

TROUTMAN SANDERS LLP

ATTORNEYS AT LAW
A LIMITED LIABILITY PARTNERSHIP

401 9TH STREET, N.W. - SUITE 1000
WASHINGTON, D.C. 20004-2134
www.troutmansanders.com
TELEPHONE: 202-274-2950

John R. Molm
jrm@troutmansanders.com

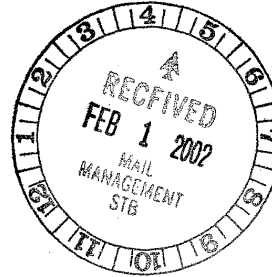
Direct Dial: 202-274-2957
Fax: 202-654-5619

February 1, 2002

VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

204676



RE: *Illinois Central Railroad Company - Construction and Operation Exemption -
In East Baton Rouge Parish, Louisiana
Finance Docket No. 33877*

Dear Secretary Williams:

Enclosed are the original and 11 copies of The Kansas City Southern Railway Company's Petition to Stay Proceeding Pending Judicial Review in the above-captioned proceeding. Also enclosed is a copy of the filing on a 3.5-inch diskette.

Please acknowledge receipt and filing of this reply on the eleventh copy of the filing, enclosed for that purpose, and return it to the person making the filing for return to me.

Sincerely,


John R. Molm

ENTERED
Office of the Secretary

FEB 04 2002

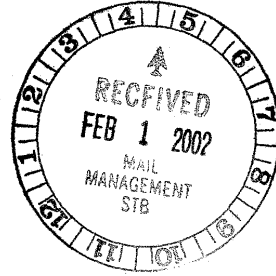
Enclosures Part of
Public Record

cc: Myles L. Tobin, Esq.
William C. Sippel, Esq.
William J. Pinamont, Esq.
W. James Wochner, Esq.

ATLANTA • HONG KONG • LONDON • NORFOLK • RICHMOND
TYSONS CORNER • VIRGINIA BEACH • WASHINGTON, D.C.

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33877



204676

ILLINOIS CENTRAL RAILROAD COMPANY
-- CONSTRUCTION AND OPERATION EXEMPTION --
IN EAST BATON ROUGE PARISH, LOUISIANA

PETITION TO STAY PROCEEDING PENDING JUDICIAL REVIEW

REQUEST FOR EXPEDITED CONSIDERATION

ENTERED
Office of the Secretary
FEB 04 2002
Part of
Public Record

William J. Pinamont
W. James Wochner
THE KANSAS CITY SOUTHERN
RAILWAY COMPANY
114 West 11th Street
Kansas City, Missouri 64105
TEL: (816) 983-1392
FAX: (816) 983-1227

John R. Molm
Sandra L. Brown
D. Michael Hurst, Jr.
TROUTMAN SANDERS LLP
401 Ninth Street, NW, Suite 1000
Washington, D.C. 20004-2134
TEL: (202) 274-2957
FAX: (202) 654-5619

ATTORNEYS FOR THE KANSAS CITY
SOUTHERN RAILWAY COMPANY

February 1, 2002

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33877

**ILLINOIS CENTRAL RAILROAD COMPANY
-- CONSTRUCTION AND OPERATION EXEMPTION --
IN EAST BATON ROUGE PARISH, LOUISIANA**

PETITION TO STAY PROCEEDING PENDING JUDICIAL REVIEW

REQUEST FOR EXPEDITED CONSIDERATION

Pursuant to 49 C.F.R. § 1115.5(a), the Kansas City Southern Railway Company ("KCS"), by its counsel, respectfully petitions the Surface Transportation Board ("STB" or the "Board") to stay its decision served January 23, 2002 exempting the construction and operation of a proposed rail line by the Illinois Central Railroad Company ("IC")¹ pending KCS's application for judicial review of that decision by a United States Court of Appeals. The primary basis of KCS's appeal is that the Board erred by failing to give the requisite "hard look" to important environmental issues and thereby failed to comply with the requirements of the National Environmental Policy Act ("NEPA") and the Council on Environmental Quality ("CEQ") regulations. As a result of these actions, a stay of the STB's decision granting construction authority to IC is warranted pending KCS's appeal for judicial review.

¹ Illinois Central Railroad Company is a wholly-owned subsidiary of the Canadian National Railway Company pursuant to the Board's approval of CN's control of IC in *Canadian National Ry. Co., et al. - Control - Illinois Central Corp., et al.*, Finance Docket No. 33556, Decision No. 37 (STB served May 25, 1999) ("*CN/IC*").

BACKGROUND

On November 29, 2000, IC filed a petition for exemption to construct a rail line to serve ExxonMobil Chemical Company's ("ExxonMobil") Baton Rouge Polyolefins ("BRPO") facility in *Illinois Central Railroad Company – Construction and Operation Exemption – In East Baton Rouge Parish, Louisiana*, STB Finance Docket No. 33877 ("Construction Petition"). KCS filed a reply to IC's Construction Petition on December 19, 2000. In conjunction with its Construction Petition, IC also filed a letter pursuant to 49 C.F.R. § 1105.6(d) requesting a waiver of 49 C.F.R. § 1105.6(a), which requires the STB to prepare an Environmental Impact Statement ("EIS") for proposed rail construction projects. This letter was not served upon KCS, nor was it placed in the public record or on the public docket. The Board's Section of Environmental Analysis ("SEA") approved IC's request for a waiver shortly thereafter on December 7, 2000. The SEA's approval of IC's waiver request was also not served upon KCS, nor was it placed in the public record or on the public docket. Although both documents were subsequently placed in the public record at KCS's insistence, they continue to be absent from the physical public docket, thereby concealing the very existence of such documents from the general public.²

Upon discovering IC's request for waiver of the EIS requirement and SEA's decision approving that request, KCS filed a letter with SEA on December 22, 2000, opposing the waiver granted IC. In its letter, KCS noted the failure of service of such documents on KCS and the

² It should be duly noted that KCS was unaware of both IC's waiver request and SEA's subsequent grant of this waiver on December 7, 2000. Not only did the SEA's decision occur rather quickly for this type of request (only six business days), but also the documents were neither served upon KCS nor placed in the public record or on the public docket. See Report of Filings in STB Docket No. 33877 (Jan. 29, 2002), attached as Exhibit A herein. Only after a happenstance phone call to SEA by KCS representatives on December 21, 2000, inquiring into the status of SEA's environmental review, did KCS learn of these hidden documents relating to a waiver of an EIS in this proceeding. See Memorandum of Telephone Conversation Between Dana White, SEA and David Reeves, Troutman Sanders LLP, attached as Exhibit B herein. The initial absence of these documents from the public record and the continued absence of such documents from the physical public docket not only harms interested parties such as KCS, but more importantly it harms the general public, who are unaware of the existence of such documents and are thus left in the dark when it comes to highly relevant environmental issues that directly affect them.

absence of both documents from the public docket. On January 5, 2001, KCS filed additional comments to this waiver request and the SEA's letter regarding the potential environmental impacts of the proposed project.

On February 8, 2001, KCS filed a set of discovery requests seeking information from IC, including requests for information specifically related to proposed storage facilities to be built in connection with and resulting from the proposed rail line. IC, however, refused to respond to such discovery requests posed by KCS, providing instead boilerplate objections. The Board subsequently issued a decision on March 9, 2001 instituting a proceeding pursuant to IC's Construction Petition to consider the issues raised by the parties. KCS thereafter filed with the Board a motion to compel discovery responses, asking the Board to require IC to adequately address issues raised by KCS in its discovery requests. The Secretary of the Board subsequently denied KCS's motion to compel on May 24, 2001, and KCS timely filed an appeal of the Secretary's decision on June 4, 2001.

The SEA completed its Environmental Assessment ("EA") on July 20, 2001. On August 21, 2001, the STB denied KCS's appeal of the Secretary's decision denying KCS's motion to compel discovery. The Board then granted IC conditional authority for its project on October 25, 2001, pending completion of the environmental review process. On January 23, 2002, the Board granted IC final authority for its project based on a review of SEA's Post EA. However, SEA's Post EA has not been published in the public record or placed on the physical public docket as of this current filing. *See* Report of Case Decisions in STB Docket No. 33877 (Jan. 29, 2002), attached as Exhibit C herein.

ARGUMENT

Under 49 C.F.R. § 1115.5(a), a party may petition the Board for a stay of a current proceeding pending judicial review. The standards governing disposition of a petition for stay are: (1) that there is a strong showing that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm absent a stay; (3) that other interested parties in the proceeding will not be substantially harmed; and (4) that the public interest supports the granting of a stay. See *Burlington Northern R.R. Co. -- Construction and Operation Exemption -- Macon and Randolph Counties, MO*, I.C.C. Decision No. 32229, 1993 WL 475366 at *1 (Nov. 17, 1993); *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). These factors are balanced together, whereby "probability of success is inversely proportional to the degree of irreparable injury evidenced," such that "[a] stay may be granted with either a high probability of success and some injury, or *vice versa*." *Cuomo v. United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985). In any event, each of the above requirements is satisfied in this case.

I. KCS WILL PREVAIL ON THE MERITS ON APPEAL BASED UPON THE BOARD'S NONCOMPLIANCE WITH THE REQUIREMENTS OF NEPA

When an action has been authorized in contravention of NEPA, there is "a presumption that injunctive relief should be granted against continuation of the action until the agency brings itself into compliance." *Realty Income Trust v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977); see also *Jones v. District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 513 (D.C. Cir. 1974). "Courts will not hesitate to stop projects that are in the process of affecting the environment when the agency is in illegal ignorance of the consequences." *Realty Income Trust*, 564 F.2d at 456.

Section 102(2)(C) of NEPA requires that all federal agencies prepare an EIS for “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C) (2001). Congress’s goal in enacting NEPA was to require agencies to take a “hard look” at the environmental consequences associated with major actions. *See Environmental Defense Fund, Inc. v. Andrus*, 619 F.2d 1368, 1378 (10th Cir. 1980). In order to properly implement NEPA, the Board adopted its own regulations. *See* 49 C.F.R. Part 1105 (2001). Although an EIS is **normally** prepared for rail construction proposals under the Board’s regulations, *see* 49 C.F.R. § 1105.6(a), the Board is permitted to prepare an EA in rail construction cases when “the particular proposal is not likely to have a significant environmental impact.” 49 C.F.R. § 1105.6(d).

In addition to NEPA and STB regulations, CEQ regulations also apply to a federal agency’s drafting of an EA. The CEQ regulations mandate the consideration of the impact of connected actions³ and cumulative actions,⁴ and the inclusion of all such actions in the same impact statement. *See* 40 C.F.R. § 1508.25(a)(1) & (2) (2001); *see also* Council on Environmental Quality, Memorandum to Federal Agencies on Procedures for Improving Environmental Impact Statements (May 16, 1972), reprinted in 3 BNA Environment Reporter 82, 87 (“Individual actions that are related either geographically or as logical parts in a chain of contemplated actions may be more appropriately evaluated in a single, program statement.” (emphasis added)). The purpose behind this inclusion of related actions into a single impact statement is to “prevent agencies from dividing one project into multiple individual actions ‘each

³ “Connected Actions” are closely related actions that should be discussed in the same impact statement and which: (1) automatically trigger other actions which may require environmental impact statements; (2) cannot or will not proceed unless other actions are taken previously or simultaneously; or (3) are interdependent parts of a larger action and depend on the larger action for their justification. *See* 40 C.F.R. § 1508.25(a)(1)(i)-(iii).

⁴ “Cumulative Actions” are “actions, which when viewed with other proposed actions, have cumulatively significant impacts and should therefore be discussed in the same impact statement.” 40 C.F.R. § 1508.25(a)(2).

of which individually has an insignificant environmental impact, but which collectively have a substantial impact.” *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 297-298 (D.C. Cir. 1988) (citing *Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985)). While NEPA may not require an agency to consider the possible environmental impacts of “speculative or hypothetical actions” when preparing an impact statement on proposed actions, see *Nat’l Wildlife Fed’n v. Fed. Energy Regulatory Comm’n*, 912 F.2d 1471, 1477 (D.C. Cir. 1990), NEPA nonetheless requires agencies to reasonably predict the complete environmental effects of proposed actions. See *Scientists’ Institute For Public Information, Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

The Board’s failure to consider in its EA the connected and cumulative action of the construction of a storage facility in connection with and resulting from IC’s proposed line construction to the BRPO plant was a violation of NEPA and will result in substantial and significant damage to the environment if its effects are not analyzed closely and the EA is not amended pursuant to NEPA. See *Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985) (holding road construction project and timber sale connected to and resulting from such construction inexplicably intertwined and dependent upon one another, such that the federal agency was required to consider both actions under one impact statement, which the agency had previously reviewed under separate impact statements).

In addition, the Board is without excuse in failing to consider the connected construction of the storage facility because KCS has consistently offered explicit evidence throughout this proceeding that the construction of such facilities is imminent. Moreover, KCS made discovery requests specifically addressing storage, which the Board summarily denied on the basis that the

Board would in fact consider all environmental effects, which it ultimately failed to do.⁵ As pointed out in previous pleadings, KCS was required by necessity to build rail storage facilities for the BRPO plant in connection with KCS's service to the BRPO plant. *See* KCS Reply dated December 19, 2000 at 10-13 and Joint Verified Statement of Andrew Martin and Amos J. Sonnier accompanying the KCS Reply, attached as Exhibit D herein. In stark contrast, IC presently has no storage capacity whatsoever in the vicinity of the BRPO plant -- a fact that is viewed by Exxon as a weakness of the project. *See* Verified Statement of Robert M. Cleator at 2, from KCS's Dec. 19, 2000 Reply, attached as Exhibit E herein; *see also* Exhibit I to Verified Statement of W. R. Needels submitted in ECA-7 in *CN/IC*, attached as Exhibit F herein. Such storage capacity is absolutely necessary in serving a facility like BRPO and in fulfilling one's common carrier obligations. As Exxon's witness Stephen Coulter has testified: storage track is in short supply in the Baton Rouge area; demand for storage track has been steadily increasing; and a second carrier will lead to increased rail infrastructure and will eliminate the need for a single carrier to provide all necessary storage. *See* Verified Statement of Stephen M. Coulter at 6, from IC's Construction Petition, attached as Exhibit G herein; *see also* Exhibit F.

Therefore, based on these facts, it can be firmly concluded that IC's proposed service to the BRPO plant as contemplated under this rail line construction proposal cannot be accomplished without the construction of storage facilities for Exxon's use. The EA's failure to

⁵ The Board's denial of KCS's discovery requests, especially the requests on the storage issue, has facilitated the piecemeal environmental review of this project which is not permitted under NEPA. This is especially egregious for two reasons. First, by denying such discovery and in ignoring KCS's comments to the EA regarding the anticipated construction of necessary storage facilities, the Board has allowed an otherwise environmentally far-reaching proposal to avoid any type of environmental review and, as such, the necessary storage construction to be built subsequently will not be subject to the Board's jurisdiction and environmental review. Second, the Board's denial of KCS's discovery is an unduly cramped vision of the role of interested parties in the environmental review processes mandated by NEPA and flies in the face of the Board's policy statement that advocates "extensive public participation" in the environmental review process to reduce the possibility of one-sided or applicant-biased environmental analyses. *See* Policy Statement On Use of Third-Party Contracting in Preparation of Environmental Documentation, 66 Fed. Reg. 15527, 15529-15530 (2001).

address the construction of the storage facility that is vital to the operations on the proposed line is in error because the need for such construction results from the construction of the proposed line. Thus, construction of a storage facility, whether open and notorious or secretive and hidden, would be considered a connected and cumulative action to the proposed rail line for purposes of drafting one, single impact statement. The Board's failure to consider such a foreseeable and connected construction proposal while considering IC's proposed rail line construction is a violation of NEPA thus warranting a stay while KCS seeks relief at the appellate level. In light of the above facts, KCS will prevail on the merits on appeal.

II. IRREPARABLE HARM WILL OCCUR IF CONSTRUCTION IS ALLOWED TO PROCEED

An agency's order is "not ordinarily stayed without an appropriate showing of irreparable harm." *Permian Basin Area Rate Cases*, 390 U.S. 747, 777 (1968). Irreparable harm, although somewhat hard to define, must involve injury that is "both certain and great; it must be actual and not theoretical." *Wisconsin Gas Co. v. Fed. Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985)). "[T]he party seeking injunctive relief must show that 'the injury complained of [is] of such imminence that there is a "clear and present" need for equitable relief to prevent irreparable harm.'" *Id.* (citing *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 307 (D.D.C.), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976) (citations omitted)). Also implicit in this requirement is that the movant substantiate the claim that irreparable injury is "likely" to occur. *See Washington Metropolitan Area Transit Comm'n*, 559 F.2d at 843 n.3.

In this instance, irreparable harm will indubitably occur if a stay is not granted pending judicial review of the Board's actions, as the construction of a storage facility resulting from IC's proposed construction of rail line will cause significant environmental impacts which were not considered by the EA. As a result of the omission of the consequent construction of this facility

from the EA, the environmental status quo will be forever altered, resulting in a large-scale construction project in an already environmentally questionable area, without adequate environmental review. Such harm to the environment will be irreparable and no amount of compensatory relief will remedy such an impact. Past occurrences have shown that the construction of storage facilities is absolutely essential to the proposed construction of rail lines that serve plants such as BRPO. Moreover, Exxon is aware of the need for additional storage facilities. In the absence of a stay, irreparable harm will occur as a result of the STB's violation of NEPA in not considering the environmental impacts of the construction of a storage facility in one comprehensive EA.

III. IC AND OTHER INTERESTED PARTIES WILL NOT BE SUBSTANTIALLY HARMED BY THE GRANT OF A STAY IN THESE PROCEEDINGS PENDING JUDICIAL REVIEW

The next factor to consider in granting a stay is whether other interested parties will be substantially harmed by the grant of a stay. In this case, IC will not be **substantially** harmed by the grant of a stay of the proposed construction of a rail line, although IC will argue nonetheless that it will be somewhat harmed by the resulting delay in approval. The numerous pleadings in this case have illustrated that there is robust competition between rail carriers for traffic at the BRPO plant as a result of a reciprocal switch fee. This competition is illustrated by the fact that of the 12,000 rail car shipments that originate from the plant annually, 2,400 move in the account of a rail carrier other than KCS (i.e., via reciprocal switching). *See* Exhibit E at 2. Staying the STB's exemption authority recently granted to IC for the construction of a proposed rail line pending KCS's appeal will not substantially harm IC or other interested parties, as IC and other carriers will still be able to compete for BRPO plant traffic via reciprocal switching. Therefore, the STB should grant a stay in this instance pending appeal by KCS.

IV. THE GRANT OF A STAY IN THIS INSTANCE WILL ADVANCE THE PUBLIC INTEREST

Finally, the affect on the public interest must be analyzed in light of a possible grant of injunctive relief. Determining the public interest is perhaps the most difficult factor in considering a stay, as it sometimes involves numerous and conflicting concerns. *See Virginia Petroleum Jobbers Ass'n*, 259 F.2d at 925.

NEPA requires federal agencies to take a "hard look" at the environmental consequences of major actions. This "hard look" requirement furthers the public interest, by identifying environmental impacts that are otherwise not considered or overlooked by agencies when preparing an EA -- omissions which could ultimately result in significant and permanent damage to the environment, causing perpetual damage that can never be remedied. *See Realty Income Trust v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977); *see also Jones v. District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 513 (D.C. Cir. 1974). If connected or cumulative considerations are not taken into account when an agency reviews a proposal pursuant to NEPA, then the public interest will be forever harmed. This is precisely the case here. As a result of the STB's failure to consider the construction of a storage facility in conjunction with IC's proposed construction of a rail line to serve the BRPO plant, the environmental impacts of such a facility will be forever unknown, which will result in significant harm to the public -- a result that can never be reversed. Therefore, this violation of NEPA by the STB must be immediately stayed pending judicial review in order to safeguard the environment.

CONCLUSION

WHEREFORE, KCS respectfully requests that its Petition to Stay Proceeding Pending Judicial Review be granted.

Respectfully submitted,

By: 

**William J. Pinamont
W. James Wochner
THE KANSAS CITY SOUTHERN
RAILWAY COMPANY
114 West 11th Street
Kansas City, Missouri 64105
TEL: (816) 983-1392
FAX: (816) 983-1227**

**John R. Molm
Sandra L. Brown
D. Michael Hurst, Jr.
TROUTMAN SANDERS LLP
401 Ninth Street, NW, Suite 1000
Washington, D.C. 20004-2134
TEL: (202) 274-2957
FAX: (202) 654-5619**

**ATTORNEYS FOR THE KANSAS CITY
SOUTHERN RAILWAY COMPANY**

A

Filing Date	Docket Number	Filed For	FILINGS General Filing Type	Std Filed by	Conf	Records: Disk Pg	ID
05/22/2000	STB FD 33877 0	ILLINOIS CENTRAL RAILROAD COMPANY	ENVIRONMENTAL MATERIALS	POR WILLIAM C SIPPEL	N	N	198736
11/29/2000	STB FD 33877 0	ILLINOIS CENTRAL RAILROAD COMPANY	PETITION FOR EXEMPTION	POR WILLIAM C SIPPEL	N	N	200674
12/07/2000	STB FD 33877 0	CITY OF BATON ROUGE PARISH OF EAST BATON ROUGE	LETTER	VIS MAYOR PRESIDENT TOM ED MCHUGH	N	N	200877
12/19/2000	STB FD 33877 0	KANSAS CITY SOUTHERN RAILWAY COMPANY	REPLY	POR JOHN R MOLM	N	Y	201098
12/26/2000	STB FD 33877 0	KANSAS CITY SOUTHERN RAILWAY COMPANY	AMENDMENT TO PRIOR FILING	POR JOHN R MOLM	N	N	201135
01/08/2001	STB FD 33877 0	ILLINOIS CENTRAL RAILROAD COMPANY	REPLY	POR WILLIAM C SIPPEL	N	N	201212
01/16/2001	STB FD 33877 0	ILLINOIS CENTRAL RAILROAD COMPANY	AMENDMENT TO PRIOR FILING	POR THOMAS J LITWILER	N	N	201320
01/23/2001	STB FD 33877 0	ILLINOIS CENTRAL RAILROAD COMPANY	ENVIRONMENTAL MATERIALS	POR WILLIAM C SIPPEL	N	N	201364
03/02/2001	STB FD 33877 0	CITY OF BATON ROUGE	LETTER	VIS MAYOR BOBBY SIMPSON	N	N	201608
03/05/2001	STB FD 33877 0	KANSAS CITY SOUTHERN RAILWAY COMPANY	MOTION TO COMPEL	POR JOHN R MOLM	N	Y	201630
03/26/2001	STB FD 33877 0	ILLINOIS CENTRAL RAILROAD COMPANY	REPLY	POR WILLIAM C SIPPEL	N	N	201852
03/30/2001	STB FD 33877 0	KANSAS CITY SOUTHERN RAILWAY COMPANY	MOTION/PETITION/REQU EST	POR SANDRA L BROWN	N	Y	201893
03/30/2001	STB FD 33877 0	KANSAS CITY SOUTHERN RAILWAY COMPANY	REPLY	POR SANDRA L BROWN	N	Y	201894
04/19/2001	STB FD 33877 0	ILLINOIS CENTRAL RAILROAD COMPANY	REPLY	POR WILLIAM C SIPPEL	N	N	202022
06/04/2001	STB FD 33877 0	KANSAS CITY SOUTHERN RAILWAY COMPANY	APPEAL	POR JOHN R MOLM	N	Y	202461
06/14/2001	STB FD 33877 0	ILLINOIS CENTRAL RAILROAD COMPANY	REPLY	POR WILLIAM C SIPPEL	N	N	202647
08/10/2001	STB FD 33877 0	STATE OF LOUISIANA	LETTER	VIS HON MIKE FOSTER JR	N	N	203113

B

TROUTMAN SANDERS LLP

MEMORANDUM

TO: John R. Molm

FROM: David C. Reeves

RE: Telephone conversations 12/20 & 21/2000 with Dana White,
STB Section of Environmental Analysis

DATE: December 21, 2000

On December 20, 2000, at approximately 9:15 a.m. EST, I called Elaine Kaiser at the STB's Section of Environmental Analysis. Her voice mail message said that she was out of the office for several days and said that calls should be directed to 202-565-1552 or 202-565-1530 in her absence.

I called 202-565-1552 and reached Dana White. I asked her whether an environmental report had been filed in Finance Docket No. 33877, the proposed Illinois Central build-in at Baton Rouge. She told me that one had not; that the file contained only IC's request for 3 waivers¹ and the Section of Environmental Analysis' letter granting that waiver. I told her that I was unaware that SEA had granted such waivers. She told me that the letter granting the waivers should be in the public docket, but that if I had any trouble getting it I should call her back.

I sent Godwin Fugar to the STB to get the materials from the public docket. By early afternoon, he advised me that the waiver letter was not in the public docket, and showed me the docket sheet which reflected our filing made the previous day, December 19. It did not, however, show either the waiver request letter or the SEA letter granting the waiver. Godwin told me that he had tried several times while he was at the STB to see Dana White but that she had been out, so he left her a note asking for the materials to be faxed to us. I called her shortly after that, at which point she said that she had gotten Godwin's note and had just faxed the materials to us. (A copy of the faxed material is attached.) She told me to call her back if we did not get the fax.

I called Ms. White this morning to confirm to her that we had indeed received the fax and said that I was surprised that the materials she faxed were not in the public file.

¹ Waiver of the requirement to prepare an EIS in a construction proceeding in order that an EA could be done instead; for permission to concentrate the environmental analysis on the preferred route, with only summary analysis of other routes; and for waiver of the six-month pre-filing notification

C

Docket Number

STB FD 33877 0

Title

Product

CASE DECISIONS

ILLINOIS
CENTRAL
RAILROAD
COMPANY--CONSTR
OPERATION AND
EXEMPTION--IN
EAST BATON
ROUGE PARISH,
LA

Off. Body Disp Decided

OP SEC OR 03/08/2001 03/09/2001

Records:

Late Bound
Rel. Vol. Dec. ID

N N 31712

RE:

INSTITUTED A PROCEEDING UNDER 49 U.S.C. 10502(B) TO
CONSIDER IC'S PETITION AND THE ISSUES RAISED IN THE KANSAS
CITY SOUTHERN RAILWAY COMPANY'S REPLY.

STB FD 33877 0

ILLINOIS
CENTRAL
RAILROAD
COMPANY--CONSTR
OPERATION AND
EXEMPTION--IN
EAST BATON
ROUGE PARISH,
LA

OTHER PROCEDURAL

OP SEC DN

05/24/2001 05/25/2001

RE:

(1) DENIED THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S (KCS)
MOTION FOR LEAVE TO FILE A REPLY TO IC'S REPLY; (2)
REJECTED KC'S TENDERED REPLY TO IC'S REPLY; AND (3) DENIED
KC'S MOTION TO COMPEL DISCOVERY RESPONSES AND FOR A
DECLARATION OF ADMISSION.

STB FD 33877 0

ILLINOIS
CENTRAL
RAILROAD
COMPANY--CONSTR
OPERATION AND
EXEMPTION--IN
EAST BATON
ROUGE PARISH,
LA

ENVIRONMENTAL
ASSESSMENT

OEEA SEA ES

07/16/2001 07/20/2001

RE:

CONSIDERED THE POTENTIAL ENVIRONMENTAL IMPACTS OF IC'S
PROPOSED RAIL LINE CONSTRUCTION AND OPERATION OF IC'S
RAIL LINE IN EAST BATON ROUGE PARISH, LOUISIANA.

01/29/2002

Case:FD 33877 0 //Service Date:01/01/01 to 01/29/02

N N 31988

CASE DECISIONS

Records: 6

Docket Number	Title	Product	Off.	Body	Disp	Decided	Served	Print Cite	Late Bound Rel. Vol. Dec. ID
---------------	-------	---------	------	------	------	---------	--------	------------	---------------------------------

STB FD 33877 0	ILLINOIS CENTRAL RAILROAD COMPANY--CONSTR UTION AND OPERATION EXEMPTION--IN EAST BATON ROUGE PARISH, LA	MERITS OF APPEAL	OP	EB	DN	08/15/2001	08/21/2001		N N 31919
----------------	--	------------------	----	----	----	------------	------------	--	-----------

RE: DENIED AN APPEAL BY KANSAS CITY SOUTHERN RAILWAY COMPANY (KCS) OF THE DECISION SERVED MAY 24, 2001, DENYING KCS'S MOTION TO COMPEL DISCOVERY RESPONSES AND FOR A DECLARATION OF ADMISSIONS.

STB FD 33877 0	ILLINOIS CENTRAL RAILROAD COMPANY--CONSTR UTION AND OPERATION EXEMPTION--IN EAST BATON ROUGE PARISH, LA	DECISION ON MERITS	OP	EB	CG	10/18/2001	10/25/2001		N N 31683
----------------	--	--------------------	----	----	----	------------	------------	--	-----------

RE: CONDITIONALLY EXEMPT, UNDER 49 U.S.C. 10502, FROM PRIOR APPROVAL REQUIREMENTS OF 49 U.S.C. 10901, THE CONSTRUCTION BY ILLINOIS CENTRAL RAILROAD COMPANY OF A LINE OF RAILROAD, IN EAST BATON ROUGE PARISH, LA.

STB FD 33877 0	ILLINOIS CENTRAL RAILROAD COMPANY--CONSTR UTION AND OPERATION EXEMPTION--IN EAST BATON ROUGE PARISH, LA	DECISION ON MERITS	OP	EB	GT	01/23/2002	01/23/2002		Y N 32284
----------------	--	--------------------	----	----	----	------------	------------	--	-----------

RE: ADOPTED THE MITIGATION MEASURES AND IMPOSED THEM AS A CONDITION TO THE EXEMPTION GRANTED.

D

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 33877

**ILLINOIS CENTRAL RAILROAD COMPANY
-- CONSTRUCTION AND OPERATION EXEMPTION --
IN EAST BATON ROUGE PARISH, LOUISIANA**



**REPLY OF THE KANSAS CITY SOUTHERN RAILWAY
TO THE PETITION FOR EXEMPTION
OF ILLINOIS CENTRAL RAILROAD COMPANY**

**Richard P. Bruening
W. James Wochner
THE KANSAS CITY SOUTHERN
RAILWAY COMPANY
114 West 11th Street
Kansas City, MO 64105
TEL: (816) 983-1410
FAX: (816) 983-1227**

**John R. Molm
Thomas J. Healey
David C. Reeves
Sandra L. Brown
TROUTMAN SANDERS LLP
401 Ninth Street, NW, Suite 1000
Washington, DC 20004
TEL: (202) 274-2950
FAX: (202) 274-2994**

December 19, 2000

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 33877

**ILLINOIS CENTRAL RAILROAD COMPANY
-- CONSTRUCTION AND OPERATION EXEMPTION --
IN EAST BATON ROUGE PARISH, LOUISIANA**

**REPLY OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY
TO THE PETITION FOR EXEMPTION
OF ILLINOIS CENTRAL RAILROAD COMPANY**

The Kansas City Southern Railway Company ("KCS"), by its counsel, hereby files its reply, pursuant to 49 CFR § 1104.13, to the Petition for Exemption of the Illinois Central Railroad Company ("Petition") filed with the Surface Transportation Board ("STB" or the "Board") on November 29, 2000. KCS has significant concerns about the perfunctory plans reflected in the Petition, and believes that the Board should carefully scrutinize the construction project. KCS's concerns are unrelated to any apprehension regarding competition at ExxonMobil Chemical Company's ("ExxonMobil") Baton Rouge Polyolefins ("BRPO") facility. Canadian National Railway Company and its wholly-owned subsidiary the Illinois Central Railroad Company ("CN/IC") already have commercial access at this facility. Nonetheless, KCS is concerned that the proposed construction is not consistent with the Rail Transportation Policy ("RTP") found at 49 U.S.C. § 10101. As will be shown below, the Petition should be dismissed as inconsistent with the RTP. If the Board does not dismiss the Petition, the Board should

require that the Petition be filed as an Application, or alternatively, the Board must open a proceeding pursuant to 49 U.S.C. § 10502(b) in order to allow for the development of a full and complete record regarding the potential transportation harms and to determine whether the proposed project is consistent with the RTP under 49 U.S.C. § 10101. As discussed below, KCS's concerns that a full and complete review be undertaken of the proposed build-in are shared by both U.S. Senators from Louisiana and other elected officials and citizens of Baton Rouge. See Exhibit A (attaching community letters).

Background

As the Board is aware, the NAFTA Railway - KCS and its affiliates Gateway Western, Gateway Eastern, Texas Mexican Railway and Transportacion Ferroviaria Mexicana - occupies a unique, strategic place in the current rail marketplace. KCS itself operates approximately 2700 track miles in 11 central and southeastern states. KCS provides the most direct access between the Gulf of Mexico and the Midwest. Together with its NAFTA Railway partners, KCS provides a route linking Middle America, the Gulf, south Texas and the premier rail system in Mexico, serving the ever-growing trade across the U.S.-Mexican border. KCS's Alliance Agreement with CN/IC extends its market reach northward as well. KCS is well-positioned to provide strong competition to other railroads, including CN/IC. KCS is committed to competing against CN/IC for any traffic, including the BRPO traffic which falls outside the Alliance. *See Verified Statement of Gerald K. Davies (hereinafter "V.S. Davis") at 2.* As the Board recently found, there have been no indications that the CN/IC merger and the KCS-CN/IC Alliance have had any anticompetitive effects. *Canadian National Ry. Co. et al. - Control - Illinois Central Corp. et al.*, Finance Docket No. 33556 (Sub-No.4)(STB served Nov. 29, 2000). CN/IC's Petition

confirms that the concerns expressed during the CN/IC merger regarding alleged collusion between the Alliance parties were, and continue to be, unfounded.

Furthermore, as will be shown in this Reply, CN/IC's thin assertion in its Petition that it must build a new line in order to compete against KCS is likewise unfounded. This assertion is clearly contradicted by the fact that in a similar situation KCS has been able to increase its share of traffic from Geismar to Baton Rouge up to 15%, despite a comparable fee that KCS pays for access to Geismar traffic. The major reason that KCS is not moving more Geismar traffic right now is that IC previously negotiated long-term contracts that locked-up the rest of the Geismar traffic. Verified Statement of Robert M. Cleator (hereinafter "V.S. Cleator") at 3.

The Geismar illustration proves that KCS is an aggressive competitor and is consistently in pursuit of more business. V.S. Cleator at 3. CN/IC touts in its Petition that it operates approximately 17,000 route miles and that the proposed build-in would give BRPO direct single line access to all points on the 17,000 miles. CN/IC Petition, Verified Statement of Terry R. McManaman (hereinafter "V.S. McManaman") at 4. CN/IC could market that expanded reach right now under an aggressive and competitive approach similar to the one that KCS has implemented in Geismar. There is no reason that CN/IC can not get as much business as they want from the BRPO plant without building this redundant and environmentally questionable line that proposes a new at-grade crossing of U.S. Highway 61 -- even under the current reciprocal switch fee. V.S. Cleator at 3. (And in fact approximately 2400 of BRPO's cars in 2000 have been moved under the accounts of other railroads. *See Reply at 9.*)

Analysis

I. THE PETITION SHOULD BE DISMISSED AS INCONSISTENT WITH THE RAIL TRANSPORTATION POLICY

Under 49 U.S.C. § 10901, a rail carrier that seeks to construct a new rail line must seek authority from the Board. Before authority to construct a rail line may be granted, the party seeking to construct the line must carry its burden of proof, and the Board must find, that the construction is not inconsistent with the public convenience and necessity ("PC&N"). 49 U.S.C. § 10901(c). Furthermore, the Board may not grant an exemption petition for a proposed construction project if the proposed construction is inconsistent with the RTP. *See* 49 U.S.C. § 10502. KCS acknowledges that Congress and the Board have recently looked favorably on construction projects and the exemption process in general. However, certain standards must still be met before authority to construct a rail line may be granted. Parties seeking to construct rail lines have not been relieved of their burden to establish that the proposed construction is not inconsistent with the PC&N and RTP standards, or in other words, that there is a public need for the construction.

A. CN/IC Must Meet The Public Convenience And Necessity Requirements And The Rail Transportation Policy

The construction of a rail line, such as the one proposed herein, that does not meet the public need standard and raises serious public safety concerns is the antithesis of the RTP of 49 U.S.C. § 10101. CN/IC's Petition does not meet the standards of the RTP. Construction of the proposed CN/IC rail line does not satisfy the RTP standard because the construction would be inconsistent with "promot[ing] a safe and efficient rail transportation system" (49 U.S.C. § 10101(3)); it would be inconsistent with "ensur[ing] the development and continuation of a sound rail transportation system...to meet the needs of the public" (49 U.S.C. § 10101(4)); it

would be inconsistent with “foster[ing] sound economic conditions in transportation” (49 U.S.C. § 10101(5)); it would be inconsistent with “operat[ing] transportation facilities and equipment without detriment to the public health and safety” (49 U.S.C. § 10101(8)); it would be inconsistent with “encourag[ing] honest and efficient management of railroads (49 U.S.C. § 10101(9)); and it would be inconsistent with “encourag[ing] and promot[ing] energy conservation” (49 U.S.C. § 10101(14)). The RTP policies found in 49 U.S.C. § 10101(3), (4), (5), (8), (9), and (14) are all aimed at evaluating the PC&N.

Authority to construct a rail line is governed by a pre-requisite finding by the Board that the present or future “public convenience and necessity” require or permit the construction. *See Alameda Corridor Construction Application*, STB Finance Docket No. 32830 (STB served May 13, 1996). Nearly 70 years ago the Supreme Court stated that the purpose for requiring a PC&N standard in construction proposals was to “enable the Commission, in the interest of the public, to prevent improvident and unnecessary expenditures for the construction and operation of lines not needed to insure adequate service.” *Chesapeake & Ohio Ry. v. United States*, 283 U.S. 35, 42 (1931). As CN/IC acknowledges (Petition at 7), the Board has traditionally looked at whether there is a public demand or need for the proposed service as one of three criteria in evaluating construction proposals under Section 10901. Yet, CN/IC’s Petition fails to present any evidence that the “public” need will be furthered by the proposed construction.

The Board’s predecessor has found that “[t]he interests and desires of one entity alone may be insufficient to establish a ‘public’ need.” *Chicago, Rock Island and Pacific Railroad v. United States*, 205 F. Supp. 378, 382 (N.D. Ill, 1962) (citing *Chesapeake and Ohio Railway Company Construction*, 267 ICC 665 (1947)). Furthermore, “[t]he needs of a single plant in an area of expanding and diversified industrialization usually do not suffice alone as evidence of

public convenience and necessity.” *Id.* (citing *Texas and Pacific Ry. v. Gulf C. & S.F. Ry. Co.*, 270 U.S. 266 (1926); *Northern Pacific Ry. Co. Construction*, 295 ICC 281 (1956)).

B. CN/IC Has Failed To Show A Public Need Or Demand For The Proposed Project

The accepted definition of “public need” supports the fact that in a typical proceeding in which a railroad seeks authority to construct a rail line, the applicant puts forth the support of numerous shippers. For example, in the *Tongue River R.R. Co. – Rail Construction and Operation – Ashland to Decker, MT*, 1 STB 809, 817, 830 (1996), the applicant had numerous shippers supporting the proposed line. In contrast, here CN/IC was not able to secure the support, much less the business, of the two other facilities located adjacent to BRPO. CN/IC stated in its Petition that its “proposed line will pass adjacent to the two other shippers” which would clearly make it very easy for them to obtain direct access to IC. (Petition at 4.) However, CN/IC states that “[n]o such arrangements are in place or, to IC’s knowledge, being developed.” *Id.* CN/IC apparently attempted to serve these industries but failed. *See CN/IC*, Comments of Exxon Chemical Americas, ECA-7 (Public Version), Exhibit VI to Verified Statement of B.K. Townsend. (Exhibit VI is a memo from J.G. Green to R.M. Cleator that describes one route for the proposed construction to accommodate the possibility that the other facilities might not want IC service) (Attached herein as Exhibit B). CN/IC’s actions in this case are also in contrast to KCS’s ability to get support and commitments from the three shippers it sought to serve in the *Geismar* proceeding. *See Kansas City Southern Railway Co. – Construction and Operation Exemption – Geismar Industrial Area near Gonzales and Sorrento, LA*, STB Finance Docket No. 32530 (“*Geismar*”).

In addition to the public need determination requiring more than one shipper's desire, the STB must look at whether the construction would be redundant and wasteful. The ICC has historically encouraged the joint use of a line over the wasteful and inefficient construction of two parallel lines. *See Mobil Oil Corp. v. ICC*, 685 F.2d 624 (D.C. Cir. 1982). The court in *Mobil Oil* affirmed a Commission decision wherein the "Commission was reluctant to authorize two new lines that would roughly parallel each other and strongly encouraged the two railroad companies to submit a proposal for a joint line." *Id.* at 627.

The STB recently affirmed the precedent that supports the reluctance to authorize new lines where the shipper's traffic can utilize the joint use of one line as in *Geismar*, STB Finance Docket No. 32530 (STB served Aug. 27, 1998). The STB held KCS's *Geismar* construction proceeding in abeyance because "it would be hard to justify either economically or environmentally undertaking this construction project when it has become apparent that service [to the same shippers proposed in the construction proceeding] could be provided over existing track." In the STB's decision approving the CN/IC merger, the Board elaborated on the *Geismar* decision when it questioned "[w]hether the public need for the line would be sufficient to warrant this construction given that KCS already can provide competitive service to the three original *Geismar* shippers is far from certain." *Canadian National Ry. Co. - Control - Illinois Central Corp.*, STB Finance Docket No. 33556 (Decision No. 37)(STB served May 25, 1999) ("*CN/IC* Decision No. 37"). As a result, the Board declared that it would be "inappropriate to take any further action in the [*Geismar* proceeding]" even though KCS wanted to complete the construction proceeding. *Id.*

It appears to KCS that the primary "public" need for the proposed construction can only be based on ExxonMobil's desire to be more profitable, a goal that KCS supports to the extent it

is consistent with the RTP that the Board must implement. However, ExxonMobil's transportation costs have decreased since 1994. In ExxonMobil's verified statement submitted to the Board in 1994, ExxonMobil stated that its transportation costs were 50% of variable costs excluding feedstock. See Petition of KCS in STB Finance Docket No. 32547, Verified Statement of Thomas K. Campbell, Jr. (hereinafter "V.S. Campbell") at 5. In Exxon's verified statement in this proceeding, Exxon now reports that its transportation costs are equal to 40% of variable costs excluding feedstock. See Petition, Verified Statement Stephen M. Coulter (hereinafter "V.S. Coulter") at 5. Exxon also is on record at the Board as acknowledging that its transportation rates have declined in recent years. See *CN/IC*, Decision No. 37 at 32. In addition, the Board has acknowledged that rail rates in general have been going down. See *Rail Rates Continue Multi-Year Decline*, Office of Economics, Environmental Analysis, and Administration, Surface Transportation Board (December, 2000). As a result, Exxon's transportation costs cannot support the public need analysis for the proposed construction.

The CN/IC Petition appears to base its required showing for public need almost entirely on the fact that the Board has approved build-ins to captive shippers in the past. See Petition at 6. The only other cursory mention of any facts supporting the public need in the CN/IC proposed construction is that "construction of the proposed line will allow ExxonMobil to receive competitive rates and service from IC without ... the reciprocal switching charge ... [and] ExxonMobil also will gain access to additional single-line routings, improved gateway routings and shortened transit times and distances." Petition at 8. The Petition contains nothing more than a brief mention of these ideas and offers no evidence supporting the assertions.

CN/IC's reliance on cases where the Board approved rail construction for captive shippers is not supportive at CN/IC's proposal.¹ The BRPO plant is not captive. As CN/IC admits, the BRPO plant is open via reciprocal switching to both CN/IC and UP. The fact that the BRPO plant is not captive is supported by the number of cars moved by KCS for Year 2000. KCS will have moved in its own account out of the BRPO plant 9600 cars for Year 2000. V.S. Cleator at 2. However, BRPO states in its Verified Statement submitted by Mr. Coulter, that "BRPO currently originates more than 12,000 annual rail car shipments." V.S. Coulter at 3. This leaves at least 2400 cars during this past year that were moved in the account of rail carriers other than KCS. *Id.*

In addition, as the Board previously acknowledged and Exxon conceded in the *CN/IC* merger proceeding, a carrier that has access via switch can compete for traffic particularly where that carrier has exclusive access to the destinations or because the switching carrier does not have direct control of the entire route. *See CN/IC* Decision No. 37 at 104. The type of competitive avenues discussed in the *CN/IC* Decision No. 37 are apparently the type of competitive benefits that CN/IC alleges it will be able to offer with its build-in. *See* V.S. McManaman. However, as the Board has agreed in similar circumstances, the BRPO plant will not gain access to single-line routings, improved gateway routings, shortened transit times or distances. CN/IC already

¹ CN/IC does cite to the prior KCS construction proceeding in *Kansas City Southern Railway Co. – Construction and Operation Exemption – To Exxon Corporation's Plastics Plant near Baton Rouge and Baker, LA*, STB Finance Docket No. 32547. The Exxon plant in that proceeding was not captive and was open to reciprocal switching to KCS. However, that case can be distinguished because the primary question raised by IC and addressed by the ICC in that proceeding was whether the construction was within the ICC's jurisdiction. *Id.*, STB decision served June 12, 1995). In any event, the STB has more recently addressed the issue of whether construction serves the public need where a carrier already has access in the *Geismar* and *CN/IC* proceedings.

provides this type of competition because CN/IC has access to the BRPO plant via reciprocal switch.

C. CN/IC Has Failed To Show That Its Proposal “Fosters Sound Economic Conditions In Transportation”

The competition that CN/IC already provides to KCS’s service at BRPO is exemplified by the amount of infrastructure that KCS has continually dedicated to the BRPO plant. CN/IC’s proposed service would render the extensive storage track built by KCS for BRPO nearly superfluous. KCS maintains a number of rail yards for the purpose of storing ExxonMobil’s loaded plastic pellet cars.² Many of these tracks are covered by track leases which ExxonMobil has with KCS, which designate an allocated amount of storage track for the purpose of storing BRPO’s loaded plastic pellet cars that are not ready for delivery to a particular purchaser. KCS maintains a large number of tracks for storing BRPO pellet cars, due to the large volume of cars often generated by BRPO for storage rather than delivery to a buyer. Joint Verified Statement of Andrew Martin and Amos J. Sonnier (hereinafter “J.V.S. Martin/Sonnier”) at 6-8.

Three storage tracks are located immediately adjacent to the BRPO plant, at a location called “Maryland” by KCS. The three storage tracks can hold up to 131 rail cars. *Id.* at 5. In addition to the three storage tracks at Maryland, KCS also uses tracks located at New Yard for BRPO, located approximately ¼ mile north of the BRPO plant. New Yard was built in 1996 for the express purpose of growing to meet Exxon’s tank car storage needs. New Yard has nine tracks and a total railcar capacity of 519 cars, although much of that capacity is often taken up by tank cars. *Id.* Located right next to New Yard is Expansion Yard, built by KCS in 1999

² As explained in the J.V.S. Martin/Sonnier, these cars are called “no destination” cars. The J.V.S. also provides additional background to assist the Board in understanding how KCS actually serves the BRPO plant.

specifically for the purpose of storing ExxonMobil's "no destination" cars. Expansion Yard contains six tracks and ExxonMobil holds a lease on all six tracks. The combined tracks in Expansion Yard can hold a total capacity of 82 cars. *Id.* at 6. In addition to the storage capacity outlined above, KCS also on occasion stores cars for ExxonMobil at a station called Irene, which is located north of New Yard. Irene consists of two tracks which can hold a combined total of 139 cars. *Id.*

On a regular basis, ExxonMobil tenders to KCS substantially more cars for storage than they have negotiated for under their track leases with KCS. Occasionally, the number of tendered cars is more than KCS can currently accommodate on all of the tracks that KCS has built for ExxonMobil or that KCS has in the immediate Baton Rouge area. Nevertheless, KCS has always accommodated BRPO's storage needs. KCS accomplishes this by storing the cars at various locations on the KCS system. Remote storage can be to BRPO's advantage. For example, the remote storage may be closer to the later-determined destination, which saves in ultimate transit time. Within the last month, KCS has stored BRPO's loaded pellet cars at East St. Louis (on GWWR), where up to fifty cars have been stored, Latanier, Louisiana (located south of Alexandria), Baton Rouge, Port Arthur, Texas, and Aberdeen, Mississippi. *Id.*

KCS has made every reasonable effort to accommodate BRPO's needs for storage capacity on its system. In fact, KCS recently discussed with ExxonMobil the possibility of constructing a substantial car storage yard dedicated to the storage of ExxonMobil's "no destination" cars from its BRPO plant. V.S. Davies at 4-5. ExxonMobil twice rejected this idea, although KCS understands that ExxonMobil intends to undertake construction of a new storage yard, at property it owns along the planned route of the proposed CN/IC line. While KCS

continues to be committed to working with ExxonMobil to meet BRPO's storage needs, ExxonMobil has shown little interest in such proposals of late. *Id.* at 4-6.

In stark contrast to KCS's continued improvements to the infrastructure and storage capacity available to BRPO, CN/IC's Petition lacks any discussion of how CN/IC intends to store ExxonMobil's "no destination" cars. The absence of any review of storage or yard capacity in the Petition is indicative of one of two possibilities: either CN/IC lacks the capacity to store ExxonMobil's "no destination" cars, or there are significant construction aspects to this build-in project which have been omitted from the Petition. The facts lean toward the latter possibility.

CN/IC's current lack of storage in the local Baton Rouge area is the same situation that Exxon faced in 1994. *See* V.S. Campbell for Exxon Chemical Americas submitted with KCS's Petition for Exemption dated November 22, 1994 in *Kansas City Southern Railway Co. – Construction and Operation Exemption – To Exxon Corporation's Plastics Plant near Baton Rouge and Baker, LA*, STB Finance Docket No. 32547. In addition, even as recently as the end of 1998, Exxon believed that a weakness of the proposed CN/IC build-in to BRPO was the lack of CN/IC storage track in Baton Rouge. *See* Exhibit I to Verified Statement of W. R. Needels submitted in ECA-7 in *CN/IC*. (Attached herein as Exhibit C). In addition, even when CN/IC signed the commercial agreement with BRPO in December 1999 regarding this proposed construction, IC did not have any infrastructure in Baton Rouge to meet BRPO's storage needs as contemplated. V.S. Cleator at 2.

CN/IC's other assertions regarding the purpose for the build-in such as a potential washout, a labor action, shortage of crews or locomotives or congestion are equally without merit. *See* Petition, V.S. McManaman at 5. A washout would affect both lines because of the topography of the Baton Rouge area. Neither CN/IC nor Exxon provide any evidence that KCS's

service to the BRPO plant has been disrupted by a labor action, shortage of crews or locomotives or congestion. To the contrary, the J.V.S. Martin/Sonnier shows that KCS's service to the BRPO plant, as requested by BRPO, has occurred without interruption. In addition, Mr. Martin and Mr. Sonnier are unaware of any complaints made by ExxonMobil to KCS regarding service issues other than issues directly caused by ExxonMobil's provision of more cars for storage on KCS's tracks than ExxonMobil has contracted for. *Id.* at 7-8.

In summary, CN/IC's Petition fails to meet the RTP and public need standard for the issuance or exemption of a PC&N certificate. CN/IC's attempt to show one shipper's desire to have a redundant rail line built does not satisfy the public need standard. CN/IC's perfunctory and unsupported mention of other reasons for the proposed build-in are also without merit. BRPO is not a captive shipper and can currently benefit from the expanded competitive service that CN/IC can provide. Furthermore, the competitive restraint that CN/IC's access at BRPO has put on KCS is shown by the continued infrastructure and storage capacity that KCS has built and offered to build in Baton Rouge.

D. CN/IC Has Failed To Demonstrate That The Public Safety Concerns Meet The RTP For The Proposed Service

The Board's statute at 49 U.S.C. § 10901(a) provides that a railroad may construct a rail line only if the Board issues a certificate authorizing such activity under subsection (c). That subsection states that the "Board shall issue a certificate ... unless the Board finds such activities are inconsistent with the public convenience and necessity." In an application proceeding to construct a 2.9 mile line (similar to CN/IC's proposal to build a 3.2 mile line), the Interstate Commerce Commission stated:

The construction of a rail line may pose significant risk to public safety... Thus, it is entirely appropriate to factor public safety concerns into our Section 10901 analysis of whether public convenience and necessity require or permit the construction of the line.

Indiana & Ohio Railroad Company – Construction and Operation, -- *Butler, Warren & Hamilton Counties, OH*, 9 ICC 2d 783, 788 (1993). Accordingly, a Section 10901 PC&N review clearly embraces an evaluation of relevant public safety concerns.

In addition, an exemption may be granted under Section 10502(a) only if “the Board finds that the application in whole or in part of a provision under this part [here § 10901] - (1) is not necessary to carry out the transportation policy of Section 10101.” As pointed out by the Court in *Palestine v. ICC*, 936 F.2d 1335, 1338 (D.C. Cir. 1991), *cert. denied* 502 U.S. 1030 (1992),

[O]ne must first decide in what respect the “provision” implements rail transportation policy. Only then can it be determined whether application of the provision is “necessary” to carry out that aspect of the policy via a particular case.

Here a Section 10901 analysis, including a determination of public convenience and necessity and a strong consideration of public safety, is required in order to carry out Section 10101(8) of the Rail Transportation Policy (RTP) which provides: “[I]t is the policy of the United States Government ... (8) to operate transportation facilities and equipment without detriment to the public health and safety.” As was held in *Louisville & Jefferson County Riverport Authority Construction and – In Jefferson County, KY*, 4 ICC 2d 749, 754 (1988), a public interest finding is required in order to issue a PC&N certificate that would allow CN/IC to cross KCS’s rail line. As stated therein, a PC&N certificate is based on a finding of public interest. “Indeed, the rail transportation policy at 49 U.S.C. § 10101a reflects these public interest considerations.” *Id.* Thus, the Board is required to give careful consideration to public

safety concerns as part of its responsibilities under the Act. *See Indiana & Ohio Ry. Co. – Construction and Operation* at 788, n. 11.

CN/IC's Petition makes absolutely no mention of the public safety concerns that its proposed build-in might entail. As shown in the attached Verified Statement of William B. Conway (hereinafter "V.S. Conway"), even an introductory look at the maps submitted to the Board and the drawings submitted to the Louisiana Department of Transportation for CN/IC's proposed at-grade crossing of Highway 61, are incomplete and wrong. These maps and drawings are such that a thorough analysis of public safety cannot be undertaken at this point. As shown in the Mr. Conway's statement, the lead track alignment is located on a floodplain back swamp which will require either a trestle or a 35 foot embankment placed on weak organic soils. Moreover, drawings submitted to the Louisiana Department of Transportation reflect substantial inaccuracies in the elevation of U.S. 61. The road crossing itself, as reflected on these drawings, does not conform to state DOT regulations. As a result, there will be severe bump on both northbound and southbound lanes. Finally, with the increasing Average Daily Traffic approaching 20,000, a grade separation should be carefully considered especially in light of the other factors which must be considered such as highway speeds, the fact that U.S. 61 is a federal highway and community issues.

E. The Proposed Construction Is Inconsistent With The RTP Because The Proposed Construction Will Unduly Harm Existing Rail Service

CN/IC's entire effort to satisfy its burden of establishing that the proposed construction will not unduly harm existing rail service is based on the unsupported assertion that there is no evidence that shows otherwise. What CN/IC fails to point out is that under the commercial agreement between CN/IC and BRPO, CN/IC has locked up 70% of all of BRPO's business

upon completion of the build-in. V.S. Cleator at 1. CN/IC contemplates the completion of the build-in by 2002. BRPO estimates its production in 2002 will be 15,000 cars. *See* CN/IC Petition, V.S. Coulter at 3. These numbers average to BRPO moving approximately 41 cars per day in 2002. Under the 70% requirement, BRPO will be locked-in to CN/IC handling approximately 10,500 cars per year or approximately 29 cars per day. The 29 cars per day will be more than KCS is projected to handle for BRPO for all of 2000. V.S. Cleator at 2. KCS's projected car loads for BRPO are projected to be 9600 for the year 2000 or approximately 26 cars per day.

Exxon has stated to Mr. Cleator of KCS on numerous occasions that once an agreement was signed between CN/IC and Exxon, Exxon would no longer consider any offer by KCS to lower the reciprocal switch rate as an alternative to the construction of a new rail line. Several people at Exxon, include Exxon's witness Mr. Coulter, stated that even if KCS lowered its reciprocal switch to \$0, they would not back down on their demand for two carrier direct access. V.S. Cleator at 2-3.

CN/IC's proposed construction of the new rail line is not needed for efficient, reliable or competitive service to BRPO. Rather, the build-in petition results from an ExxonMobil policy decision to have two-railroad direct access wherever possible at ExxonMobil plants. Thus, CN/IC's exemption petition is a classic case of a railroad proposing to build excess capacity at a location that is already adequately served, where the added capacity will work to the detriment of the railroads involved and the public. There is no real need for CN/IC to build a new line. V.S. Davies at 3.

IC's determination to build-in despite the adequate capacity of KCS's existing line becomes particularly worrisome because of the surplus of production in the plastics market. *Id.*

ExxonMobil's own witness in this proceeding states that the plastics business is cyclical and that the supply of the products manufactured at the BRPO will exceed demand for years to come.³ If the additional unneeded line that IC proposes to build reduces the volume of cars that KCS handles for the BRPO, KCS will have to consider paring back its facilities to a level that is economically viable. V.S. Davies at 5. This is a clear harm to the existing rail service.

II. AN APPLICATION, NOT AN EXEMPTION, IS REQUIRED IN THIS PROCEEDING, OR ALTERNATIVELY, THE BOARD SHOULD INSTITUTE A PROCEEDING PURSUANT TO 49 U.S.C. § 10502(b) IN ORDER TO FULLY ASSESS WHETHER THE PROPOSED CONSTRUCTION AND OPERATION MEETS THE RTP AND PC&N STANDARD

It appears to KCS that CN/IC has fallen prey to the false security that a petition for exemption to construct a rail line will unilaterally be granted by the Board without any requisite evidence of the public need for the construction. The Board should not tolerate filings that are incomplete and that fail to fully disclose the facts or provide the Board with sufficient evidence to support a finding that the proposed construction is consistent with the RTP and the PC&N standard. The existence of exemption proceedings does not excuse CN/IC from carrying its burden of establishing that its Petition qualifies for an exemption.

The Board should find that CN/IC's failure to address how CN/IC's proposed construction will specifically affect the RTP and PC&N standards, should be grounds for dismissal. In the event the Board does not grant the dismissal of the Petition, KCS incorporates

³ "The PE and PP businesses are cyclical, highly capital-intensive commodity businesses in which profit margins are limited," and "We believe PE and PP resin supply will be higher than industry demand for the foreseeable future." Verified Statement of Stephen M. Coulter at 5 and 6.

by reference its arguments in Part I of its filing which are equally relevant to support the requirement that an application be filed or that a proceeding be instituted.

The Board recently instituted proceedings pursuant to Section 10502(b) in two construction exemption proceedings. In *Entergy Arkansas And Entergy Rail--Construction And Operation Exemption--White Bluff To Pine Bluff, AR*, STB Finance Docket No. 33782 (STB served Oct. 28, 1999) ("*Entergy*"), the Board instituted a proceeding in order to determine the merits of the proposed construction based upon a railroad's objection to the construction of rail service as proposed. Likewise, in *Public Service Company of Colorado - Construction Exemption - Pueblo County, CO*, STB Finance Docket No. 33862 (STB served July 12, 2000) ("*Public Service*"), the Board instituted a proceeding based upon a railroad's motion to dismiss the construction exemption on the basis that the proposed construction is a spur or industrial track. The concerns raised in KCS's Reply are no less significant, and KCS argues that the issues raised in this Reply are of utmost importance, than the issues raised in the *Entergy* and *Public Service* proceedings. Therefore, the Board should institute a proceeding in order to fully and complete assess whether the proposed construction exemption meets the RTP and PC&N standard.

CN/IC should be required to file an application or a proceeding should be instituted so that the Board can base its decision on a full disclosure of the facts. CN/IC's Petition is nearly void of any specifics on the proposed project. CN/IC's description of the line can be summed up by CN/IC's statement that "the proposed line is south of and somewhat longer than the other alternatives studied for access to the BRPO plant." Petition at 4. This description does not describe the proposed location of the line with any sufficient degree of accuracy for the Board or KCS to assess the proposals. In addition, Exhibit A of the Petition which includes a topography

map with the proposed line sketched, is circa 1980. The topography of the area has changed significantly since that time so as to render the Exhibit A map nearly meaningless. Moreover, the Board cannot make any finding that the Petition complies with PC&N requirements without access to any information relative to CN/IC's plans to store ExxonMobil's pellet cars.

KCS acknowledges that if this proceeding progresses, the environmental issues will be addressed in a separate review. Nevertheless, KCS finds it unsettling that the Petition makes no mention of the proposed at-grade crossing of a major four lane divided highway, Highway 61. Furthermore, as addressed above the Board must address the public safety issues in its determination of whether the proposed construction is consistent with the RTP. Since the Petition is completely void of the mention of and specifics on the proposed construction, including the public safety issue, the Board cannot adequately address the complete impact that the project might have on the RTP and PC&N standard. The Board must require that additional information, either in the form of an application or in an expanded proceeding, be provided for the public record. The Board should insist that CN/IC's Petition for an exemption to construct a rail line cannot simply presume that authority will be granted, and instead the CN/IC must meet the burden of showing that the proposed construction is not inconsistent with the RTP.

The need for a full and thorough review of the proposed build-in shared by Senators and John Breaux and Mary L. Landrieu, Councilman-Elect Ulysses Z. Addison, Jr. and numerous citizens from Baton Rouge as shown in Exhibit A. Construction proposals that raise "concerns about the impact of the project on the people that live in the area," are not appropriate for the exemption process and are more appropriately reviewed under an application process. *Ozark Mountain Railroad – Construction Exemption*, Finance Docket No. 32204 (ICC served Dec. 15, 1994). The letters included in Exhibit A indicate that more information is needed and that the

Baton Rouge community is concerned about the impact the project might have on them. As a result, the Board should require CN/IC to file an application, or at least institute a proceeding to develop a more thorough record.

Finally, CN/IC will not be harmed by the requirement to file an application or, the Board institution of a proceeding. The Board generally issues construction authority that is conditional upon the completion of the environmental review. As a result, the environmental review can be continued simultaneous with the collection and review of the requisite detail for the Board to determine whether the RTP and PC&N standards have been met for this proposed construction project.

Conclusion

For all of the foregoing reasons, KCS urges the Board to dismiss the CN/IC Petition. If the Board is not disposed to dismissing the Petition, then KCS respectfully urges the Board to require an application for this proceeding, or alternatively, KCS urges the Board to institute a proceeding in order to fully assess whether the proposed construction meets the RTP and PC&N standard.

Respectfully submitted,

**Richard P. Bruening
W. James Wochner
THE KANSAS CITY SOUTHERN
RAILWAY COMPANY
114 West 11th Street
Kansas City, MO 64105
TEL: (816) 983-1410
FAX: (816) 983-1227**


**John R. Molm
Thomas J. Healey
David C. Reeves
Sandra L. Brown
TROUTMAN SANDERS LLP
401 Ninth Street, NW, Suite 1000
Washington, DC 20004
TEL: (202) 274-2950
FAX: (202) 274-2994**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33877

**Illinois Central Railroad Company
-- Construction And Operation Exemption --
In East Baton Rouge Parish, Louisiana**

**JOINT VERIFIED STATEMENT OF
ANDREW MARTIN AND AMOS J. SONNIER**

Martin Background

My name is Andrew Martin. I am the Chief Transportation Officer - Field Operations for The Kansas City Southern Railway Company ("KCS"). My business address is 4601 Shreveport Blanchard Highway, Shreveport, Louisiana. In my job with KCS, I am responsible for the supervision of all train and engine employees on the KCS system (including those working for Gateway Western Railway Company ("GWWR"), our subsidiary), and safety programs on the entire system. I have responsibility over all trains, including locals and switch engines, on our entire rail system.

I began my railroad career with The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") in Chicago in 1976 as a labor contractor. Between 1976 and 1995, I held various positions with Santa Fe, including TOFC Inspector, Console Operator, Assistant Operations Manager, Operations Manager, Assistant Terminal Manager, Terminal Manager, and Trainmaster. In October of 1995, I left Santa Fe to take a position with KCS as a Trainmaster. I have also worked for KCS as an Assistant

Superintendent, Superintendent, and Assistant Chief Transportation Officer - Field Operations. I was promoted to my current position in July of 2000.

Sonnier Background

My name is Amos Joseph ("A.J.") Sonnier. I am employed by KCS as Assistant Superintendent - Midcontinent Division in Baton Rouge, Louisiana. My business address is 1401 Foss Street, Baton Rouge, Louisiana. My job responsibilities as Assistant Superintendent are to oversee terminal operations between Heavener, Oklahoma to New Orleans, Louisiana.

I began my career with KCS on February 15, 1970, as a Switchman in New Orleans. I have also worked for KCS as a Conductor, Yardmaster, Engine Foreman, Assistant Trainmaster, and Trainmaster. I also spent nearly one year assisting in the design of KCS' MCS project, which is a computer project designed to aid in the movement of freight over the railroad.

Statement of Purpose

The purpose of this verified statement is to provide information relative to KCS' current infrastructure, recent expansions, and ability to serve the polyolefins plant operated by ExxonMobil Chemical Company (referred to herein as the "BRPO plant" or the "plant"), formerly operated by Paxon, in Baton Rouge, Louisiana. The BRPO plant is involved in the large-scale production of plastic pellets. The pellets produced at the plant are shipped in covered hoppers, for distribution throughout the United States. The plant also receives occasional cars of solvents, transported in railroad tank cars, although the primary movement of rail traffic to or from the plant is outbound loads of plastic pellets.

We have each visited the plant, and are familiar with both the physical facilities and the train service provided by KCS to serve the plant.

Rail Service To The BRPO Plant

We would like to summarize how KCS serves the BRPO plant. The plant is located approximately eight miles away from KCS' Baton Rouge Yard. KCS owns the track that connects the Baton Rouge Yard to the BRPO plant. As with many shippers, the track located within the BRPO plant is owned by the industry. KCS reaches the plant through industrial leads that access both the "South Gate" and the "North Gates."

The provision of rail service to the BRPO plant can be viewed as a cycle, which begins with the receipt of a telefax in our customer service facility in Shreveport, Louisiana from ExxonMobil informing us of how many empty, 65' covered hoppers ExxonMobil would like spotted at the BRPO plant that day. We then move the required number of empty covered hoppers into our yard at Baton Rouge. The cars are spotted on spur tracks, and are then cleaned, inspected, and repaired (if necessary) by SRIS, a contractor for ExxonMobil. After the cars have been approved for movement to the BRPO plant, they are gathered in the Baton Rouge Yard. On occasion, we have moved up to 40 empty covered hoppers to the BRPO plant, although generally the required number of cars is less than that.

One KCS crew is assigned to provide service to the BRPO plant, which we do once a day, seven days a week. The crew usually comes on duty at KCS' Baton Rouge Yard at 3:30 p.m. each day, and hence that job is often referred to as the "3:30 Job." They couple their locomotives onto the inspected covered hoppers and, after performing

all required air tests and other trip preparations, leave the Baton Rouge Yard for the BRPO facility.

Upon arriving at the BRPO plant, the crew performs a "run-around" (to move the locomotive to the other end of the string of empty covered hopper cars) and shoves the cars in one long string into the BRPO plant. This same procedure is followed even if the train contains one of the few tank cars of solvent required by the BRPO plant.

After shoving the empty cars into the BRPO plant, the crew contacts the industry to request that one of the "North Gates" be unlocked. By accessing the North Gates, the crew is able to gather outbound loaded cars of plastic pellets. KCS does not generally perform any interplant switching, as ExxonMobil owns a Trackmobile which it uses to shuttle cars around inside the plant. However, on occasion, the KCS crew will have to collect the loaded cars from up to three separate tracks within the BRPO plant. After all outbound cars have been assembled into the train, the crew again makes a run-around move, and (after all required pre-trip tests and procedures are satisfied), the crew returns with the train to KCS' Baton Rouge Yard.

As a general matter, the 3:30 Job only serves the BRPO plant. We are not familiar with any time where more than one crew was required to serve the BRPO plant per day. Switching at the plant, and moving trains to and from the plant, can take anywhere from eight to twelve hours of crew time per day.

Although some of the loaded covered hoppers which ExxonMobil provides to us each day have a specified shipper destination, most do not. Those that have a destination (termed, appropriately enough, "destination cars") are switched into destination tracks in KCS' Baton Rouge yard according to the KCS station or other railroad to which they

must be interchanged. Those cars that have no destination (sometimes called "storage cars" or "no destination" cars) are to be stored by KCS on its own tracks until delivery instructions are received from ExxonMobil.

KCS Infrastructure Dedicated To The BRPO Plant

KCS maintains a number of rail yards for the purpose of storing ExxonMobil's "no destination" cars. Many of these tracks are covered by track leases which ExxonMobil has with KCS, which designate an allocated amount of storage track for the purpose of storing ExxonMobil's storage cars. KCS maintains a large number of tracks for storing ExxonMobil pellet cars, due to the large volume of cars often generated by ExxonMobil as "no destination" cars.

Three storage tracks are located immediately adjacent to the BRPO plant, at a location called "Maryland" by KCS. The three storage tracks are called "Tracks 1, 2 and 22" by KCS. Track 1 has the capacity to store 2,960 feet of cars, Track 2 can accommodate 3,380 feet of railcars, and Track 22 holds 4,200 feet of cars. Given that most covered hopper cars are 65' in length, this means that these tracks can hold approximately 131 railcars.

In addition to the three storage tracks at Maryland, we also use tracks located at New Yard, located approximately ¼ mile north of the BRPO plant. New Yard was built in 1996 for the purpose of storing Exxon Chemical Company's tank cars. However, we have used New Yard on occasion to store ExxonMobil's covered hopper cars when more cars are provided by ExxonMobil than are covered by track lease, a situation which has occurred in the past. New Yard has nine tracks and a total railcar capacity of 519 cars, although much of that capacity is often taken up by tank cars.

Located right next to New Yard is Expansion Yard, built by KCS in 1999 specifically for the purpose of storing ExxonMobil's "no destination" cars. Expansion Yard contains six tracks (numbered 210-215). ExxonMobil holds a lease on all six tracks. The tracks in Expansion Yard, and their approximate length for holding railcars, is as follows: Track 210, 725 feet; Track 211, 800 feet; Track 212, 800 feet; Track 213, 900 feet; Track 214, 800 feet; and Track 215, 800 feet. The total railcar capacity for these six tracks is 82 cars in Expansion Yard.

In addition to the storage capacity outlined above, KCS also on occasion stores cars for ExxonMobil at a station called Irene, which is located north of New Yard. Irene consists of two tracks. Track 1 can hold 5,889 feet of railcars (or 72 cars), and Track 2 can hold 5,671 feet of cars (or 67 cars).

On a regular basis, ExxonMobil tenders to KCS far more "no destination" cars than they have negotiated for KCS to store under their track leases. Sporadically, the number of tendered cars is more than we can accommodate on all of these tracks. To the best of our knowledge, KCS has always accommodated ExxonMobil, even when they have provided far more "no destination" cars than their track leases would allow. We do this by storing the cars at various locations on the KCS system. Remote storage can be to ExxonMobil's advantage. For example, the remote storage may be closer to the later-determined destination, which saves in ultimate transit time. Within the last month, KCS has stored ExxonMobil's loaded pellet cars at East St. Louis (on GWWR), where we have stored up to fifty "no destination" cars, Latanier, Louisiana (located south of Alexandria), Baton Rouge, Port Arthur, Texas, and Aberdeen, Mississippi.

KCS has made every reasonable effort to accommodate ExxonMobil's needs for storage capacity on our system. In fact, we understand that KCS recently discussed with ExxonMobil the possibility of a project to construct a very large storage yard dedicated to the storage of ExxonMobil's "no destination" cars from its BRPO plant. That plan was unsuccessful because ExxonMobil would not commit to use of the new yard.

KCS Service Quality To BRPO

We believe that in light of our positions with KCS, and given the fact that we have attended meetings with ExxonMobil regarding rail service, we would be aware of any issues raised by ExxonMobil relating to rail service to the BRPO plant. The only significant issue they have ever raised with us is occasional congestion in our Baton Rouge Yard which, as we have previously explained, is caused by an excess of ExxonMobil's own "no destination" cars over track lease space. Despite the logistical issues occasionally generated by the storage of these "no destination" cars, KCS has always been able to supply the BRPO plant with the requested number of empty, inspected covered hoppers.¹ We also believe that we have provided service to the plant by our 3:30 Job every day, as requested by ExxonMobil, without interruption. We are unaware of any problems serving the plant because of a lack of crews or locomotives, or because of other congestion on our railroad. Although every railroad will on occasion have issues with weather-related service delays, derailments, malfunctioning equipment, or the like, we believe that KCS' service for ExxonMobil has never experienced more than infrequent service delays, of short duration, caused almost exclusively by an excess

¹ By way of example, last week we were holding sixty covered hoppers, waiting for a request to spot them in the plant.

of ExxonMobil's "no destination" cars in our Baton Rouge Yard. The congestion issue raised by ExxonMobil could be wholly addressed through construction of new yard space, but such space will not be constructed unless there is a reasonable assurance that it will be used. We are unaware of any other complaints made by ExxonMobil to KCS regarding service issues.

It is our understanding that Illinois Central Railroad (a wholly owned subsidiary of Canadian National Railroad) ("IC") has filed a petition with the Surface Transportation Board seeking authority to build a track from one of its nearby rail lines into the BRPO plant, and that IC desires to provide rail service into the BRPO plant. From an operational standpoint, if IC attempts to serve the BRPO plant while KCS' 3:30 Job is also switching the plant, operational and safety problems could result. In order to properly serve any plant, KCS' crews must work together closely, and communicate frequently, in order to avoid disaster. KCS's crews are instructed to always perform their work safely, whether switching at the BRPO plant or any other facility. However, if IC were to switch the plant at the same time as KCS did, a failure to adequately communicate between the crews could result in operations on the same track by two crews at the same time, which might result in collisions between cars, trains or locomotives. It takes great effort to achieve operational safety within one plant or facility when two crews, from the same railroad, are working in the facility. Those problems are greatly expanded when the two crews are working for different railroads, as the crews may have different working rules, or be operating on different radio frequencies.

VERIFICATION

I, Amos J. Sonnier, verify under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this statement.

12-18-2000

Date

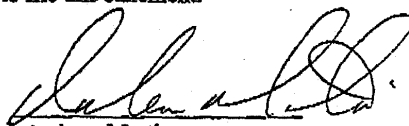
Amos J. Sonnier
Amos J. Sonnier

VERIFICATION

I, Andrew Martin, verify under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this statement.

12-19-2000
Date


Andrew Martin

E

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33877

**Illinois Central Railroad Company
- Construction and Operation Exemption -
In East Baton Rouge Parish, Louisiana**

**VERIFIED STATEMENT OF
ROBERT M. CLEATOR**

My name is Robert M. Cleator. I am Vice President of Chemicals and Petroleum Products for The Kansas City Southern Railway Company ("KCS"). I am submitting this statement as part of KCS's Reply to the Petition of the Illinois Central Railroad Company and its parent the Canadian National Railway Company ("CN/IC") with respect to a proposed build-in at ExxonMobil's Baton Rouge Polyolefins ("BRPO") plant.

I joined the KCS in July, 2000 as Vice President of Chemicals and Petroleum Products. Prior to joining KCS, I was the Assistant Vice President - Chemicals for CN/IC until December 1999. Before that I was the Assistant Vice President - Chemicals for IC. I started at the IC in July of 1989 and I have worked in the area of marketing rail transportation of chemicals since 1992. Most relevant to this statement, I was working at IC I had primary responsibility for negotiating IC's transportation agreements with Exxon and other chemical shippers. I was also at IC during planning for the proposed CN/IC merger and was with that company when the merger was consummated.

In connection with the CN/IC proposed build-in to the BRPO plant, I negotiated the commercial agreement for CN/IC during my tenure as Assistant Vice President - Chemicals for

CN/IC. Under this agreement, CN/IC has locked up 70% of all of BRPO's business upon completion of the build-in which CN/IC contemplates to be completed by 2002. BRPO estimates its production by Year 2002 will be 15,000 cars. (See CN/IC Petition, Verified Statement of Stephen M. Coulter at 3). This averages approximately 41 cars per day. With the 70% requirement, BRPO will be locked-in to giving CN/IC approximately 10,500 cars per year or approximately 29 cars per day. The 29 cars per day will be more than KCS is projected to handle on a daily basis throughout the year of 2000. Outbound loads from the BRPO plant in KCS's account are projected to be 9600 for the year 2000, or approximately 26 cars per day. The KCS movement of 9600 cars during 2000 also supports the fact that the BRPO plant is not captive to KCS. As BRPO states in its Verified Statement by Mr. Coulter, "BRPO currently originates more than 12,000 annual rail car shipments." Coulter V.S. at 3. This leaves at least 2400 cars during this past year that were moved in the account of a rail carrier other than KCS (i.e. via reciprocal switch). This fact alone establishes that there is robust competition at BRPO.

At the time that the CN/IC commercial agreement was signed with BRPO in December 1999, IC did not have the rail infrastructure in Baton Rouge to meet BRPO's storage needs. I do not believe that CN/IC has completed any storage facility projects since that time. However, I understand that ExxonMobil may have plans to build a new storage facility on the Maryland Tank Farm property similar to a facility that KCS had previously proposed to have built for Exxon's storage needs.

Officials at Exxon have stated to me on numerous occasions that once an agreement was signed between CN/IC and Exxon, Exxon would no longer consider any offer by KCS to lower the reciprocal switch rate as an alternative to the construction of a new rail line. Several people

at Exxon, including Exxon's witness Mr. Coulter, stated to me that even if KCS lowered its reciprocal switch to \$ 0, Exxon would not back down on its demand for two carrier direct access.

Finally, I would like to address CN/IC's thin assertion in its Petition that it must build a new line in order to compete against KCS. This assertion is clearly contradicted by the fact that KCS has been able to increase its share of traffic from Geismar to Baton Rouge up to 15%, despite a comparable fee that KCS pays for access to Geismar traffic. The major reason that KCS is not moving more Geismar traffic right now is because while I was at IC, I negotiated contracts that locked the rest of the Geismar business up in long-term contracts.

The Geismar illustration proves that KCS is an aggressive competitor and is aggressively seeking more business. CN/IC touts in its Petition that it operates approximately 17,000 route miles and that the proposed build-in would give BRPO direct single-line access to all points on the 17,000 miles. (CN/IC Petition, Verified Statement of Terry R. McManaman at 4). CN/IC could market that expanded reach right now under an aggressive competitive approach similar to the one that KCS has implemented in Geismar. There is no reason that CN/IC could not get as much business as it wants out of the BRPO plant under the current reciprocal switch fee without building the unnecessary line.

VERIFICATION

I, Robert M. Cleator, verify under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this statement.

12/19/00
Date

Robert M. Cleator
Robert M. Cleator

F

7/1/98

EXHIBIT I TO VERIFIED STATEMENT OF

W.R. Needels

introduction of a "premises" search warrant at west end of BRFO

(Holler truck)

- benefits (?) for BRFO
- for IC $\approx$ a IC can make a commercial proposal
- ~~that~~ detriments (?)

what main concern is that we do have main line to Holler truck. There
he is not doing back.

Paxon Build-In Project

More trucks need work
to cut out overloads

Distributed Storage

- birds can be buried
in big pile
if more info then
of that

Conall Pharis
Ed Kanner
Rob Porter
John King (opm)
Garry Taylor
Jeff Tobitt (opm)
Jim
WRP
with Mark

Competitive Analysis

• IC Competition

— Trucks

— KCS

• \$720 switch charge (± 720 charge off storage tracks)

• IC Strengths

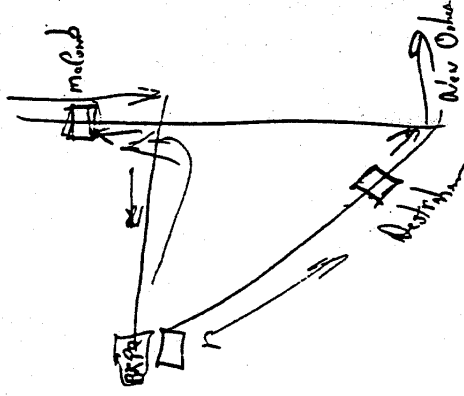
— Operating Efficiency

— Route Structure

— Direct access to new Canadian Markets

• IC Weaknesses

— Storage Track (Infrastructure)



G

ExxonMobil
Global Services Company
3225 Gallows Road
Fairfax, Virginia 22037

ExxonMobil

**VERIFIED STATEMENT
OF
STEPHEN M. COULTER
on behalf of
EXXONMOBIL CHEMICAL COMPANY**

My name is Stephen M. Coulter. I am Senior Advisor - Global Transportation Sourcing Department for ExxonMobil Global Services Company, a subsidiary of Exxon Mobil Corporation. My business address is 3225 Gallows Road, Fairfax, Virginia, 22037-0001. Among other responsibilities, my department and I are responsible for purchasing and managing transportation services, including rail and truck transportation service on behalf of ExxonMobil Chemical Company ("EMCC") and other divisions and affiliates of Exxon Mobil Corporation in the United States and throughout the world (collectively referred to as "ExxonMobil"). Members of my department and I interact routinely with the railroads and other suppliers who provide these services.

I assumed my present position early in 2000, shortly after the merger of Exxon Corporation and Mobil Corporation. Prior to the merger, I was the Land Transportation Manager for Exxon Chemical Americas ("ECA"), a division of Exxon Chemical Company, which was a division of Exxon Corporation. Additionally, prior to holding the ECA Land Transportation Manager position, I was the Land Transportation Manager for Exxon Company, U.S.A., a division of Exxon Corporation.

I have been employed by various ExxonMobil companies for over 30 years and I have held engineering, operations, and business management positions in several ExxonMobil business areas. I am a graduate of the University of Texas at Arlington with a Bachelor of Science Degree in Aerospace Engineering.

This statement is submitted in support of the petition of the Illinois Central Railroad ("IC") to construct and operate a rail line to EMCC's Baton Rouge Polyolefins Plant ("BRPO") in East Baton Rouge Parish, Louisiana. I have been directly involved in this project since its early feasibility screening stage and I have participated in numerous meetings and discussions with representatives of IC and its parent, the Canadian National Railway Company ("CN", and collectively, "CN-IC") regarding this project. I am qualified to make this verified statement and have been authorized by EMCC to submit this verified statement on its behalf.

An **ExxonMobil** Subsidiary

BACKGROUND INFORMATION

ExxonMobil is the largest petroleum refiner in the United States and the world, and is among the three largest petrochemical companies in the world. ExxonMobil is also a major rail shipper of chemical and petroleum products in the United States and throughout North America. ExxonMobil is heavily dependent on rail transportation, as other modes of transportation generally are not economically feasible substitutes for ExxonMobil's rail transportation needs. Although ExxonMobil extensively uses pipelines, inland waterways and trucks as part of its overall transportation plan, traffic moving by rail generally involves quantities that are not sufficiently large to make transportation by barge or pipeline a cost effective option for ExxonMobil or its customers. Also, any substantial realignment from rail to truck would require significant investment by ExxonMobil and its customers to accommodate the shift to truck-usable loading facilities, especially for plastic resin shipments which represent a substantial portion of ExxonMobil's rail shipments. Transportation via truck in the quantities and distances currently used by ExxonMobil for rail also would greatly increase ExxonMobil's transportation costs, as recently demonstrated industry wide during the Union Pacific Railroad service disruptions of 1997/1998 and the Norfolk Southern and CSX service disruptions of 1999/2000.

ExxonMobil employs over 4,000 regular employees and 1,600 regularly assigned contractors at its four sites in East Baton Rouge Parish, Louisiana: Baton Rouge Polyolefins Plant ("BRPO", formerly Paxon Polymer), Baton Rouge Plastics Plant ("BRPP"), Baton Rouge Resins Plant and the Baton Rouge Refinery/Chemical Plant Complex. Additionally, over 23,000 annual railcar shipments originate at the four sites, which are approximately 25% of ExxonMobil's total nationwide rail shipments. Total rail freight expenses for ExxonMobil's rail shipments from Baton Rouge currently total approximately \$55 million per year. Further, ExxonMobil's rail shipments from Baton Rouge are expected to increase substantially in the future as planned expansions are implemented at the ExxonMobil sites.

Two of ExxonMobil's four plant sites in East Baton Rouge Parish, Louisiana are plastics plants owned by Exxon Mobil Corporation and operated by EMCC. BRPP produces low-density polyethylene ("PE"), a recyclable plastic resin, and BRPO produces high-density PE in addition to polypropylene, which also are recyclable plastic resins. BRPO is one of the largest plastic

resin production plants in the world, and had a 1999 PE production capacity of approximately two billion pounds. Based on Chemical Data Incorporated ("CDI") data, BRPO represents 6.0% of PE industry capacity in Texas and Louisiana, and 5.5% of U.S.A capacity. (CDI is a well-known market research firm that provides its subscribers with up-to-date marketing, cost and pricing information on the U.S. petroleum, natural gas, petrochemical and plastics industries).

In addition to BRPO's 1999 PE capacity, a new production unit designed to produce 0.6 billion pounds per year of polypropylene ("PP") resin went into service at BRPO in May 2000. The plant expansion to a total of 2.6 billion pounds of annual production was a significant investment for EMCC and, based on CDI data, the additional production represents 4.0% of PP industry capacity in Texas and Louisiana and 3.5% of U.S.A capacity.

Approximately 90% of BRPO's production is shipped from the plant in pellet or granular form using EMCC's fleet of covered hopper rail cars, and the remainder is shipped by truck. In addition to these outbound plastics shipments BRPO receives over 150 tank cars/year of inbound raw material shipments. BRPO is designed to load its production directly into rail cars and has very limited flexibility to handle its production if empty rail cars are not immediately available for loading. BRPO is clearly heavily dependent on rail service, and has very limited practical transportation alternatives to rail. BRPO rail shipment destinations are distributed throughout the USA and Canada.

EMCC Support for IC Track Construction

EMCC strongly support the proposed construction by the IC of a rail line to provide direct rail service to EMCC's BRPO plant. Accordingly, EMCC urge the Surface Transportation Board ("STB") to grant the IC's Petition for Exemption from the provisions of 49 U.S.C. §10901 on an expedited basis.

The Kansas City Southern Railroad ("KCS") provides the only direct service to BRPO. BRPO currently originates more than 12,500 annual rail car shipments of plastic resin in hopper cars, and planned expansions are expected to increase annual rail car shipments to an estimated 15,000 by 2002, and an estimated 23,000 by 2010. Although BRPO is open to reciprocal switching, delays and errors in interchanging cars, combined with high switch

charges of \$715/car and \$777/car for switching BRPO cars to IC and UP, respectively, preclude both from effectively and fully competing for the business.

As a result of the high switch charges and resultant lack of effective competition, BRPO rates are significantly higher than rates on traffic from nearby BRPP, where KCS was allowed to build-in during 1996¹, and where both KCS and IC have direct physical access to the site. The higher BRPO rates equate to approximately \$3.3 million per year in added freight costs to EMCC based on BRPO volumes expected by 2002. As a result of the current lack of rail competition at BRPO, and the close proximity of IC tracks to BRPO, EMCC has been working with the IC since 1996 to develop a build-in project for the site. Feasibility studies have been completed, project teams have been formed, and project implementation has been scheduled for completion within six months after receiving approval to proceed from the STB.

EMCC believes the availability of a second rail carrier to provide direct service to BRPO will bring better service and reduced transportation costs to BRPO, as well as better service and reduced costs to EMCC customers and, ultimately, the consumer. Rail is today the only viable option for bulk shipment of plastic resins, and direct service from a second railroad will allow EMCC to achieve more competitive rates and service. The STB should grant the IC authority to construct the proposed line extension into BRPO as soon as possible in order to provide BRPO with a second direct rail carrier. EMCC is committing substantial funds to the construction of the necessary track and other facilities at BRPO to support rail service from IC. EMCC believes this is necessary for the long-term competitiveness and viability of BRPO.

Benefits from Track Construction

Market Position and Competitive Pressures on Plastics Suppliers

United States consumption of PE and PP has exhibited strong growth for a number of years, and both products represent very large markets today. Recent CDI data estimates total United States PE production capacity to be approximately 33 billion pounds, growing about

¹ Interstate Commerce Commission Finance Docket No. 32547, Kansas City Southern Railway Company - Construction and Operation Exemption - to Exxon Corporation's Plastics Plant near Baton Rouge and Baker, Louisiana.

4.5% per year, and PP capacity to be approximately 16.5 billion pounds, growing about 10.5% per year.

The United States PE and PP manufacturing industries are highly competitive. Recent PE market analysis by CDI shows there are a total of 16 U.S. producers, with no producer having more than an 18% market position. Similar PP market analysis shows a total of 13 United States producers, with no producer having more than a 14 % market position. This fragmentation results in a high level of competition in both the PE and PP markets with price, quality, product performance and service as major selling points. Most of the PE and PP producers are located in the Gulf Coast states, especially Texas and Louisiana, with both PE and PP consumers spread widely around the country, thus essentially all the producers have similar transportation challenges. This highly competitive environment results in continued price and delivery service pressures.

The PE and PP businesses are cyclical, highly capital-intensive commodity businesses in which profit margins are limited. Pricing of PE and PP is very competitive and generally driven by the balance of supply and demand, with the prices of ethylene and propylene feedstocks representing the fundamental cost drivers. The PE and PP products produced, and to be produced, at BRPO are limited margin, high volume commodities. PE and PP are priced to customers on a delivered basis with the supplier absorbing the cost of transportation. Customers often play one producer against another to obtain a better price; therefore the supplier with the more competitive freight rates and service is in a much better position to obtain and retain the customer's business. Transportation costs are the second-highest variable cost after the cost of feedstock, and represent about 40% of variable cost excluding feedstock. Having the best possible freight rates and service can clearly have a significant impact on a producer's profitability.

Customers for the PE and PP grades produced at BRPO typically consume large quantities of product and have limited on-site bulk storage facilities for the incoming product. Consistent transit times are therefore critical to avoiding customer shutdowns due to lack of raw material. In the absence of consistent transit times, customers typically require suppliers to arrange for lease tracks for the storage of PE and PP products in the vicinity of the customer's plant; EMCC currently maintains approximately 90 such customer lease tracks. The use of these lease tracks to overcome delivery inconsistencies by railroads lead suppliers to maintain higher inventories and larger fleets than would otherwise be needed, which is inefficient and increases costs for the supplier, the supplier's customers, the end-consumer, and even the railroads. Due to the highly competitive nature of the PE and PP markets, customers (given

equal product quality and pricing) will give preference to suppliers who can consistently deliver product on time.

We believe PE and PP resin supply will be higher than industry demand for the foreseeable future. EMCC and other manufacturers are continuously looking for new ways to improve the profitability of their products by instituting cost reduction programs. Since rail transportation cost has been a major component of overall production cost, all manufacturers including EMCC are looking at new ways to control this cost component. Transportation costs have begun to dictate in some cases where products are sold, and can literally price a manufacturer out of some markets. If EMCC's competitors have more competitive rail access at their manufacturing locations, resulting in lower transportation costs, these competitors are in a much better position to compete in the marketplace. Opening BRPO to effective, competitive rail service would place EMCC in a much better position to compete domestically and world-wide.

Rail Service Issues:

Local Area Hopper Car Storage
Local Area Congestion
Transit Times
Switch and Freight Rates

Customer orders are generally shipped from hopper cars already in inventory, rather than loading and shipping a hopper car after an order is received. BRPO has traditionally required inventory storage track for 250-300 hopper cars in the plant local area, and with the expansion completed in May 2000 to add the PP unit, this requirement has increased to 450-500 hopper cars. Storage track is already in short supply on the KCS in the Baton Rouge area, and industry's demand for hopper cars storage track, and rail traffic congestion, have been increasing. EMCC believes having a second carrier who can effectively compete for BRPO's rail shipping requirements will lead to increased rail infrastructure in the Baton Rouge area, benefiting BRPO, ExxonMobil's other plant sites in East Baton Rouge Parish, and other area shippers. Having more than one rail carrier serving BRPO will eliminate the need for a single carrier to provide all necessary storage, will relieve congestion, and will bring competition to bear, thus improving service and reducing costs.

The BRPO plant is operated 24 hours per day, 7 days per week and has very limited storage capacity for hopper cars. It is critically important that rail switches be made on-schedule daily, and that loaded hopper cars be moved expeditiously to their designated initial storage-in-transit areas. It is essential that this switch be made consistently during the agreed time frame to avoid plant shutdowns or slowdowns due to a lack of cars to load; the shutdown of a large polyolefins plant like BRPO is extremely costly due to product degradation and inefficient use of energy and labor. The KCS has experienced periodic, significant difficulties in meeting BRPO requirements for spotting empty cars and for shipping loaded cars to designated storage-in-transit locations during 1999 and 2000, as they have reported to us, due to congestion and locomotive shortages. Having a second direct-serving rail carrier with the resources of the CN-IC would greatly improve the reliability of BRPO to meet its day-to-day operating and shipping requirements without the concern of a costly shutdown or slowdown. Additionally, having a second direct-serving rail carrier, with an independent access to BRPO virtually eliminates the risk to plant operation that could result from a force majeure incident such as a derailment or extensive rail damage to one of the railroads in the Baton Rouge area.

Rail switches, hopper car storage, transit times and rail costs are areas of great concern at BRPO, and EMCC strongly believes that the addition of a second direct-serving rail carrier will greatly improve rail carrier performance and costs. Rail storage and congestion problems in the Baton Rouge area on the KCS have had a negative impact on EMCC's ability to optimize inventory, rail fleet size and transportation costs. EMCC believes that the CN-IC's presence will result in significantly improved customer service through its direct participation, and should also create a more competitive environment to promote railroad structural changes needed to improve rail service and adapt to increasing shipping volumes between 2000 and 2010.

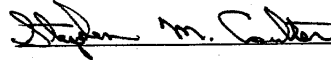
Summary

EMCC strongly encourage the STB to act quickly and rule favorably on the Illinois Central's track construction proposal, and to grant the Petition for Exemption from Section 10901 on an expedited basis. This project certainly promotes the policy of the STB to facilitate competition and the establishment of reasonable rate structures, and it does so with a private sector solution that promotes continuing deregulation of the railroad industry. EMCC believes that the presence of a second direct-serving rail carrier will result in more cost-effective rail

service to ExxonMobil's BRPO, EMCC's customers, the plastics-consuming public. Any delays in approving the IC's proposal may jeopardize the viability of this project, and delay benefits to polyolefin customers, the consumer and the United States economy. Both the CN-IC and EMCC plan to invest millions of dollars in this effort, and delays that affect the start of construction of the new rail line will be economically burdensome to both companies, and perhaps even close this opportunity for EMCC, its customers and the consumer to benefit from additional direct rail service.

I declare under penalty of perjury that the foregoing is true and correct to the best of my belief and knowledge. Further, I certify that I am qualified and authorized to file this verified statement on behalf of EMCC

Executed this 27th day of November 2000.

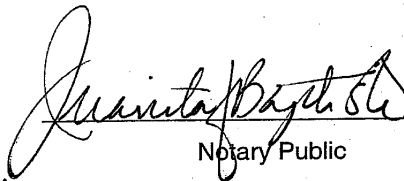


Stephen M. Coulter

STATE OF TEXAS
COUNTY OF HARRIS

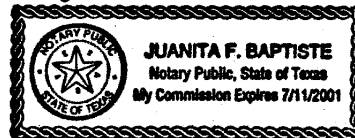
I, Juanita F. Baptiste, a notary Public in and for said state and county, do hereby certify that Stephen M. Coulter personally appeared before me this day and acknowledged his due execution of the foregoing Verified Statement.

Witness my hand and official seal this 27th day of November, 2000.



Notary Public

My commission expires: 7/11/2001

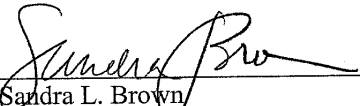


CERTIFICATE OF SERVICE

This is to certify that on this 1st day of February, 2002, I caused the foregoing "Petition to Stay Proceeding Pending Judicial Review" to be served by overnight delivery upon the following persons:

William C. Sippel
Fletcher & Sippel LLC
Two Prudential Plaza, Suite 3125
180 North Stetson Avenue
Chicago, IL 60601-6721

Myles L. Tobin
Illinois Central Railroad Company
455 North Cityfront Plaza Drive
Chicago, IL 60601-5317


Sandra L. Brown
Attorney for The Kansas City Southern
Railway Company