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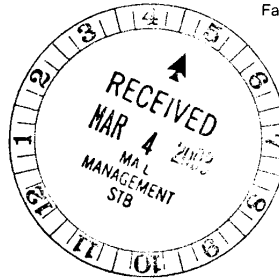
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March 4, 2003

VIA HAND DELIVERY

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



RE: Docket No. AB-103 (Sub-No. 15)

Kansas City Southern Railway Company--Adverse Abandonment--In St. Clair County, IL, and

Docket No. AB-849

Gateway Eastern Railway Company--Adverse Abandonment--In St. Clair County, IL

207338

Dear Secretary Williams:

Enclosed please find an original and ten copies of the Reply to Petition for Waiver and Exemption, filed on behalf of The Kansas City Southern Railway Company and Gateway Eastern Railway Company in connection with the above-referenced matters. Three copies of the filing (other than the attached map) are contained on the enclosed disks in WordPerfect format.

Please note that this filing contains an over-sized original map and over-sized (but reduced size) copies thereof, each containing COLOR.

Please acknowledge filing of the enclosed pleading by receipting the eleventh copy which is enclosed for that purpose and returning it to the individual making this filing for return to me. If there are any questions about this matter, please contact me.

Sincerely,



William A. Mullins

Enclosures

cc: Thomas J. Healey
All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. AB-103 (Sub No. 15)

**THE KANSAS CITY SOUTHERN RAILWAY COMPANY --
ADVERSE ABANDONMENT--IN ST. CLAIR COUNTY, IL**

Docket No. AB-849

**GATEWAY EASTERN RAILWAY COMPANY--ADVERSE ABANDONMENT--IN
ST. CLAIR COUNTY, IL**

REPLY TO PETITION FOR WAIVER AND EXEMPTION

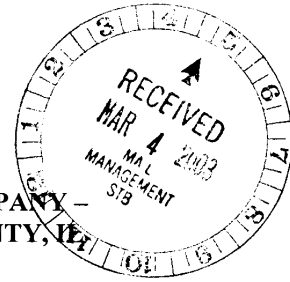
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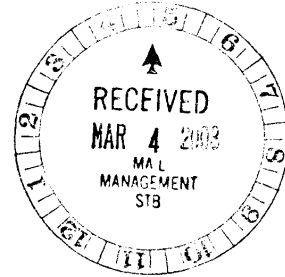
March 4, 2003

INCLUDES COLOR ATTACHMENT



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. AB-103 (Sub No. 15)



**THE KANSAS CITY SOUTHERN RAILWAY COMPANY –
ADVERSE ABANDONMENT--IN ST. CLAIR COUNTY, IL**

Docket No. AB-849

**GATEWAY EASTERN RAILWAY COMPANY--ADVERSE ABANDONMENT--IN
ST. CLAIR COUNTY, IL**

REPLY TO PETITION FOR WAIVER AND EXEMPTION

The Kansas City Southern Railway Company (“KCS”) and Gateway Eastern Railway Company (“GWER”) hereby reply to the Petition for Waiver and Exemption (“Waiver Petition”) filed by the Illinois Department of Transportation (“IDOT”) on February 19, 2003. IDOT has not established any basis for relief from the information requirements established by the Surface Transportation Board (“STB” or “Board”) in similar contexts, and therefore the Waiver Petition should be denied.

SUMMARY OF ARGUMENT

IDOT seeks waivers of certain of the Board’s regulations applicable to an application for adverse abandonment that IDOT intends to file to force KCS and GWER to abandon certain unspecified line segments located in East St. Louis, Illinois.¹ Forced abandonment of these lines will leave four shippers without KCS service. This Waiver Petition is deficient on a number of

¹ Unless specifically referring to GWER’s lines or shippers served by GWER, KCS and GWER will be referred to collectively as KCS in this reply.

fronts, and therefore must be denied. The IDOT project involves much more than an adverse abandonment of unidentified KCS tracks. Instead, this project involves track relocations, abandonments, new line construction, jointly-owned track, single carrier-owned tracks, and shared passenger/freight tracks. As such, this project implicates numerous other provisions of the ICC Termination Act of 1995 that have not been addressed by IDOT. The Board cannot determine what information it will need to rule upon the impending abandonment application until it has been fully advised of all of the host of railroad changes planned by IDOT. IDOT's Waiver Petition is therefore both unsupported at law and incomplete in fact, and must be denied.

Moreover, apart from the inadequate showing IDOT has presented in its Waiver Petition, IDOT also has not first sought to obtain the information made subject to its Waiver Petition by other means, as required by the regulations and this Board's precedents. IDOT's failure to make any effort to secure this information provides an independent ground for denying its Waiver Petition.

ARGUMENT

I. THE PETITION SHOULD BE DENIED AT THIS STAGE BECAUSE THE BOARD DOES NOT HAVE SUFFICIENT INFORMATION TO DETERMINE WHETHER OR NOT IDOT HAS PURSUED A PROCEDURALLY PROPER COURSE

A. The Project Involves More Than An Adverse Abandonment, And The Board Cannot Determine What Information It Needs to Rule on the Abandonment Application Without Reviewing The Project In Its Entirety

In its Waiver Petition, IDOT indicates that it will soon file an adverse application for the abandonment of unspecified² line segments, owned and operated by KCS, in connection with

² Neither IDOT's Waiver Petition nor its proposed Notices of Adverse Discontinuance and Abandonment disclose the specific rail lines IDOT is seeking to adversely abandon. IDOT only vaguely references the zip codes of the several regions where the lines lie, and gives no indication whether it seeks abandonment of the entire line or a lesser portion within each of these

IDOT's plan to realize a major highway relocation plan. The forced abandonment of KCS's tracks is just a very small portion of an enormous project that has been in the planning stages for over ten years. The project involves a new highway bridge across the Mississippi River, a relocation of two major interstate highways and a relocation of state highways and local roads. It will adversely impact over fifty businesses and 500 jobs, as well as transmission lines and utility lines, in the region. The project affects four Class I railroads,³ 2 terminal railroads,⁴ numerous spur tracks, jointly-owned trackage, single carrier-owned tracks, and a passenger operation. IDOT's plan implicates at least four active rail shippers,⁵ involves multiple-carrier access, and implicates abandonments, relocations, and new line constructions. Indeed, even a cursory review of the project as reflected on the attached map indicates the project's enormous scope.⁶

Despite the enormous scale of this project, IDOT would have this Board believe that the Board's authority and jurisdiction is limited to an adverse abandonment of unspecified KCS lines, and that any other aspect of the project either doesn't need authority or can be accomplished through the use of notice of exemption procedures. KCS submits otherwise.

regions. Thus, neither KCS, GWER, their shippers nor the public is informed by the proposed notices what rail lines are affected by IDOT's proposal.

³ In addition to KCS, the other Class I Railroads which will be affected by the project are CSX Transportation, Inc. ("CSX"), Norfolk Southern Railway Company and Union Pacific Railroad Company.

⁴ Terminal Railroad Association of St. Louis ("TRRA") and The Alton and Southern Railway Company.

⁵ Four shippers are located on the KCS and GWER line segments alone. They are O'Neil Lumber & Millwork, Inc., Cargill, Inc., Robins Solvents Co., and Cahokia Marine.

⁶ The attached map, Attachment A hereto, is the most current photographic map of the project in KCS's possession. As the map is extremely large, a single original copy of this map is being filed herein. Because IDOT has a copy of this map, as do all other railroads involved in this project, IDOT is not prejudiced by the failure to serve this map on them as part of this reply. Furthermore, on all copies of this reply, the map has been reduced to a more manageable size and attached thereto.

Based upon KCS's knowledge of the proposed project, the project will likely involve actual abandonments, not just relocations, and will also involve construction of new track that will allow a carrier new access to shippers currently served by other carriers. Of additional importance is the fact that IDOT is seeking to reduce shippers' competitive options. These shippers currently receive service from KCS and will no longer have that option if the adverse abandonment application is granted. All of these actions will require approval from the STB under either an application or an exemption.

Yet, IDOT barely even mentions the abandonment, relocation, joint use, and new construction aspects of its project in the Waiver Petition, let alone the ripple effects that they will impose throughout the region. Only in passing does IDOT reveal that the highway project will entail the "taking of the land underlying certain segments of the lines and relocations of those lines" and "install[ation of] replacement tracks." Waiver Petition at 2-3. The Waiver Petition fails to disclose how and when IDOT will pursue these relocation and construction transactions. It likewise fails to disclose exactly how many abandonments, joint use agreements, or new line constructions will take place. It simply glosses over these impacts.

To minimize the effects that its project will impose on rail carriers and shippers, IDOT inaccurately asserts that "No Board authority is required for these railroad line relocations." Waiver Petition at 3. How does the Board know what projects will and will not require its authority or whether or not this is an accurate statement? The Board cannot know because little, if any, information about the other aspects of the project has been presented to the Board. It is true that a carrier seeking to simply abandon and relocate its own track (as opposed to jointly owned track) does not require Board approval as long as the relocation project does not affect service to shippers or pose any other significant impacts. *See City of Detroit v. Canadian*

National Railway, 9 I.C.C. 1208 (1993), 1993 MCC LEXIS 121, *aff'd sub nom. Detroit/Wayne County Port Authority v. Interstate Commerce Commission*, 59 F.3d 1314 (D.C. Cir. 1995).

Similarly, the Board authorizes relocation of jointly-owned track pursuant to a Notice of Exemption filed under 49 C.F.R. § 1180.2(d)(5) when two or more carriers support a minor relocation project that does not affect service to shippers. *See Wisconsin Central Ltd. and Fox Valley & Western Ltd.--Joint Relocation Project Exemption--Wisconsin Rapids, WI*, Finance Docket No. 33912, 2000 STB LEXIS 498 (STB served August 30, 2000). However, the joint ownership of or joint use of tracks requires approval (or an individual petition for exemption) under Section 11323(a)(6), and joint relocation cannot be done without STB approval or via a notice of exemption if any disruption of service to shippers will occur.⁷ Furthermore, if the project includes new access to shippers by CSX, which the petition seems to indicate it does, Waiver Petition at 7, construction authority is required. Likewise, abandonment of service to any shipper also requires Board approval under Section 10903.

The point of this discussion is that despite IDOT's efforts to minimize the Board's review of the sweeping changes IDOT has planned for the railroads in the East St. Louis area, the Board is not in a position to begin an adverse abandonment proceeding and make the required public interest findings until the Board has complete information about all aspects of the project that will or will not require STB approval.⁸ IDOT's attempt to secure the regulatory authority for

⁷ Contrary to the impression left by the Waiver Petition, CSX does not currently serve any of the shippers that will lose KCS service. Consequently, service to shippers will be disrupted by the loss of KCS access.

⁸ Ironically, in the context of downplaying the scope of the highway relocation project, IDOT also greatly exaggerates the other railroads' willingness to allow IDOT free reign over their lines. Despite IDOT's claim that "All [other railroads] have cooperated and agreed to the relocation of their rail lines," KCS has been informed by at least one other railroad that it does not intend to sign the Memorandum of Understanding ("MOU") in its present form. IDOT is also far off base

these multiple projects through an adverse abandonment proceeding is not consistent with the law and, in that light, IDOT's request to be relieved from most of the Board's information requirements must be denied.

Essentially, IDOT is pursuing its plan to abandon line segments, relocate lines and construct new lines involving several rail carriers, including four Class I railroads, in piecemeal fashion. Yet, the various components of the project are necessarily interrelated and cannot be separated and ruled on in piecemeal fashion. See *St. Louis Southwestern Railway Company Arbitration Appeal*, Finance Docket No. 28799 (Sub-No. 9), 1995 ICC LEXIS 209 at*14 (ICC served August 15, 1995), (the Commission "encourage[s] parties to raise all disputes and issues in one proceeding to assure the full resolution of all relevant matters"); *A.L. Mechling Barge Lines, Inc., et al. v. United States, et al.*, 376 U.S. 375, 383 (1964)(vacating and remanding an ICC order permitting departure from certain ICA provisions because "splintering" proceedings "result[ed] in manifest inequities and allow[ed] potential windfalls to some carriers"); *Burlington Northern, Inc.--Control Exemption--Victory Freightway System, Inc, et al.*, Nos. MC-F-16448, 16372 and 16452, 1986 MCC LEXIS 578 at *9 (ICC served January 29, 1986) (noting that the ICC's consideration of the cumulative impact of a series of acquisitions cannot be evaded by the piecemeal filing of petitions for approval on the merits or by notices of exemption).

Requiring projects to be presented in their entirety ensures that the Board can properly take into account all aspects of the project. Thus, IDOT cannot pursue its plans to abandon line segments, relocate lines and construct new lines in piecemeal fashion, but instead must be upfront about its entire plan so that the Board can consider its specific requests for waivers, as

in accusing KCS of "intransigence." In fact, KCS has refused to sign IDOT's MOU because the MOU mandates TRRA's forced access to KCS's tracks apart from any need presented by IDOT's project.

well as the adverse abandonment and other transactions, in light of the overall relocation project. Thus, unless IDOT only seeks adverse abandonment of KCS's and GWER's line segments, which it clearly does not, it cannot file successive applications for smaller transactions that do not properly account for its overall scheme.

Rather than allowing the adverse abandonment proceeding to continue, IDOT should present the various components of its project together in a single application that accurately reflects the true scope of its project. At the very least, IDOT should simultaneously file separate applications or exemptions for all of the rail projects for which it seeks Board approval. These applications or exemptions should clearly reference one another so that the Board can properly consider each proposal in light of the others. Indeed, the Board has an obligation to collectively consider all transactions in order to decide not only whether KCS must abandon its lines, but more immediately whether IDOT's specific requests for waivers are warranted. It would be premature for the Board to decide these waiver requests without any further guidance from IDOT about the effects that its highway project will have on rail carriers and shippers in the region.

By asking the Board to consider its request for specific waivers from regulations governing abandonment proceedings in the vacuum of a vaguely presented future adverse abandonment proceeding, IDOT has denied the Board the opportunity to consider the synergistic effects that granting or denying the waivers will have on various stages of the project. IDOT has not been forthcoming about the various transactions implicating Board jurisdiction that it will pursue to achieve its relocation plan, and the Waiver Petition should therefore be denied in its entirety.

B. The STB Should Deny The Waiver Petition For Failure To Follow The
Appropriate Regulations And Procedures

Pursuant to 49 U.S.C. § 10903, *et seq.*, the Board may authorize abandonment only upon finding that “the present or future public convenience and necessity require or permit” it. The Board must consider a number of factors, including the effects on area shippers and communities and environmental impacts. *See South Orient Railroad Company, Ltd. – Abandonment and Discontinuance of Trackage Rights – Between San Angelo and Presidio, TX*, Docket No. AB-545, 1998 WL 687344 (STB served October 6, 1998) at *11 (“*South Orient*”). The burden of proof is on the moving party to convince the Board that the abandonment is in the public interest. *South Orient* at *10.

Thus, the Board has set forth regulations at 49 C.F.R. Part 1152 requiring a party seeking abandonment of rail lines to provide various types of information relevant to whether the public convenience and necessity support abandonment. As IDOT notes, the Board occasionally waives some of these requirements pursuant to an adverse abandonment application when the required data is unnecessary or unavailable. IDOT Waiver Petition at 4, n.1. In all prior cases where the Board has granted such waivers, however, the parties requesting them first made a good faith effort to obtain the information requested by the Board’s regulations and/or provided such information via expert testimony or analytical studies. Only where the information was truly unavailable or expert testimony was insufficient to provide such information has the Board granted the waiver requests. *The Kansas City Southern Railway Company--Adverse Discontinuance Application--A Line of Arkansas & Missouri Railroad Company*, Docket No. AB-103 (Sub-No.14), 1998 STB LEXIS 875 at *5 (STB served Nov. 13, 1998) (holding the

petition in abeyance until the petitioning party provided additional information and only granting such waivers after the additional information was provided.)(“*AMR Discontinuance*”).

The Board requires adverse abandonment applicants to “make a good faith effort to comply with the regulations to the extent possible” before it will grant the requested waivers. *See The Western Stock Show Association, et al. – Abandonment Exemption – in Denver, CO*, Docket No. AB-452 (Sub-No. 1X), 1995 WL 611719 (ICC served October 19, 1995) at *2 (“*Western Stock Show*”). *See also Jacksonville Port Authority – Adverse Discontinuance – In Duval County, FL*, STB Docket No. AB-469, 1996 STB LEXIS 322 (STB served April 18, 1996) at *6. The Board recognizes that such a good faith effort at the very least requires the petitioner to estimate the information based upon the best information available. *Western Stock Show* at *2. Only after the petitioner complies with this requirement will the Board grant a waiver of the remaining information that the petitioner was not in position to provide or estimate. *Western Stock Show* at *2. In this case, however, IDOT has not made a good faith effort to obtain the required information nor has it shown why it could not present such information through expert testimony. Accordingly, the Waiver Petition should be denied and refiled only after IDOT makes the appropriate required showings.

IDOT has made no attempt to garner easily accessible information required by the regulations governing abandonments. On the sole basis of its unsupported assertion that the information normally required in abandonment applications is not readily available to it, IDOT has requested a waiver of the requirement that it: (i) reference the rail line to be abandoned on KCS’s and GWER’s system diagram maps (required by 49 C.F.R. § 1152.22(a)(5) and 49 U.S.C.

10903(c)⁹); (ii) describe the condition of the rail lines (required by 49 C.F.R. § 1152.22(b)); (iii) describe the service rendered on the lines (required by 49 C.F.R. § 1152.22(c)); (iv) describe the revenue and cost data pertaining to the railroads' operations on the line (required by 49 C.F.R. § 1152.22(d)), and (v) describe the rural and community impact of the proposed abandonment (required by 49 C.F.R. § 1152.22(e)).

Despite IDOT's unsupported assertion that it cannot attain this information, such a claim should not, in and of itself, justify granting waivers at this time. The Board has held that an adverse applicant not possessing data required by the regulations because it is not operator of the line should nonetheless first request such data from the operator. Only if the operator fails to provide the data, and the applicant cannot obtain it by any other means, will the Board waive the relevant portions of its abandonment regulations. *See Tacoma Eastern Railway Company – Adverse Discontinuance of Operations Application – A Line of City of Tacoma, in Pierce, Thurston and Lewis Counties, WA*, STB Docket No. AB-548, 1998 WL 392755 (STB served July 13, 1998) at *1; *accord AMR Discontinuance*.

Other than proffering vague and self-serving statements, IDOT has not adequately explained to the Board why it cannot provide the information required by Section 1152.22 or why it cannot make a "good faith" estimate of the information. IDOT has simply taken the easy way out by requesting an upfront waiver. If IDOT believes that it can support a proper application for adverse abandonment, as opposed to some more significant transaction, it should provide as much information as possible and, to the extent that it cannot obtain the information or make "good faith estimates," it should seek a waiver at that time. Indeed, each of the four

⁹ Presumably, IDOT's frequent reference to the © symbol in its petition is meant to refer to part (c) of the relevant regulation or statute.

pieces of information that IDOT claims it cannot access is publicly available or otherwise easily accessible.

First of all, IDOT could obtain a copy of KCS's and GWER's SDMs pursuant to 49 C.F.R. § 1152.22(a)(5) through a number of means. The provisions of 49 C.F.R. § 1152.12 require each carrier to (i) file the SDM with the Board; (ii) publish the SDM in a newspaper of general circulation in the county containing the line; (iii) post a copy of the SDM in each station or terminal on the line; (iv) furnish, at reasonable cost, upon request of any interested person, a copy of its SDM (either color-coded or black-and-white), and (v) notify interested persons of this availability through publication in the appropriate county newspaper. By failing to obtain a copy of the SDM from one of the above sources, IDOT has not made a good faith effort to comply with 49 C.F.R. § 1152.22(a)(5).¹⁰

Second, even if information regarding the rail service over the line, as required by 49 C.F.R. § 1152.22(c), was not available from KCS, which IDOT failed to ascertain, it could easily be developed by performing on-site observation of the line. Additionally, subject to certain confidentiality requirements, the provisions of 49 C.F.R. § 1244.8(b)(4) allow a transportation practitioner, consulting firm or law firm to request data from the Board by way of an STB Waybill Sample¹¹ for the sake of preparing verified statements to be submitted in formal

¹⁰ Even if all the above sources of information were not available to IDOT – a highly unlikely scenario – IDOT could have furnished its own map depicting service density on the line in question. Such information is available from sources such as the US Railroad Traffic Atlas.

¹¹ A waybill is defined in 49 C.F.R. § 1244.1 as a “document or instrument prepared from the bill of lading contract or shipper’s instructions as to the disposition of the freight, and used by the railroad(s) involved as the authority to move the shipment and as the basis for determining the freight charges and interline settlements.”

proceedings before the Board. The waybill sample provides all the necessary information regarding service that IDOT might need to provide the necessary service description.

Third, IDOT did not even attempt to request the information regarding cost and revenue data, required 49 C.F.R. § 1152.22(d), from KCS prior to filing its waiver petition. Even if such information is not available from KCS accounting records, IDOT is perfectly capable of providing a computation of avoidable costs attributable to the line. IDOT could have requested on branch costs from KCS and GWER. Even if such costs were not available from KCS and GWER, IDOT could have estimated on branch costs using standard engineering costs based on IDOT expertise or rail consultant expertise. IDOT could have computed off branch costs using the Uniform Rail Costing System ("URCS") – a rail costing formula expressly provided for in 49 U.S.C. § 10707(d)(1)(B). The Commission has held the URCS costing formula is a well-established means of reflecting the extent to which the different categories of costs incurred in the rail industry have been found to change in direct proportion to changes in output. *Rate Guidelines – Non-Coal Proceedings*, Ex Parte No. 347 (Sub-No. 2), 1996 WL 741358 (ICC served December 31, 1996) at *30, n. 10. URCS data are updated annually for each Class I railroad.

IDOT could have computed estimated future revenues and costs by applying current revenue and cost trends and extrapolating them from base year data. These trends are reported routinely by the Association of American Railroads. IDOT could likewise have computed estimated subsidy payments utilizing the requirements published in 49 C.F.R. Part 1152, Subpart D. These requirements make use of the costs and revenues specified above and thus could easily be computed by IDOT.

To the extent that any of this information is not available to compute the subsidy formula, estimates could be used and calculated. *See* former 49 C.F.R. § 1155.3(b) through 1155.3(f). For these reasons, the Board should not simply grant a waiver of this information without any effort by IDOT to make the required computations. Finally, IDOT could easily obtain information to describe the rural and community impact of the abandonment pursuant to 49 C.F.R. § 1152.22(e).

Although the Board in the past has granted waivers from some of the regulations applicable to an adverse application for the abandonment of line segments, it does not simply grant all waivers that are requested. Instead, the Board requires the waiver applicant to make a good faith effort to obtain all readily available information. If such information is not readily available, a waiver applicant should make a good faith effort to estimate based on the best information at its disposal. IDOT has not made a good faith effort to provide much of the required information in 49 C.F.R. Part 1152 relating to the service, financial and community impacts of abandoning KCS's line segments, although almost all the information is readily available or can easily be estimated. Therefore, its Waiver Petition should be denied until such time as IDOT can establish that a waiver is absolutely required for it to proceed with its proposed adverse abandonment application.

II. IDOT HAS IGNORED RELEVANT PRECEDENT AND COMMON SENSE IN REQUESTING CERTAIN WAIVERS

For a number of the individual waiver requests presented in the Wavier Petition, IDOT has failed to call the Board's attention to the existence of established precedent refusing such requests in other abandonment cases. For example, IDOT should be required to provide notice to all shippers and communities of its proposed actions. The Board has recognized that the

requirement that affected shippers be notified cannot be waived. *City of Rochelle, Illinois – Adverse Discontinuance – Rochelle Railroad Company*, STB Docket No. AB-549, 1998 WL 296001 at *3 (STB served June 5, 1998) (“*City of Rochelle*”). This notice requirement affords those shippers who currently benefit from the service of the current provider an opportunity to oppose the abandonment proceeding if they wish. In this light, KCS does not oppose the request to waive the requirement that the petitioner post notice at rail terminals and stations, but the Board should not waive the requirement that shippers on the line receive notice. *City of Rochelle* at *2. Thus, IDOT should not be allowed to disregard its obligation to directly inform shippers that it intends to eliminate their access to KCS as a transportation option.¹²

IDOT requests a blanket waiver of any obligation to provide the Board with detailed information regarding the potential impacts of its proposed adverse abandonment on the environment or on historic resources. IDOT’s request for a waiver is impermissible, as the Board has repeatedly held that it will not waive environmental and historic reporting requirements in connection with a proposed adverse abandonment. The Board’s policy ensures the Board’s own compliance with the National Environmental Policy Act (“NEPA”) and the National Historic Preservation Act (“NHPA”), which require the Board to consider the impacts of its proposed actions on the quality of the human environment and on historic resources. Nothing in IDOT’s petition justifies a departure from the Board’s determination not to permit waivers of environmental and historic reporting requirements in connection with adverse abandonments, or indeed demonstrates any authority for the Board to waive the regulations applicable to such proposals.

¹² Indeed, IDOT explicitly states that it is aware of the identity of the four shippers on the line, and even goes so far as to specifically identify them, yet still seeks exemption from the entire provision at 49 C.F.R. § 1152.22(e). Waiver Petition at 4, 5.

The Board's regulations explicitly commit that the Board will normally prepare an environmental assessment pursuant to the NEPA for a proposal to abandon a rail line. 49 C.F.R. § 1105.6(b)(2). To provide the Board with the information it needs to meet its NEPA responsibilities, an applicant for abandonment of a rail line must submit an environmental report to the Board containing detailed information describing the proposed action, alternatives to the action, and the effects of the action and its alternatives on the environment. 49 C.F.R. § 1105.7(a); 49 C.F.R. § 1152.22(f). To provide the Board with information needed to carry out the consultation process required by the NHPA, an applicant for abandonment must also include in the environmental report a report on potential impacts of the proposed action on historic and cultural resources. 49 C.F.R. § 1105.8.

Because this information is needed for the Board to carry out its own legal responsibilities under NEPA and the NHPA, the Board has consistently refused to waive these requirements in connection with proposals for adverse abandonment. *See, e.g., Napa Valley Wine Train, Inc. -- Adverse Abandonment -- In Napa Valley, CA*, STB Docket No. AB-582, 2001 STB LEXIS 327 (served March 29, 2001); *CSX Corp. and CSX Transportation, Inc. -- Adverse Abandonment Application -- Canadian National Railway Co. and Grand Trunk Western Railroad Inc.*, STB Docket No. AB-31 (Sub-No. 38), 2001 STB LEXIS 200 (served March 2, 2001) ("*CSX Corp.*"). As the Board noted in *Napa Valley Wine Train* and *CSX Corp.*, rather than seeking a waiver, the applicants should have presented information in their applications supporting their claim that their proposed actions would not have significant environmental impacts. The Board concluded emphatically in each case: "The environmental requirements [of the Board's regulations] *will not be waived.*"

As did the petitioners in *Napa Valley Wine Train* and *CSX Corp.*, IDOT argues that its proposal for adverse abandonment will not have significant environmental impacts. The short answer is that, just as in *Napa Valley Wine Train* and *CSX Corp.*, IDOT's position regarding the likely environmental impacts of its proposal should be presented, and supported by detailed information, in its application and the required environmental and historic reports. IDOT relies upon prior decisions of the Board involving *discontinuances*, but those decisions are simply irrelevant here. As the Board has noted, a discontinuance in which service will continue to be provided along the existing rail line by another carrier is unlikely to have any significant environmental impacts, and is explicitly exempted from detailed environmental documentation under the Board's regulations. *See, e.g., Kansas City Southern Railway Co. -- Adverse Discontinuance Application -- A Line of Arkansas & Missouri Railroad Co.*, STB Docket No. AB-103 (Sub-No. 14), 1998 STB LEXIS 917 (served November 24, 1998); 49 C.F.R. § 1105.6(c)(6). By contrast, an adverse abandonment raises obvious issues concerning impacts on rail traffic and potential diversion to other modes of transportation, and the Board's regulations explicitly require environmental analysis of such actions.

IDOT's self-serving characterization of the magnitude of environmental and historic impacts of its proposed action is in any event entirely unsupported by the record. IDOT relies upon excerpts from other environmental documents prepared for other agencies, but those brief excerpts on their face only confirm the need for detailed information addressing the specific impacts of IDOT's proposed action. First, the attached excerpts from various other environmental reports contain only vague information concerning potential impacts from the closure and removal of affected rail lines, and the construction of new lines to replace the removed lines. That is hardly surprising; the environmental reports relied upon by IDOT were

prepared to address the sweeping effects of the entire transportation project IDOT is pursuing, and devoted little attention to this aspect of the proposed action. The environmental information that the Board's regulations require, by contrast, is closely focused on the impacts of rail abandonment that directly concern the Board: potential changes in regional and local transportation systems or patterns, diversion of traffic to other transportation systems or modes, air and noise impacts generated by additional truck traffic, etc. 49 C.F.R. § 1105.7. The excerpts of reports attached to IDOT's petition do not contain adequate or relevant information on these points.

Secondly, it is impossible that the attached reports could suffice in any case, since the current proposal advanced by IDOT is new, and has *never* been considered before in any environmental report. Until the filing of the Waiver Petition, IDOT had informed KCS and the other involved railroads that it anticipated relocating all affected rail lines with the concurrence of the carriers involved, with no change in service for affected shippers. IDOT's prior environmental analyses, to the extent they focused at all on this aspect of the larger transportation project, simply assumed continuation of service at current levels. Now, however, IDOT seeks to eliminate two carriers altogether, forcing shippers on the affected lines to make other arrangements, potentially including turning to other modes of transportation. These are the impacts of most direct significance to the Board, and they have never been addressed by IDOT in any fashion.

For these reasons, the Board should flatly reject IDOT's attempt to circumvent the Board's regulations that require applicants for adverse abandonments to provide the Board with information necessary for the Board to carry out its own responsibilities under NEPA and the NHPA. Furthermore, when it does present its NEPA and NHPA analysis, the analysis should

include all aspects of the project related to the Board's jurisdiction and not just the portion dealing with the forced abandonment of KCS's lines.

IDOT does propose to give both notice in the newspaper and in the *Federal Register* and has attached draft notices to that effect. However, IDOT's proposed alternative forms of notice are grossly insufficient. Claiming that "In view of its other waiver requests...the wording of the notice [of intent], as prescribed in 49 C.F.R. § 1152.21, is inappropriate for use in these proceedings," IDOT asks the Board to waive this requirement and allow it to use the alternative form of notice it sets forth in Attachment A. Waiver Petition at 4. For the same reasons, it requests that it be allowed to use its proposed alternative *Federal Register* notice set forth in Attachment B. Waiver Petition at 5. Both of these essentially identical proposed alternative notices severely lack essential information, however, and IDOT should not be allowed to use them.

Most importantly, the proposed notices do not clearly identify which lines IDOT seeks to abandon, but only obliquely refer to the eight different zip codes that the lines traverse and the rail stations that will be affected along the lines. Thus, it is impossible for interested parties to obtain any information about the location of the lines from the notice of intent and *Federal Register* notice that IDOT proposes.

The proposed notices also fail to address other important informational components required under 49 C.F.R. § 1152.21. For example, they drastically shortchange the options available to parties seeking to formally protest the abandonment, as well as the procedural means by which to do so. In addition, they do not explain how the interest of rail employees will be protected under IDOT's abandonment scheme, except to note the case *Oregon Short Line R. Co.--Abandonment--Goshen*, 360 I.C.C. 91, 1979 ICC Lexis 92 (1979), which would bear little

significance to most, and may be difficult to either access or understand for non-STB practitioners.

Thus, as has been customary throughout its Petition, IDOT once again seeks to hide the ball in the proposed Notice of Intent and *Federal Register* notice. This is especially egregious in that at least four shippers would lose access to KCS if the proposed project moves forward as proposed by IDOT. Accordingly, IDOT should not be allowed to evade the notice requirements contained in 49 C.F.R. §§ 1152.21 and 1152.22.

Furthermore, the provisions of 49 C.F.R. §§ 1152.22(e)(1) and (e)(2) require applications for abandonment to specify the name and population of each community in which a station on the line is located and to identify significant users and commodities handled for such users. If IDOT does not already have this information, the population of each town is available from the U.S. Census and a wide range of secondary publications based on the census. In addition, the Official Railway Guide contains a general description of alternative sources of transportation available and can be utilized to identify such sources as needed. Therefore, if IDOT proceeds to file an application for adverse abandonment, it must supply the name and population of the relevant communities to the Board.

CONCLUSION

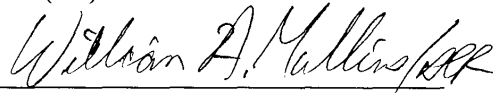
IDOT's Waiver Petition should be denied in all respects. Given the limited amount of information provided by IDOT at this stage, it is almost impossible for this Board to determine whether or not this project, in its entirety, is warranted. Until this Board is satisfied that all relevant information, and all STB jurisdictional applications, exemptions, or notices of

exemption have been presented so that the entire project can be reviewed, the Board should deny the Waiver Petition and not begin an adverse abandonment proceeding.

IDOT simply does not justify why the Board should grant its specific requests for waivers nor adequately explain why IDOT is only filing an adverse abandonment application when it clearly plans to perform additional transactions implicating the Board's jurisdiction. Essentially, the Waiver Petition represents IDOT's attempt to pursue its comprehensive project in piecemeal fashion, thereby downplaying the significant effects that it will pose for numerous regional shippers and rail operators. Accordingly, the Board should deny this Waiver Petition.

Respectfully submitted, this 4th day of March, 2003.

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A handwritten signature in cursive script, appearing to read "William A. Mullins", followed by a stylized flourish or set of initials.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "Reply to Petition for Waiver," KCS/GWER-1, was served this 4th day of March, 2003, by hand delivery on Applicant's representative Fritz R. Kahn, and by first class mail to all other parties of record in this proceeding.

Elizabeth A. Martin

Elizabeth A. Martin
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Company and Gateway Eastern Railway Company



AB-103 (Sub-No. 15): AB-849
KCS/GWER-1, Attachment A