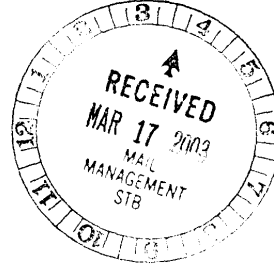


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March 17, 2003

VIA HAND DELIVERY - RETURN COPY

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW (7th fl.)
Washington, DC 20423-0001

ENTERED
Office of Proceedings

MAR 17 2003

Part of
Public Record

Dear Secretary Williams:

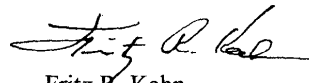
Enclosed for filing in each of STB Dockets Nos. AB-103 (Sub-No. 15), Kansas City Southern Railway Company-Adverse Abandonment-In St. Clair County, IL, and AB-849, Gateway Eastern Railway Company-Adverse Abandonment-In St. Clair County, IL, are the original and ten copies of the Petition for Leave to File Rebuttal and the attached Rebuttal of the Illinois Department of Transportation.

Additional copies of this letter, of the Petition and of the Rebuttal are enclosed for you to stamp to acknowledge your receipt of them.

Service of copies of this letter, of the Petition and of the Rebuttal upon the parties has been effected by facsimile transmitting copies to their counsel.

If you have any question concerning the foregoing which you believe I may be able to answer or if I otherwise can be of assistance, please let me know.

Sincerely yours,


Fritz R. Kahn

enc.

cc: William A. Mullins, Esq.
Cindy Bushur Hallam, Esq.

207404
207405

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423

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

KANSAS CITY SOUTHERN RAILWAY COMPANY
– ADVERSE AND ABANDONMENT –
IN ST. CLAIR COUNTY, IL

STB Docket No. AB-849

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

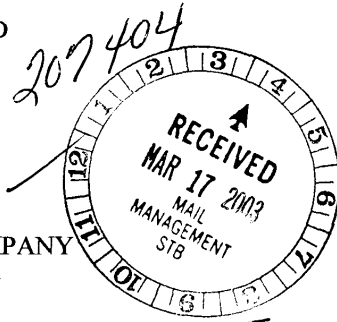
PETITION FOR LEAVE TO FILE REBUTTAL
OF
ILLINOIS DEPARTMENT OF TRANSPORTATION

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Special Assistant Attorney General
STATE OF ILLINOIS

Dated: March 17, 2003



BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423



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

KANSAS CITY SOUTHERN RAILWAY COMPANY
– ADVERSE AND ABANDONMENT –
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– ADVERSE ABANDONMENT –
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PETITION FOR LEAVE TO FILE REBUTTAL
OF
ILLINOIS DEPARTMENT OF TRANSPORTATION

Petitioner, Illinois Department of Transportation ("IDOT"), pursuant to 49 C.F.R. 1117.1, petitions for leave to file the attached Rebuttal in response to the Reply to Petition for Waiver and Exemption which The Kansas City Southern Railway Company ("KCS") and Gateway Eastern Railway Company ("GWER") filed March 4, 2003, and in support thereof IDOT states, as follows:

1. IDOT is mindful of the Board's rule, 49 C.F.R. 1104.13 (c), disallowing a reply to a reply.
2. The Board, however, has entertained rebuttal statements in the interest of having a

thorough presentation when issues of interpretation and application of the Board's case law and the Board's rules are involved, STB Finance Docket No. 33323, Chicago Rail Link, L.L.C.–Lease and Operation Exemption–Union Pacific Railroad Company, served September 2, 1997, and no party would be harmed by its admission. STB Finance Docket No. 32964, Brotherhood of Maintenance of Way Employees, et al. v. Soo Line Railroad Company, et al., served December 22, 1998. See, STB Finance Docket No. 34048, Reading Blue Mountain and Northern Railroad Company–Lease and Operation Exemption–Norfolk Southern Railway Company, et al., served August 1, 2001; Finance Docket No. 32158, Gateway Western Ry. Co.–Construction Exemption–St. Claire County, IL, served May 4, 1993; Finance Docket No. 30968, Delaware and Hudson Railway Company–Lease and Trackage Rights Exemption–Springfield Terminal Railway Company, et al., served October 23, 1989.

3. Without repeating the substance of the tendered Rebuttal, it suffices to say that, in their Reply, KCS and GWER mischaracterized the relief which IDOT seeks by its Petition for Waiver and Exemption and misrepresented the applicable decisions of the Board in an attempt to have the agency impose prerequisite requirements for securing the regulatory waivers and statutory exemptions foreign to its practice. KCS and GWER did not, and cannot, allege that grant of the waiver harms them in any way.

WHEREFORE, Illinois Department of Transportation requests that its Petition be granted
and its Rebuttal be admitted..

Respectfully submitted,

ILLINOIS DEPARTMENT OF TRANSPORTATION

By its attorneys,

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Special Assistant Attorney General
STATE OF ILLINOIS

Dated: March 17, 2003

CERTIFICATE OF SERVICE

I certify that I this day have served a copy of the foregoing Petition by facsimile
transmitting copies thereof to counsel for each of the parties.

Dated at Washington, DC, this 17th day of March 2003.


Fritz R. Kahn

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423

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

KANSAS CITY SOUTHERN RAILWAY COMPANY
– ADVERSE AND ABANDONMENT –
IN ST. CLAIR COUNTY, IL

STB Docket No. AB-849

GATEWAY EASTERN RAILWAY COMPANY
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REBUTTAL
OF
ILLINOIS DEPARTMENT OF TRANSPORTATION

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Special Assistant Attorney General
STATE OF ILLINOIS

Dated: March 17, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423

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

KANSAS CITY SOUTHERN RAILWAY COMPANY
– ADVERSE AND ABANDONMENT –
IN ST. CLAIR COUNTY, IL

STB Docket No. AB-849

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

REBUTTAL
OF
ILLINOIS DEPARTMENT OF TRANSPORTATION

Illinois Department of Transportation ("IDOT"), having been granted leave to file this Rebuttal, responds to the Reply to Petition for Waiver and Exemption which The Kansas City Southern Railway Company ("KCS") and Gateway Eastern Railway Company ("GWER") filed March 4, 2003, as follows:

1. At pages 1 and 4 of their Reply, KCS and GWER would fault IDOT for seeking the regulatory waivers and statutory exemptions with respect to the proposed adverse abandonment of "unspecified line segments" of their railroad lines. Waiver requests, however, traditionally do not describe the affected lines with the specificity that the adverse abandonment applications do.

See, STB Docket No. AB-582, Napa Valley Wine Train, Inc.–Adverse Abandonment–In Napa Valley, CA, served March 30, 2001; Docket No. AB-6 (Sub-No. 348), Tri-County Metropolitan Transportation District of Oregon–Abandonment–A Line of Burlington Northern Company in Washington County, OR, served March 4, 1993. In any event, KCS and GWER know full well which line segments will be the subject of the adverse abandonment application which IDOT will file with the Board, for the representatives of KCS and GWER have been active participants in the negotiations with the other railroads' and IDOT's representatives concerning the proposed relocations of the railroad lines in the East St. Louis area and have reviewed the successive drafts of the Memorandum of Understanding, which details the line relocations, the latest version of which all but one of the other railroads have signed but KCS and GWER have not.

2. Beginning at page 4 of their Reply, KCS and GWER claim that the Board is without sufficient information to determine whether the relief which IDOT seeks by its Petition for Waiver and Exemption should be granted, noting that the proposed relocation and partial elevation of Illinois Route 3 and the construction of access and exit ramps for relocated Interstate Highways I-55, I-64 and I-70 will affect all of the railroads in the East St. Louis area. With the exception of KCS and GWER, however, there is only one railroad whose lines are expected to be abandoned, the East St. Louis Junction Railroad Company ("ESLJ"), and it has been identified as the subject of an adverse abandonment application to be filed with the Board.¹ All but one of the remainder of the railroads, other than KCS and GWER, have agreed, at IDOT's expense, to relocate their lines, and no Board filings, accordingly, will be required or entertained by the Board. City of

¹ See, Petition for Waiver and Exemption of Illinois Department of Transportation, filed February 14, 2003, in STB Docket No. AB-838, East St. Louis Junction Railroad Company–Adverse Abandonment–In St. Clair County, IL.

Detroit v. Canadian National Ry. Co., et al., 9 I.C.C.2d 1208 (1993), aff'd sub nom.

Detroit/Wayne County Port Authority v. I.C.C., 59 F.3d 1314 (D.C. Cir. 1995).

3. At page 7 of their Reply, KCS and GWER contend that there can be no relocation of a railroad line over which another railroad operates, citing to 49 U.S.C. 11323(a)(6). That section of the statute, however, refers to the acquisition of trackage rights and not to the relocation of a railroad line over which trackage rights heretofore have been granted. Indeed, in STB Finance Docket No. 33751, Grand Truck Western Railroad Incorporated, et al.-Joint Relocation Project Exemption-In Harvey, IL, served July 9, 1999, the Board stated, "Line relocation projects may embrace trackage rights transactions such as the one involved here. See D.T.&I.R.-Trackage Rights, 363 I.C.C. 878 (1981)."

4. At pages 7 of their Reply, KCS and GWER refer to the arrangement which IDOT has made for CSX Transportation, Inc. ("CSXT"), to serve O'Neil Lumber & Millwork, Inc., so that the shipper will not be without railroad service following the adverse abandonment of the GWER's line segment by which GWER heretofore has served the shipper, alleging that it requires construction authority from the Board, pursuant to 49 U.S.C. 10901. CSXT, however, needs to install only a spur to reach the shipper, and the construction of a spur calls for no Board authorization, pursuant to 49 U.S.C. 10906.

5. Contrary to the assertion of KCS and GWER, beginning at page 8 of their Reply, IDOT is not applying in piecemeal fashion for the Board's authorization of the railroad line relocations required for the implementation of its highway project.. It is only the proposed

adverse abandonments of the lines of ESLJ², KCS and GWER which appear to necessitate Board approval and they have been identified in the waiver petitions which IDOT has filed with the Board..

6. Beginning at page 10 of their Reply, KCS and GWER argue that regulatory waivers and statutory exemptions can be secured by an adverse abandonment applicant only if the information called for by the regulation or statute cannot be obtained "via expert testimony or analytical studies." The Board never has imposed such a prerequisite requirement, and KCS and GWER cite to no Board or Interstate Commerce Commission ("ICC") decision which supports their assertion.

7. KCS and GWER, at page 10 of their Reply, cite STB Docket No. AB-103 (Sub-No. 14), The Kansas City Southern Railway Company–Adverse Discontinuance Application–A Line of Arkansas & Missouri Railroad Company, served November 13, 1998, for the proposition that, only where the information about the railroad which is the subject of the adverse abandonment or discontinuance proposal was truly unavailable or expert testimony was insufficient to provide such information, has the Board granted waiver requests. KCS and GWER completely misrepresent the holding of the Board's decision. The Board granted the stay of the requested waivers not because the applicant, Arkansas & Missouri Railroad Company, had failed to provide sufficient information about KCS's trackage right operations which it sought to have terminated. To the contrary, the Board declared, "More information about AMR's future plans involving the overhead service now being provided by KCS is needed before the merits of the waiver petition

² The Union Pacific Railroad Company is the lessee of the ESLJ, and its operations will be the subject of an adverse discontinuance proceeding in STB Docket No. AB-33 (Sub-No. 207), Union Pacific Railroad Company–Adverse Discontinuance–In St. Clair County, IL.

can be assess." In other words, the insufficient data related to the applicant's proposed operations and not to prior services rendered by the target railroad..

8. In Docket No. AB-452(Sub-No. 1X), The Western Stock Show-Association--Abandonment Exemption--In Denver, CO, served October 19, 1995, cited at page 11 of the Reply of KCS and GWER, the ICC commended applicant for having submitted estimates of much of the sought information and deemed that to be a demonstration of the applicant's intent to make a good faith effort to comply with the regulations to the extent possible. The ICC, however, did not state that an adverse abandonment applicant must make such an effort before the agency will grant the requested waivers, as KCS and GWER contend. To the contrary, the ICC, in granting the petition for waiver, declared:

Requiring WSSA to provide information regarding service provided over the line, commodities handled, revenues and costs resulting from the service, and financial statements would serve no purpose, as WSSA obviously does not have such data. Similarly, WSSA does not have the ability to cause the involved rail carriers to list the subject line on SDM's. Conformity to the governing regulations thus should not be required.

Similarly, in STB Docket No. AB-469, Jacksonville Port Authority--Adverse Discontinuance--In Duval County, FL, served April 18, 1996, cited by KCS and GWER at page 11 of their Reply, the Board said:

Requiring JPA to provide information regarding service rendered over the line, revenues and costs resulting from service, and financial statements would serve no purpose, as JPA does not have such data. Similarly, JPA does not have the ability to require JTRC to list the subject line on an SDM. Full compliance with the environmental regulations likewise is unnecessary as the operations of one carrier are to be replaced by the operations of another. Strict conformity to the governing regulations thus should not be required..

The same, of course, well might be said of IDOT and its lack of information about the affected

operations on the line segments of KCS and GWER proposed for adverse abandonment. To be sure, IDOT has not sought to secure the information called for by the abandonment regulations and statutory provisions via expert testimony or analytical studies. No decision of the Board or ICC, however, imposes such a requirement, and that IDOT has not sought to meet them does not demonstrate that it has failed to make a good faith effort to comply with the Board's regulations or the statute's dictates.

9. At page 12 of their Reply, KCS and GWER cite to STB Docket No. AB-548, Tacoma Eastern Railway Company--Adverse Discontinuance of Operations Application--A Line of City of Tacoma, in Pierce, Thurston and Lewis Counties, WA, served July 13, 1998, for the proposition that an adverse applicant not possessing data required by the regulations must first request it from the operator and, only if the operator fails to provide the data and the applicant cannot obtain it by any other means, presumably expert testimony or analytical studies, will the Board waive relevant portions of its abandonment regulations. The Board, of course, held no such thing. To be sure, in that proceeding the applicant had requested the data from the operator and was denied them. What the Board did say was, "The City correctly states that the requirements cited are not relevant to this adverse discontinuance application." The Board continued, "In appropriate instances, such as situations involving adverse applications, the Board , or its predecessor agency, has waived inapplicable and unneeded portions of its abandonment regulations [citations omitted]."

10. Illustrative of IDOT good faith effort to comply with the abandonment regulations and statutory provisions is its agreeing to the newspaper publication of its notice of intent to seek the adverse abandonment of the KCS and GWER line segments. Applicants seeking waivers

often ask for and are granted a waiver of the provisions of 49 C.F.R. 1152.20(a)(4), requiring the publishing of the notice of intent at least once during each of three consecutive weeks in a newspaper of general circulation in each county in which any part of the involved line is located. See STB Docket No. AB-582, Napa Valley Wine Train, Inc.–Adverse Abandonment–In Napa Valley, CA, served March 30, 2001; STB Docket No. AB-31 (Sub-No. 38), CSX Corporation, et al.–Adverse Abandonment Application–Canadian National Railway Company, et al., served March 2, 2001. IDOT seeks no such waiver.

11. In its Petition for Waiver and Exemption, IDOT did not claim that it could not secure the system diagram maps of KCS and GWER, as KCS and GWER infer, at page 13 of their Reply. What IDOT did say, in support of its request for waiver of 49 C.F.R. 1152.22(a)(5), is that "[i]t is unlikely that the railroads will have included the lines which are the subject of the proposed adverse abandonment in category 1 of their system diagram maps." KCS and GWER do not dispute that such is the case.

12. At page 13 of their Reply, KCS and GWER suggest that IDOT might have determined what service KCS and GWER are rendering on the four line segments proposed for adverse abandonment "by performing on-site observation on the line." KCS and GWER, however, fail to indicate whether they would deem representative an hour's observation at each of the four sites, eight hours', a day's, a week's or even a month's. Their proposal cannot be taken seriously; it is altogether impractical. Alternatively, KCS and GWER suggest that IDOT might have determined what service KCS and GWER are rendering on the four line segments proposed for adverse abandonment by having a consultant undertake an analysis of the waybill data, pursuant to 49 C.F.R. 1244.9(b)(4). KCS and GWER, however, fail to identify the origins,

destinations, routes of movement and commodities the consultant would reference in framing an appropriate request for the waybill data. Again, the proposal of KCS and GWER is specious; it is wholly unrealistic. Moreover, KCS and GWER point to not a single Board or ICC decision in which a prospective applicant for an adverse abandonment was expected to observe operations on the railroad line or undertake a waybill study of the service being rendered on it as a prerequisite for securing the regulatory waivers and statutory exemptions in advance of filing its application.

13. No less fatuous is the suggestion by KCS and GWER, at page 14 of their Reply, that IDOT might have completed a cost and revenue study of the four line segments proposed for adverse abandonment. KCS and GWER, however, fail to indicate on what data the cost and revenue study would be based.. A cost and revenue study surely cannot be undertaken in a vacuum. More significantly, however, KCS and GWER fail to cite to a single Board or ICC decision in which the agency held that a petitioner for regulatory waivers and statutory exemptions in connection with an adverse abandonment application should be put to the burden of performing a cost and revenue study as a prerequisite to receiving the relief it sought.

14. Beginning at page 15 of their Reply, KCS and GWER urge that IDOT not be allowed to avoid providing notices to all affected shippers of the proposed adverse abandonment of the KCS and GWER line segments. IDOT cannot imagine where KCS and GWER got the idea that IDOT sought to avoid doing so. 49 C.F.R. 1150.20(2)(I) calls for the applicant's service of its notice of intent upon "[s]ignificant users of the line." IDOT, in its Petition for Waiver and Exemption did not seek a waiver of that provision, and IDOT has every intention of notifying the affected shippers of the proposed adverse abandonment.

15. Finally, beginning at page 16 of their Reply, KCS and GWER contend that,

notwithstanding that the relocation of the railroad lines in the East St. Louis area has been the subject of an intensive environmental review process, of which, incidentally, KCS and GWER were kept fully apprized, waiver of the environmental report would be inappropriate. KCS and GWER cite to STB Docket No. AB-582, Napa Valley Wine Train, Inc.—Adverse Abandonment—In Napa Valley, CA, served March 30, 2001, and STB Docket No. AB-31 (Sub-No. 38), CSX Corporation, et al.—Adverse Abandonment Application—Canadian National Railway Company, et al., served March 2, 2001. In the former, the principal shipper on the line which was to be abandoned was to be without railroad service, at least for a brief period of time, and, in the latter, the target railroad's overhead service was in jeopardy. In contrast, the proposed adverse abandonment of the KCS and GWER line segments will deprive no shipper of railroad service, even for a single day, and no railroad having operated on KCS or GWER's track will be denied the ability to route overhead traffic. In the circumstances, waiver of the environmental report would be altogether fitting. STB Docket No. AB-520, Salt Lake City Railroad Company, Inc.—Adverse Abandonment—Line of Utah Transit Authority in Salt Lake City, UT, served August 24, 1999; STB Docket No. AB-103 (Sub-No. 14), The Kansas City Southern Railway Company—Adverse Discontinuance Application—A Line of Arkansas & Missouri Railroad Company, served November 24, 1998; STB Docket No. AB-469, Jacksonville Port Authority—Adverse Discontinuance—In Duval County, FL, served April 18, 1996.

16. Significantly, nowhere in their Reply do KCS and GWER allege that they will be prejudiced by the Board's grant of the regulatory waivers and statutory exemptions which IDOT seeks by its Petition for Waiver and Exemption; indeed, they are unable to make such a claim. The relief which IDOT seeks cannot and will not in any way harm KCS and GWER.

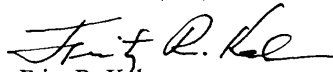
WHEREFORE, Illinois Department of Transportation, seeks the waiver of certain of the Board's abandonment regulations and exemption from certain of the provisions of subtitle IV of Title 49 of the U.S. Code in connection with the anticipated filing by IDOT of its adverse abandonment application.

Respectfully submitted,

ILLINOIS DEPARTMENT OF TRANSPORTATION

By its attorneys,

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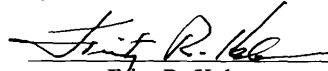
Special Assistant Attorney General
STATE OF ILLINOIS

Dated: March 17, 2003

CERTIFICATE OF SERVICE

I certify that I this day have served a copy of the foregoing Petition by facsimile transmitting copies thereof to counsel for each of the parties.

Dated at Washington, DC, this 17th day of March 2003.


Fritz R. Kahn