

KCS/GWER-3

**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**

**RESPONSE TO REBUTTAL
OF ILLINOIS DEPARTMENT OF TRANSPORTATION**

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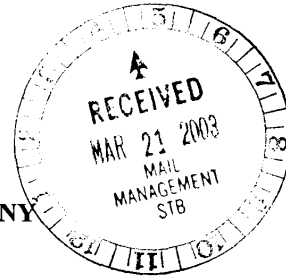
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The Kansas City Southern Railway Company ("KCS") and Gateway Eastern Railway Company ("GWER")¹ hereby respond to the Rebuttal filed by the Illinois Department of Transportation ("IDOT") on March 17, 2003 ("IDOT's Rebuttal"). Despite the fact that IDOT's Rebuttal should be stricken as an unlawful reply to a reply, IDOT's filing actually illuminates and establishes the precise point that KCS raised: IDOT is pursuing regulatory authority in a piecemeal fashion based on incomplete and incorrect information which is designed to mislead this Board and the public about the true nature of this massive highway and railroad relocation project. Furthermore, IDOT mischaracterizes this Board's precedents with respect to petitions for waiver filed in adverse abandonment or adverse discontinuance proceedings. As KCS's March 4, 2003 filing made clear, the Board cannot determine what information it will need to

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.

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rule upon the impending abandonment application until it has been fully advised of the entire 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.

ARGUMENT

I. THE BOARD SHOULD DENY THE WAIVER PETITION AS PREMATURE AT THIS TIME

A. IDOT's Piecemeal Approach Should Be Rejected And The Waiver Request Denied

What is most illuminating about IDOT's Rebuttal is the information that KCS and this Board now learn about the entire project, some of it for the first time, and this information clearly contradicts what IDOT wanted this agency to believe when it filed its February 19 Petition for Waiver. What is most astonishing is the fact that IDOT has filed two adverse abandonment applications and one adverse discontinuance proceeding against four different railroads; notwithstanding the fact that IDOT told this agency that all affected railroads, except KCS and GWER, had agreed to the Project.

1. Other Railroads Oppose Some Or All Of The Project

From IDOT's Rebuttal filing we now learn that when it filed its Waiver Petition on February 19 in the KCS matter, IDOT had previously filed, on February 14, an almost identical waiver petition for an adverse abandonment against the East St. Louis Junction Railroad Company ("ESJRC") and an adverse discontinuance against the Union Pacific Railroad Company ("UP").² This earlier-filed waiver petition involves the same project as involved in this KCS proceeding. Yet, when it filed the Waiver Petition in the instant proceeding just five days later, there was absolutely no mention to this Board or to KCS that another adverse

² See Petition for Waiver and Exemption Of Illinois Department of Transportation, filed Feb. 14, 2003, in AB-838 and AB-33 (Sub-No. 199).

abandonment proceeding involving the same project was going on at the same time. One searches the Waiver Petition in vain for even the slightest hint that the two cases are connected, involving the same project and almost identical issues.

In fact in the Waiver Petition, IDOT and its counsel went as far as to list five railroads who have “all cooperated and agreed to the relocation,” Waiver Petition at 3, and that it was KCS’s and GWER’s “intransigence” that necessitated the filing of the adverse abandonment against KCS and GWER. Nowhere is there any mention of any other opposition or of related STB cases. Now, we learn that those statements were misleading at best or flatly untrue. We now learn that ESJRC also does not support having its property taken and its tracks relocated. Likewise, we also learn that UP, which was listed as agreeing to the project, also does not want its operations over ESJRC discontinued. At a minimum, this leaves four railroads opposed to at least some aspect of the project. Quite a different story than simple “intransigence” by KCS and GWER.

Furthermore, there may even be a fifth railroad that does not support the project. On page 2 of its Rebuttal, after IDOT discloses the ESJRC case, IDOT makes a statement that “[a]ll but one of the remainder of the railroads, other than KCS and GWER,” (emphasis supplied) have agreed to the project. In the context of that sentence, the “remainder” railroads cannot include ESJRC, KCS, or GWER. Is the “but one” of the “remainder” railroads UP or is it another railroad? KCS has been told by Norfolk Southern as recently as two weeks ago that it has not agreed to the Project either. If correct, that would mean three Class I’s oppose some aspect of this project.³

³ A careful reading of the last two sentences of ¶ 1, at pg. 2 of the IDOT Rebuttal (“the latest version of which all but one of the other railroads have signed but KCS and GWER have not”) also indicates that besides KCS and GWER, at least one other railroad has not signed the proposed Memorandum of Understanding.

Regardless of the identity of that remaining railroad, the point is that IDOT has once again failed to disclose all of the details of the Project so that this Board can have an accurate understanding of the entire Project when it decides the two waiver petitions. IDOT wanted this Board to believe that it should proceed with the adverse abandonment case against KCS because the only opposition came from KCS, but this Board now knows differently. There are two adverse abandonment cases, one adverse discontinuance case, and opposition from at least four, possibly five, railroads.

2. Other Applications Or Regulatory Authorities May Be Required

If the other non-concurring railroad is NS, as KCS believes, it is highly likely that IDOT may eventually be required to also file an adverse abandonment against NS as well. If that occurred, there would be three adverse abandonment proceedings and one discontinuance proceeding, all involving the same Project and similar issues. As KCS noted in its Reply, 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 impacts over fifty businesses and 500 jobs, as well as transmission lines and utility lines, in the region. The project affects four Class I railroads, terminal railroads, numerous spur tracks, jointly-owned trackage, single carrier-owned tracks, and a passenger operation. As such, it is highly likely that there may be other applications or exemptions that may also be required to be filed.

IDOT seems to be under the impression that, other than the two now-identified proceedings, other aspects of the project would not require STB authority. KCS believes that IDOT misunderstands this Board's procedures and statutes. For example, a large part of the operations in the East St. Louis terminal covered by the Project involves track jointly owned and operated by KCS and UP. This track is governed by a series of contracts and agreements between KCS and UP. It may be that UP will agree to the relocation of that track, but KCS may

not so agree. While KCS does not take issue with IDOT's statement that a voluntarily track relocation by a single carrier involving track operated by that carrier does not require Board authority, *City of Detroit v. Canadian National Railway*, 9 I.C.C. 1208 (1993), *aff'd sub nom. Detroit/Wayne County Port Authority v. Interstate Commerce Commission*, 59 F.3d 1314 (D.C. Cir. 1995), the same cannot be said with respect to jointly-owned and operated track. Instead, the operation and ownership of such track is clearly covered by 49 U.S.C. § 11323(a)(6).

IDOT's Rebuttal, Paragraph 3 thus misses the point. Section 11323(a)(6) does involve the acquisition of trackage rights as stated by IDOT, but it also involves "joint ownership or joint use of" a railroad line owned or operated by another carrier. KCS's point was that UP, as a joint owner and operator of this joint track, cannot simply abandon its use of such track without consideration of that section or the contractual arrangements governing the use of such track, nor can IDOT impact KCS's operations over that track without similar consideration of that section.⁴

Another area where IDOT misunderstands this Board's precedents involves IDOT's plan to have CSXT build a "spur" track to access O'Neil Lumber & Millwork, a shipper that today is served solely by GWER. IDOT claims that CSX can simply access this shipper without regulatory authority by constructing a "spur" line pursuant to 49 U.S.C. § 10906; however, this position is incorrect, or at a very minimum requires further analysis by this Board. Because CSXT does not currently serve O'Neil Lumber, it is highly likely that CSXT would require authority under 49 U.S.C. § 10901 to construct the line because it would be "invading" the territory of another carrier. *Missouri Pacific Railway Co. v. St. Louis Southwestern Railway Co.*,

⁴ Indeed, because IDOT did not even identify what tracks it seeks to adversely abandon, it is unclear to KCS if the UP/KCS jointly owned track is included in the adverse abandonment application. Contrary to IDOT's assertion that KCS "know[s] full well which line segments will be the subject of the adverse abandonment application," IDOT Rebuttal at 2, KCS would point out that the last discussion between IDOT and KCS prior to the filing of IDOT's Waiver Petition did not involve any shippers losing KCS service. Moreover, even if KCS did know what track was involved, IDOT's proposed notices would not adequately inform the public on that issue.

73 F.2d 21 (8th Cir. 1934); *Chicago, Rock Island & Pacific Railroad Company v. Thompson*, 135 F.Supp. 43 (E.D. Ark, 1955); *Georgia Southern and Florida Railway Company v. Atlantic Coast Line Railroad Company*, 373 F.2d 493 (5th Cir. 1967). This would require a separate application and separate environmental analysis. Because IDOT has presented little or no information about the entire Project, however, this Board is without information to make a sufficient judgment about what does and what does not require Board authorization.

As just these two examples show, it is difficult for this Board and the public to determine precisely what the Board will be required to rule upon because IDOT has not fully disclosed that information. As KCS has stated, this Board simply does not have enough information to determine how it should rule upon the two waiver petitions in a vacuum. Indeed, IDOT has not been forthcoming about the various transactions implicating Board jurisdiction. In fact, as we now know, as IDOT now finally admits, IDOT has already pursued its plans to abandon line segments and operations and to relocate lines in piecemeal fashion, without fully disclosing these interrelated proceedings until its Rebuttal. Yet, the various components of the entire Project are necessarily interrelated and cannot be separated and ruled on in piecemeal fashion. Requiring projects to be presented in their entirety ensures that the Board can properly take into account all aspects of the project.

Rather than allowing the two adverse abandonment proceedings and the one adverse discontinuance proceeding to continue in a piecemeal fashion, the Board should either deny the waiver request outright or at a minimum hold those proceedings in abeyance until IDOT presents all of the various components of its project together in a single application that accurately reflects the true scope of its project. 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. In that sense, AB-838

and AB-33 (Sub-No. 199) should be consolidated with this proceeding.⁵ 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.

B. IDOT's Rebuttal Mischaracterizes Board
Precedent With Respect To Waiver Requests

This Board should deny the Waiver Petition at this time or, at a minimum, not rule upon the requests until such time as IDOT presents a full and complete picture of what parts of the massive Project are and are not going to require STB approval. In no event should this Board grant the Waiver Petition. However, if the Board were to address the Waiver Petition on the merits of the individual waiver requests, KCS established in its Reply that IDOT must first make a good faith effort to obtain the information requested by the Board's regulations and/or establish that it cannot provide such information via expert testimony or analytical studies before it can request a waiver. Only where the information was truly unavailable or expert testimony was insufficient to provide such information should the Board grant 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)(“*AMR Discontinuance*”); *The Western Stock Show Association, et al. – Abandonment Exemption – in Denver, CO*, Docket No. AB-452 (Sub-No. 1X), 1995 WL

⁵ *Blackstone Capital Partners L.P.--Control Exemption--CNW Corporation and Chicago And North Western Transportation Company; Notice of Exemption--Issuance of Securities And Assumption Of Obligations And Liabilities--Chicago And North Western Transportation Company And Midwestern Railroad Properties, Inc.*, Finance Docket Nos. 31493 and 31493 (Sub-No. 1)(ICC served Jun. 30, 1989)(consolidating two cases because evidence presented in both proceedings is germane to both); *John P. Wronowski--Common Control--Cross-Sound Ferry Services Island Marine Corporation, And Nelseco Navigation Co., Inc., Island Marine Corporation (New London, CT)*, Finance Docket No. 30846, W-1448 (ICC served Dec. 2, 1986)(consolidating two cases involving the same transaction and that relate to each other); and *Burlington Northern, Inc.--Control Exemption--Victory Freightway System, Inc.; Burlington Northern, Inc.--Control Exemption--Monkem Company Inc; Burlington Northern, Inc --Control Exemption--Monroe Trucking, Inc.*, Nos. MC-F-16248, 16372, and 16452 (ICC served Jan. 29, 1986)(Consolidating three cases involving similar parties and issues).

611719 (ICC served October 19, 1995) at *2 ("*Western Stock Show*"); and *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 ("*Jacksonville Port Authority*").

The IDOT Rebuttal takes issue with the use of those precedents. However, a close examination of the points raised in the IDOT Rebuttal shows it is IDOT, and not KCS, that has mischaracterized this Board's precedents. IDOT objects to the requirement that it describe the lines for which adverse abandonment authority is sought, but IDOT points to no precedent that would allow it to avoid the requirement to at least describe the mileposts and right-of-way of the lines which it desires to take. IDOT does claim that it shouldn't have to comply with this requirement because "KCS and GWER know full well which line segments will be the subject of the adverse abandonment application." IDOT Rebuttal at ¶ 1, at pg. 2. For the record, KCS and GWER do not have knowledge of which specific parts of their lines are going to be subject to the application nor do they know with any degree of certainty which lines will be included. The only one who possesses such information is the applicant who intends to file the adverse abandonment application. Thus IDOT should not be allowed to avoid this requirement.

1. *Napa Valley*⁶ Does Not Support IDOT's Request

Consistent with its desire to avoid having to describe the lines at issue in this proceeding, IDOT seeks a waiver of the requirements of 49 C.F.R. § 1152.22(a)(5)(system diagram maps), 49 C.F.R. § 1152.22(b)(condition of the rail line); 49 C.F.R. § 1152.22(c)(description of the service rendered on the lines), 49 C.F.R. § 1152.22(d)(description of the revenue and cost data pertaining to the line), and 49 C.F.R. § 1152.22(e)(description of the rural and community impacts).

⁶ *Napa Valley Wine Train, Inc --Adverse Abandonment--In Napa Valley, CA*, STB Docket No. AB-582, 2001 STB LEXIS 327 (served March 29, 2001)("Napa Valley").

IDOT cites *Napa Valley* as support for its position, but a close examination of the waivers requested in that case shows that *Napa Valley* actually supports KCS's position.

It is true that certain waivers were requested by the Napa County Flood Control and Water Conservation District ("NCFCWCD") and some, but not all, of those waivers were granted. The key distinction between those waiver requests and the waiver requests by IDOT is the fact that NCFCWCD did not seek a waiver from compliance with the entire provisions of § 1152.22(b)-(e), while IDOT does. In *Napa Valley*, NCFCWCD sought only a partial waiver from those requirements. In that case and consistent with this Board's precedents, NCFCWCD first made a good faith effort to gather as much information as possible, including sending a letter to the railroad involved that sought information that was in the possession of the railroad. Once NCFCWCD had gathered as much information as possible and presented a full description of its plan to the Board, it then sought a partial waiver from the provisions of § 1152.22(b)-(e).⁷

At no time did NCFCWCD seek a complete waiver. Indeed, NCFCWCD was willing to provide a detailed map, a detailed description of the lines, a detailed statement of the reason for filing the adverse abandonment application, a description of the service currently provided and as much description as possible regarding the revenues and costs of operations over the line. The Board then granted NCFCWCD a partial waiver from the requirements. On the other hand, IDOT seeks a complete waiver and hopes to avoid having to comply with any of these requirements. Thus, *Napa Valley* clearly supports KCS's position that a party seeking to file an adverse abandonment application must first make a good faith effort to gather and provide as much information as possible before filing a waiver petition. IDOT has not met this standard.

⁷ Moreover, because *Napa Valley* involved relocation of a line, not abandonment, the impacts of the proposal and the amount of information necessary to analyze it were much less than here.

2. *AMR Discontinuance*⁸ Does Not Support IDOT's Position

IDOT claims that *AMR Discontinuance* stands for the proposition that it does not have to provide information about the "target railroad," *i.e.* for this case, KCS and GWER, and thus IDOT's waivers should be granted because it should not be required to provide information about KCS and GWER. In *AMR Discontinuance*, the party filing the adverse discontinuance application -- Arkansas & Missouri Railroad ("AMR") -- had sought a complete waiver of most of the same requirements that IDOT has sought to have waived herein. The Board held the waiver petition in abeyance until such time as AMR provided additional information.

IDOT misunderstands the point of that decision in the context of this proceeding. KCS has made two arguments. First, to avoid proceeding in a piecemeal fashion, KCS believes that the Board cannot rule on the Waiver Petition without first getting more information from IDOT about the entire Project and all of its impacts on Board-regulated carriers. Only after that information has been provided should the Board proceed on the merits of the waiver petitions filed in this case and the ESJRC case. Second, when the Board does proceed to the merits of the Waiver Petition, it should not grant the waivers unless IDOT has first made a good faith effort to gather the information on its own to establish to the Board that the waivers are actually needed. The *AMR Discontinuance* case is precisely on point with those arguments.

In *AMR Discontinuance*, the Board made it clear that it could not rule on the waiver petition unless it had more information regarding the entire scope of AMR's plans. The type of information AMR was to provide included information regarding the impacts on the shippers, future plans to serve the shippers, what operating arrangements would be put in place as a result of the adverse discontinuance, and a more detailed description of the reasons for the adverse

⁸ *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).

action. This is precisely the type of information that IDOT has not provided. As such, IDOT's Waiver Petition should be denied or, at a minimum, held in abeyance pending receipt of such information. Furthermore, as the Board directed in *Napa Valley* and *AMR Discontinuance*, IDOT should make a good faith effort to gather and provide as much information as possible in its application and then only seek a waiver for those portions of the regulations that require production of information that is truly unavailable to IDOT. Information contained in Sections 1152.22(b)-(e) is not unavailable and should be provided, and thus any waiver of those provisions should be denied.

3. Other Precedent Also Establishes That IDOT Must First Provide As Much Information As Possible Before Seeking A Waiver

At Paragraphs 8 and 9, pages 5-6 of the IDOT Rebuttal, IDOT claims that *Tacoma Eastern*,⁹ *Western Stock Show*, and *Jacksonville Port Authority* all support its position that it should not be required to comply with various regulations. While those cases did grant waivers of some of the same requirements that IDOT seeks to avoid, the ICC or the Board did so only after the party requesting the waivers established that it had made a good faith effort to gather the required information but was unable to obtain it. For example, in *Tacoma Eastern* the City of Tacoma had first sought as much information as possible from the operator of the line, Tacoma Eastern ("TE"). When TE failed to provide information about the condition of the properties, the service on the line, and cost and revenue data, then and only then did the City file a waiver petition, which was then granted.

Likewise, in *Western Stock Show*, the Western Stock Show Association ("WSSA") was granted a waiver of the notice and service requirements (similar to the waivers IDOT seeks) but

⁹ *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).

not because they were unnecessary. Instead, those waivers were granted because the filing of the applications was a refilling of applications and information that had been submitted previously and thus all of the parties had already been put on notice. *Western Stock Show* at n. 4. Here, IDOT seeks waiver of some of these provisions in the first instance, a situation not contemplated by the decision in *Western Stock Show*.

With respect to information about service over the line, commodities handled, revenues and costs, and financial statements, a waiver of those requirements was granted but only because WSSA provided "estimates" of such information and had made a "good faith effort to comply with the regulations." *Western Stock Show*, 1995 ICC LEXIS 272 at *5. Here, IDOT has given no indication that it will provide estimates, nor has IDOT made a good faith effort to comply with the regulations. IDOT simply wants a blanket waiver without having to provide any information. Such a position is contrary to the holding in *Western Stock Show*, not consistent with that decision as IDOT's Rebuttal contends.

Jacksonville Port Authority also requires IDOT to make a good faith effort to comply with the regulations before seeking a waiver. Waivers were eventually granted to the Jacksonville Port Authority ("JPA") but such waivers were based upon two premises: (1) the JPA did not propose that any shipper would lose existing service; and (2) JPA had first made a good faith effort to comply with the regulations. Those two preconditions have not been satisfied here. In this case, IDOT proposes to eliminate shippers' access to KCS and has made no effort to provide this Board with any information, even good faith estimates. *Jacksonville Port Authority* does not support IDOT's request for a blanket waiver. IDOT's waiver requests should be denied at this stage of the proceeding.

All three of these cases - *Tacoma Eastern*, *Western Stock Show* and *Jacksonville Port Authority* - clearly hold that applicants filing adverse abandonment or discontinuance

applications will not be granted blanket waivers of the Board's regulations. IDOT's Rebuttal does not point to a single precedent that allowed such a blanket waiver. Instead, these precedents require IDOT to seek to obtain the required information, to provide good faith estimates of the required information that it cannot obtain, and only then to seek a waiver of any information that was unavailable.

4. IDOT's Rebuttal Underestimates The Ease Of Providing
A Good Faith Estimate Of The Required Information

In addition to claiming that it should be granted a complete waiver of some of the regulatory requirements, IDOT also claims that it cannot provide a good faith estimate. IDOT misunderstands the extent to which such information is obtainable. IDOT has numerous means to provide such good faith estimates. IDOT should not be relieved of this requirement by simply claiming that gathering such information would somehow burden IDOT.

As a first step, IDOT can ask for information from the involved railroads and shippers regarding the scope and type of service provided. It can conduct its own on-site observations of car counts and car types. It can use the waybill sample to determine origins and destinations of the involved commodities.¹⁰ Finally, IDOT can use both the Board's waybill data and its URCS costing system to develop a good faith estimate of the costs and revenues generated from the line.¹¹ IDOT has not made even the slightest efforts to provide good faith estimates for any

¹⁰ IDOT claims that KCS has failed to identify the origins, destinations, and commodities so as to allow IDOT to frame an appropriate request for waybill data. IDOT Rebuttal, ¶ 12, at 8. Perhaps IDOT misunderstands the usefulness of the waybill data. In a proceeding, any party may request access to the waybill data. 49 C.F.R. § 1244.9. Waybill data then allows any competent railroad analyst to determine within reasonable certainty what the origins, destinations, and commodities are being shipped to and from a given railroad station. As IDOT knows the stations and the lines involved, it should be able to at least provide a reasonable estimate of the information requested in the abandonment regulations. To the extent it cannot provide such information, IDOT can then seek a waiver at that time, but in no event should a waiver be granted before IDOT has actually made a good faith effort to provide the information.

¹¹ IDOT again seeks to cast the blame on KCS for IDOT's alleged inability to be able to provide such information, claiming that KCS and GWER "failed to indicate on what data the cost and

information regarding the lines and the service conducted over the lines, even though such information is available. Rather, IDOT has simply requested a blanket waiver. Such an approach is contrary to this Board's established precedent.

5. What Good Faith Effort IDOT Put Forward Is Insufficient

Curiously, IDOT must at least implicitly admit that it has a good faith obligation to provide at least some information because in Paragraph 9 on page 6 of the IDOT Rebuttal, IDOT claims that it has made "a good faith effort to comply with the abandonment regulations." As evidence of such a good faith effort, IDOT points to the fact that it has agreed to "newspaper publication." Putting aside the fact that this is the first and only mention of IDOT's "good faith" efforts, newspaper publication is not something that parties "agree to do." Instead, it is something that is required by the regulations and is very rarely waived.

When newspaper notice is waived, it is done only when other notice and service requirements have been followed or the adverse abandonment application would not impact active shippers. *Napa Valley*, 2001 STB LEXIS 327 at *7 (STB served Mar. 30, 2001)(newspaper notice waived but only because applicant did not seek a waiver of 49 C.F.R. § 1152.20(a)(1) and (2) and agreed to serve pre-filing notice, the waiver petition, and the application on shippers and government parties); and *CSX Corporation and CSX Transportation, Inc --Adverse Abandonment Application--Canadian National Railway Company and Grand Trunk Western Railroad, Inc.*, AB-31 (Sub-No. 38), 2001 STB LEXIS 200 at * 5 (STB served Mar. 2, 2001)(newspaper notice not required because no active shippers were adversely impacted)("CSX"). Here, IDOT seeks not only a waiver of the newspaper publication requirements but also of the other service and notice requirements that were followed in the cited

revenue study would be based." IDOT Rebuttal, ¶ 13 at 8. Because IDOT knows the line and shippers involved, it can take the Board's waybill data and the Board's UCRS costs and provide at least a good faith estimate of the costs and revenue over the line.

cases. Furthermore, there are four active shippers. Accordingly, IDOT's blanket waiver request of almost all of these notice and service requirements, replaced only by an inadequate newspaper notice, is not consistent with precedent and should be rejected. IDOT's blanket waiver request is especially egregious given the nature of its proposed newspaper notice, which doesn't even describe the line segments and right-of-way that IDOT seeks to confiscate.

IDOT's claims in its Rebuttal that it has made a good faith effort to obtain and provide information are vastly exaggerated. IDOT has provided little information to the Board and seeks to avoid having to provide further information by seeking a waiver from numerous requirements. While IDOT wants this Board to believe that precedent supports its position, a close examination of the points raised in the IDOT Rebuttal shows that IDOT has mischaracterized this Board's precedents. Precedent clearly provides that before it can request a waiver, IDOT must first make a good faith effort to obtain the information requested by the Board's regulations and/or establish that it cannot provide such information via expert testimony or analytical studies. Only where the information was truly unavailable or expert testimony is insufficient to provide such information has the Board to grant the waiver requests.

C. The Board Cannot Waive Its Environmental and Historic Reporting Requirements

IDOT's Rebuttal claims that a waiver of the environmental review requirements is justified because no shipper (at least according to IDOT) will be without rail service. IDOT Rebuttal, ¶ 15 at 9. This fact, according to IDOT, distinguishes the Board's holding in *Napa Valley*, which emphatically held that "the environmental requirements [of the Board's regulations] *will not be waived*." *Napa Valley*, 2001 STB LEXIS 327, *8 (STB served Mar. 29, 2001). IDOT misreads *Napa Valley*. In that case, there was one active shipper on the line, but unlike this proceeding, the shipper was going to receive service from the same carrier after the

relocation project as it did before the relocation project as the carrier's line was merely being relocated. Here, the sole purpose of the adverse abandonment application is to remove KCS's lines and right-of-way and to eliminate KCS service to the shipper.¹²

Likewise, *CSX* does not support IDOT's position; indeed, IDOT makes no effort to distinguish this case, nor can it. In *CSX*, there were no active shippers and there had not been service over the line for five years. Notwithstanding this fact, the Board refused to waive the environmental reporting requirements. Thus, the test is not whether a shipper will or will not lose service. Those factors may be used to mitigate or otherwise limit the scope of the environmental review, but they cannot be used to justify a complete waiver of the environmental reporting requirements. As in *Napa Valley* and *CSX*, IDOT should present its environmental impacts, supported by detailed information, in its application. No waiver of the required environmental and historic reports should be granted.

CONCLUSION

Obviously realizing that its Waiver Petition was inadequate, IDOT has filed an improper reply to a reply, albeit styled a "Rebuttal." The IDOT Rebuttal should be stricken in its entirety. However, if IDOT's Rebuttal is accepted, the Board should also accept this Response.

As set forth herein, IDOT's Rebuttal proves KCS's prior point: IDOT is pursuing a wide-ranging project in piecemeal fashion, trying to downplay the significant effects that the project will pose for numerous regional shippers and rail operators. Furthermore, IDOT has not made a

¹² IDOT proposes to replace KCS service with service from other carriers; however, to what extent and how such service will be replaced is undisclosed. The environmental impacts of the removal of KCS's tracks and lines and the replacement by another carrier could be significant and, if a waiver were granted, they would not be examined. Furthermore, while the facilities located on the lines may in fact have alternative rail service if KCS were removed, IDOT has not discussed, yet alone analyzed, the service or environmental impacts to KCS off-line shippers who ship to the facilities that are slated to have KCS service terminated. These impacts could also be significant.

good faith effort to comply with the Board's abandonment regulations before seeking a waiver.

Precedent clearly requires IDOT to make such an effort before filing a waiver request.

Accordingly, because the Board has limited information regarding the entire scope of the Project and IDOT has failed to make any efforts to gather and provide information required by the regulations, IDOT's Waiver Petition should be denied in all respects.

Respectfully submitted, this 21st day of March, 2003.

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March 21, 2003

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "Response to Rebuttal of Illinois Department of Transportation," KCS/GWER-3, was served this 21st 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.

A handwritten signature in black ink, appearing to read "William A. Mullins", written over a horizontal line.

William A. Mullins
Attorney for The Kansas City Southern Railway
Company and Gateway Eastern Railway Company