the Board for leave to file a reply to CSX Transportation’s response to BMWE’s motion for declassification of BMW Exhibit 5 or alternatively for leave to file supplemental evidence. As is explained in BMW’s reply, CSXT’s response is premised on a totally erroneous premise that BMW violated the protective order and Decision No. 1 in this case. As is explained in BMW’s reply, BMW obtained the document it produced pursuant to a Freedom of Information Act Request. The only thing that BMW did wrong was to mis-identify the document that it asked to be declassified. BMW erroneously asked for declassification of Exhibit 5 or alternatively for leave to submit a different version of the document that BMW attached to its motion when that document was actually BMW Exhibit 4.

Since the basis for CSXT’s response to BMW’s motion to declassify or alternatively to supplement the record is the erroneous assertion that BMW violated the protective order and

Decision No. 1, BMW should be granted leave to file its reply to demonstrate that it did not in fact do so.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. Edelman', written over a horizontal line.

Richard S. Edelman  
O'Donnell, Schwartz & Anderson, P.C.  
1900 L Street, N.W.  
Suite 800  
Washington, D.C. 20036  
(202) 898-1824

Dated: October 7, 2004

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day caused copies of the foregoing Motion for Leave to File Reply of the Brotherhood of Maintenance of Way Employees To Response of CSX Transportation, Inc. To Motion of the Brotherhood of Maintenance of Way Employees for Declassification of BMW Exhibit 5 or Alternatively for Leave to File Supplemental Evidence to be served by First Class Mail on all parties of record indicated on the attached service list and also by facsimile transmission to counsel for applicants and representatives of parties that filed comments.

Date: October 7, 2004



Richard S. Edelman

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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CSX TRANSPORTATION, INC.  
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**REPLY OF THE  
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES  
TO RESPONSE OF CSX TRANSPORTATION, INC.  
TO MOTION FOR DECLASSIFICATION OF  
BMW EXHIBIT 5 OR ALTERNATIVELY FOR LEAVE TO  
FILE SUPPLEMENTAL EVIDENCE**

CSX Transportation's response to the Brotherhood of Maintenance of Way Employees' ("BMWE") motion to declassify is totally without merit. As BMWE stated in its motion, BMWE obtained the document it produced pursuant to a Freedom of Information Act Request. The only thing that BMWE did wrong was to mis-identify the document that it asked to be declassified. BMWE erroneously asked for declassification of Exhibit 5 or alternatively for leave to submit a different version of the document that BMWE attached to its motion, when that document was actually BMWE Exhibit 4. In fact, both documents were produced to BMWE by the FRA pursuant to BMWE's FOIA request. To be absolutely clear, the document that BMWE attached to its filing was a copy of a document provided to BMWE's counsel by the FRA, consequently there was no violation of the protective order or Decision No. 1.

As CSXT has observed, BMWWE wrote to CSXT requesting declassification of the FRA documents produced by CSXT in discovery because such documents may be obtained from the FRA by FOIA request. BMWWE then filed a FOIA request seeking disclosure of many of the same documents. The FRA acknowledged receipt of that request on August 9, 2004. On September 21, 2004, the FRA finally produced a number of documents in response to BMWWE's request. Copies of BMWWE's letter to applicants' counsel, the FRA's letter of August 9 and the FRA's cover letter describing the documents produced are attached to this reply. Among the documents produced was the May 10, 2002 memorandum from David Myers relating to FRA file CS 2002-68 (TS) that was attached to BMWWE's motion to declassify or for leave to file supplemental evidence. However, BMWWE's motion erroneously described that document as part of BMWWE's exhibit 5 when it was actually part of BMWWE's Exhibit 4. It is therefore clear that there was no violation and no impropriety in BMWWE's release of the May 10, 2002 memorandum. Indeed, there would have been no violation of the confidentiality order or Decision No. 1 had BMWWE just filed the memorandum along with a motion for leave to file supplemental evidence. Accordingly, it would be entirely proper for the Board to declassify Exhibit 4 since that was the actual document at issue and BMWWE merely erred in identifying it as Exhibit 5.

BMWWE also notes that among the items produced by the FRA was a September 27, 2002 letter to Patricia Barksdale, a summary of alleged violations a transmittal of violation report, a July 31, 2002 memorandum from Kirk Munro and attachments concerning FRA file CSX 2002-88-TS. The documents at BMWWE Exhibit 5 are documents pertaining to FRA file CSX 2002-88-TS, including the July 31, 2002 memorandum of Kirk Munro. So even if the Board were to declassify the documents at Exhibit 5 that still would be proper because the documents were

produced by the FRA as public documents. BMW would be glad to provide entire copies of the voluminous production to the Board if the Board feels it useful to examine the documents.

Once the actual facts are known, it is readily apparent that BMW did not violate the protective order or Decision No. 1. The document BMW produced was not the document that CSXT produced to BMW in discovery marked confidential under the protective order. CSXT implies that BMW must have covered over the "confidential" marking and the document production numbers placed on the document by CSXT. But, CSXT has surmised incorrectly. Thus there is no merit whatsoever to CSXT's charges.

Nor is there any basis for CSXT to cry foul about disclosure of the document because it is a different copy of a document that CSXT produced under the confidentiality order. CSXT has the right to shield its own documents produced in discovery under the confidentiality order, it does not have the right to hide from public view all extant versions of documents within its possession. BMW obtained the document on its own and should be allowed to produce the document for the public record. And there is no merit to CSXT's invocation of the history of protective orders, or to CSXT's claims that BMW did damage to Board practice, since the document BMW produced was not a document CSXT provided under protective order. Furthermore, there is no burden on BMW to show that the document should be made public, the burden must be on CSXT to show that the document should remain secret when it should not have been shielded in the first place, since such documents are available to the public under the FOIA. CSXT has failed to provide any valid reason why the May 10, 2002 FRA report cited by BMW should not be part of the public record in this case.

For the foregoing reasons, BMW requests that its motion be granted and that the document it referred to as Exhibit no. 5 but is actually Exhibit 4 be declassified, or that BMW be permitted to file that document as supplemental evidence.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. Edelman', written over a horizontal line.

Richard S. Edelman  
O'Donnell, Schwartz & Anderson, P.C.  
1900 L Street, N.W.  
Suite 800  
Washington, D.C. 20036  
(202) 898-1824

Dated: October 7, 2004

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Date: October 7, 2004

  
Richard S. Edelman

FILE

*O'Donnell, Schwartz & Anderson, P.C.*

*Counselors at Law*

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July 30, 2004

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BRENDA C. ZWACH

JOHN F. O'DONNELL  
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1455 F Street, N.W. Suite 225  
Washington, D.C. 20005

Re: Buckingham Branch RR Co.-Lease-CSX Transportation, STB F.D. No.  
34495

Gentlemen:

Thank you for your forthcoming responses to the first sets of interrogatories and first requests for production of documents of the Brotherhood of Maintenance of Way Employees in the above-referenced matter. As I mentioned to Lou in our telephone conversations, while the responses were helpful, I did not fully understand some of the responses and some of the documents; and certain responses raised additional questions. While I had hoped to address as many of these issues as possible by informal discussions with you, it turns out that my vacation schedule and Lou's vacation schedule may make that difficult. I have therefore served second sets of interrogatories and requests for production of documents. However, I remain willing to work things out informally or by supplemental responses as may be appropriate.

Review of the second discovery requests will provide a detailed explanation of the clarifications and additional information/documents that we seek. But I will provide a brief summary. Among the questions I would like clarified is whether the documents numbered 0015-0022, 0652, 0653, 0655, 0656, 0671, and 0672 were intended to convey information about the

Washington and Piedmont Subdivisions. I would also appreciate an explanation of the abbreviations STCC, AG, CH, CO, EM, and PA in document 0653. And I have a number of questions about document 0008. There also aspects of the ongoing CSXT service for the Martin Marietta facility that do not seem to have been answered by the interrogatory responses and document production. Additionally, the responses referred to other documents that we believe that we need to see, so we have requested those documents.

Finally, we believe that certain of the documents that are FRA reports concerning the lines to be leased have been inappropriately labeled "Confidential". It is our understanding that such reports, once final, are available to the public at least through FOIA requests. We feel that since such documents are available through FOIA processes, they should not be marked confidential. Once you have had a chance to consider this matter please advise me as to whether applicants will lift the confidential designations on those documents.

As I mentioned at the outset, I will be glad to discuss these issues with you and to try to resolve these issues, informally, by supplemental responses to BMW's first discovery requests, by formal responses to BMW's second discovery requests or by some combination of those approaches. Please call me with any questions that you may have, but, as I advised Lou, I will be out of town all next week.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Edelman", with a long horizontal flourish extending to the right.

Richard S. Edelman  
O'Donnell, Schwartz & Anderson, P.C.



U.S. Department  
of Transportation  
**Federal Railroad  
Administration**

1120 Vermont Ave., N.W.  
Washington, D.C. 20590

8/9/2004

Mr. Richard S. Edelman  
Attorney  
O'Donnell Schwartz V. Anderson, P.C.  
1300 L Street, N.W. - Suite 1200  
Washington, DC 20005-4126

Re: FRA FOIA File No.: FOIA-04-426

Dear Mr. Edelman:

The Federal Railroad Administration (FRA) has received your letter requesting, pursuant to the Freedom of Information Act (FOIA), records concerning:

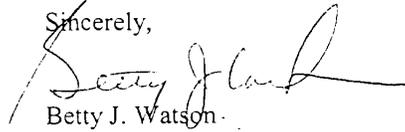
CSX Transportation's track & right of way on the line between mile post near Richmond, Virginia to milepost CA 276 near Clifton Forge, Virginia. Documents related to violations on the line and/or track safety standards regarding the line

We have assigned your request the FOIA number noted above and are initiating a search of the FRA's files for relevant records. The agency processes FOIA requests on a first in first out basis. After the search is completed, you will be informed in writing of the search results.

In order to expand the availability of FRA records to the public, the agency is providing public access to a number of agency records through the FRA Internet site. If you are interested in highway-rail grade crossing and accident information, railroad accident/incident reports or railroad employee injury/illness reports, you may be able to find the information more expeditiously through the FRA web site. The FRA Safety Data Internet site is found at <http://safetydata.fra.dot.gov/officeofsafety>. Simply click on about this site, select Query FRA Safety Databases or Crossing Inventory and Accident Histories, and follow the instructions. If you are able to fully satisfy your record needs through the FRA Internet site, I would appreciate it if you would let me know so I will be able to focus resources on other pending requests.

If you have any questions regarding FRA's FOIA process, please contact me at (202) 493-6065 or FRA's FOIA Officer, Lauren Price, at (202) 493-6039. I hope this information is helpful.

Sincerely,

A handwritten signature in cursive script that reads "Betty J. Watson". The signature is written in black ink and is positioned above the printed name.

Betty J. Watson  
Administrative Staff Assistant



U.S. Department  
of Transportation

**Federal Railroad  
Administration**

1120 Vermont Ave., N.W.  
Washington, D.C. 20590

September 21, 2004

Mr. Robert Edelman  
O'Donnell, Schwartz & Anderson, P.C.  
1300 L Street N.W. - Suite 1200  
Washington, D.C. 20005-4126

Re: FRA FOIA File No. 04-426

Dear Mr. Edelman:

This letter is in response to your Freedom of Information Act (FOIA) request to the Federal Railroad Administration (FRA) for agency records related to CSX Transportation Inc. (CSX) track & right of way between Richmond and Clifton Forge, VA.

In accordance with the FOIA, I am enclosing the following related documents:

1. FRA civil penalty enforcement file CSX 2002-68 (TS) including:
  - July 18, 2002 letter to Patricia D. Barksdale.
  - summary of alleged violations.
  - May 10, 2002 memorandum from David R. Myers.
  - transmittal of violation report.
  - May 10, 2002 memorandum from Kirk Munro.
  - attachments as listed.
2. FRA civil penalty enforcement file CSX 2002-88 (TS) including:
  - September 27, 2002 letter to Patricia D. Barksdale.
  - summary of alleged violations.
  - transmittal of violation report.
  - July 31, 2002 memorandum from Kirk Munro.
  - attachments as listed.
3. Computer printout of FRA inspections for CSX in Virginia for 2000 and 2001.

Enforcement file CSX 2002-68(TS) was settled on September 30, 2003 for the amount of \$50,000. Enforcement file CSX 2002-88 (TS) was settled on September 30, 2003 for the amount of \$16,000.

The agency is withholding three pages from File CSX 2002-68 (TS) and three pages

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from file CSX 2002-88 (TS) involving draft copies of the case control sheet, letter to CSX law department, and summary of alleged violations. These draft documents are being withheld on the basis of FOIA exemption 5 (5 U.S.C. 552(b)(5)) which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party...in litigation with the agency." Specifically, these document are covered by the deliberative process privilege in that they reflect agency considerations in advance of a final determination.

No fee has been assessed for the enclosed documents in light of the minimal cost incurred in providing you with these records.

Since FRA has no other records in its possession that are responsive to your request, I am closing your file in this office. If you have any questions regarding the processing of your request, please contact FRA's FOIA Officer, Lauren Price at (202) 493-6039.

Sincerely,



William R. Fashouer  
Assistant Chief Counsel

Enclosures