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22 January 2004

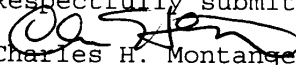
Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: City of Venice -- Abandonment Exemption,
AB 863X

Dear Mr. Williams:

Enclosed for filing please find an original and ten copies of a Reply to TRRA's "Comments" filed on or about December 29, 2003. The document also contains a motion to strike as either a reply to a reply or as prejudicially redundant a January 20, 2003 TRRA petition for reconsideration.

Respectfully submitted,


Charles H. Montange
for City of Venice

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JAN 26 2004

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cc. counsel for TRRA per cert. serv.
Joseph Levine (STB Off. Proc.) (by fax to 202-565-9002)

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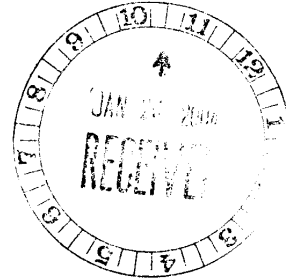
BEFORE THE SURFACE TRANSPORTATION BOARD

DOCKET AB 863X

CITY OF VENICE

-- ABANDONMENT EXEMPTION --

BETWEEN BRANCH STREET YARD, MO
AND MCKINLEY JUNCTION, IL



CITY OF VENICE'S
REPLY TO TRRA DECEMBER 29 "COMMENTS"
and
MOTION TO STRIKE TRRA's
JANUARY 20 PETITION FOR RECONSIDERATION

FILED
Office of Proceedings

JAN 26 2004

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Public Record

This is City of Venice's Reply to the "Comments" filed by Terminal Railroad Association of St. Louis (TRRA) dated December 29, 2003, and Motion to Strike TRRA's January 20 "petition for reconsideration."

I. Background

The central thrust of the TRRA December 29 "comments" is that City of Venice does not have and has never had a common carrier obligation with respect to the two-mile line of railroad at issue in this proceeding. TRRA specifically asks that the "Notice of Exemption" filed by City of Venice be "rejected" and the line declared already abandoned "so far as the Board is concerned", ostensibly so that TRRA is "free to dismantle" the trestles traversing its properties. TRRA "comments" at 9.¹

¹ TRRA asserts that it is the underlying fee owner of approximately 3/4 of a mile of the two-mile rail line in question. TRRA "comments" at 2-3. TRRA contends that the elevated trestles "crossing TRRA's property are in a deplorable state" and constitute an attractive nuisance and liability risk.

TRRA also requests that Madison County Transit's (MCT's) "statement of willingness" [invoking 16 U.S.C. § 1247(d) for the line in question] be rejected, but the sole grounds advanced is TRRA's contention that no common carrier obligations reside in City of Venice as to the property in question. The TRRA comments basically constitute a motion or petition to reconsider and to dismiss the proceeding on grounds of lack of jurisdiction should this Board agree that City of Venice has never held common carrier obligations with regard to the two-mile line in question.

The TRRA December 29 "comments" were filed 20 days before the due date for comments or reconsideration requests in this case. Under this Board's rules, replies are generally required 20 days after a pleading to which they are directed. In order to avoid the need for multiple responses should other entities file comments or reconsideration requests, City of Venice sought a formal extension of the deadline for responding to TRRA to February 9, 2004, which would be twenty days after the January 20, 2004 deadline for filing of comments and reconsideration requests. In that way one consolidated response could be filed.

By order issued January 15, 2004, this Board extended City of Venice's time to respond to the TRRA comments only to January

Id. at 3-4. As City of Venice pointed out in its opposition to TRRA's petition for a stay, the only real obstacle to trestle removal appears to be the existence of City's unabandoned common carrier obligation. City agrees that the wooden trestles otherwise may be removed by TRRA, for all parties agree they have deteriorated.

23. In order to comply with filing requirements, City is expressing this Response to the Board on January 22.

On January 20, 2004, City received by fax transmission a "petition for reconsideration" filed by TRRA. Although the TRRA January 20 petition for reconsideration seeks relief which in effect is identical to the relief sought by TRRA in its December 29 comments, and although the gravamen of the "petition" is the same as the gravamen of the "comments," the January 20 petition contains additional argument and case citations, evidently aimed at replying to City's Opposition to TRRA's January 7 petition for a stay.²

City had served its Opposition, at the request of this Board, on January 12, roughly 15 days before the nominal due date under the applicable rule. It appears that TRRA wishes to employ the vehicle of a redundant pleading, styled a "petition for reconsideration," to purport to reply to City's reply.

II. Motion to Strike

The January 20 "petition for reconsideration" should be stricken for two reasons: first, this Board's rules forbid replies to replies, 49 C.F.R. § 1104.13(c), and pages 4-6 of the TRRA January 20 petition refer to issues framed by City of Venice in its Stay Opposition. These pages thus amount to a reply to a reply. Second, the entire January 20 "petition" seeks relief identical to that in the "comments" and is a

² In particular, although pp. 1-3 of the "petition" appear largely duplicative of the TRRA "comments," pp. 4-6 appear to be replying to positions taken by City in its "Opposition."

redundant, duplicative pleading which adds nothing, except to the extent it constitutes a "reply" to City's reply to TRRA's stay request, which of course is impermissible. TRRA's action in filing its redundant pleading forces City of Venice to file multiple responses, first to the December 29 "comments" on or before January 23 (which City will have to express out on January 22), and then second to the January 20 "petition" on February 9. This is burdensome to the City, and insofar as TRRA is using it as a device to reply to a reply, highly prejudicial to City. While redundancy alone may not be grounds to strike, when coupled with burdensomeness and prejudice it is. The January 20 "petition" should accordingly be stricken even it could somehow be construed as something other than a reply to a reply.

III. Comment on TRRA's Conspiracy Theory

In its "comments," TRRA devotes substantial rhetoric to the proposition that MCT "lapsed" in that it "failed to avail itself of the opportunity to acquire the right-of-way ... between the Branch Street Yard and McKinley Junction" from Norfolk & Western (N&W). TRRA "comments" at 6-8, and especially p. 8. TRRA attempts to paint this proceeding as some kind of conspiracy by Madison County Transit (MCT) to acquire a rail corridor into St. Louis for possible future light rail or trail use. To this end, TRRA calls the proceeding "nothing more than a contrivance" in a peroration at p. 6 of its January 20 "petition for reconsideration" (which the City has moved to

strike). TRRA's rhetoric is misleading and irrelevant.

TRRA's claim is misleading in that TRRA appears to acknowledge (see p.. 4 of its "comments") that City of Venice acquired all the interests of Illinois Terminal in rail line in question in 1958. It follows that after 1958, Illinois Terminal no longer owned a right of way over the two miles at issue. Norfolk and Western was the successor to Illinois Terminal. Norfolk and Western could not own more than its predecessor. Since Norfolk and Western owned no rail line between the Branch Street Yard and McKinley Junction, it had no real property interests there to sell or to transfer to MCT or anyone else. Thus, there appears never to have been an "opportunity" (in the sense TRRA implies) for anyone, including MCT, to avail itself at Norfolk and Western for purposes of acquiring the two mile line after 1958. Thus it is hard to see how MCT failed to avail itself of something or otherwise "lapsed" with respect to Norfolk and Western.

More important, TRRA's entire "MCT lapse" argument is irrelevant. If City of Venice has a common carrier obligation as to this line, then this Board has jurisdiction. If this Board has jurisdiction, then MCT's "statement of willingness" is properly before the Board. Certainly the purposes that TRRA ascribes to MCT -- securing a right of way into St. Louis for light rail or trails -- are not incompatible with any applicable federal law. See 16 U.S.C. § 1247(d). Moreover, since TRRA nowhere contends that the property is needed for current rail

use (indeed, TRRA certainly implies the opposite), the relief MCT seeks and to which Venice has assented is fully compatible with federal rail policy in 49 U.S.C. § 10101. Because TRRA conjures up no improper purpose, its rhetoric is irrelevant, unjust, and merits no further response by City of Venice.

In point of fact, City of Venice's motive is two-fold. First, City wishes to abandon any common carrier obligation it has on the line in order to facilitate rehabilitation of the McKinley Bridge. City in good faith believes that there remains a common carrier obligation on the line.

Second, so long as City's interests are protected, City is prepared to assist other government agencies in preserving railroad corridor for continued public use, either as future freight rail lines, as light rail lines, or as trails.

City notes that in the January 20 "petition for reconsideration," TRRA makes repeated claims that the "notice of exemption" contained false and misleading information. Although City reserves the right to respond further on or before the February 9, 2004, due date for its reply, City notes that all TRRA's specific allegations of false or misleading are wrong. For example, TRRA claims that the City did not reveal that Norfolk & Western had abandoned its common carrier obligation over the line (see Petition for Reconsideration at p.2, citing to AB 290 (sub-no. 139X)). But TRRA's claim is false. City attached an entire Exhibit (Exhibit B) to its application discussing why it believed it held a common carrier obligation

on the line. City specifically referenced the Norfolk & Western [AB 290 (sub-no. 139X)] proceeding. Notice, Ex. B, p. 11. City likewise indicated that MCT railbanked the line immediately adjacent to the two-miles at issue here at McKinley Junction. City also referenced the N&W proceeding in City's environmental and historic reports (Exhibits E and F to the City's Notice) and indeed attached the N&W environmental and historic reports, for City acknowledges relying in part upon them or upon comments received in response to them in preparing its own reports.³ Since the City was aware of the proceeding, City disclosed it. City did so not because the earlier proceeding alters the result on the Notice of Exemption here, but in order to avoid exactly the kind of misfired accusation of non-disclosure that TRRA is making anyway.

TRRA should save its false accusations and allegations of improper motives for politics, and stick to facts and law in administrative proceedings.

IV. Response to December 29 TRRA "Comments"

This Board's predecessor (ICC) has emphasized that when a state or local government acquires an operating rail line, it is

³ As noted by Mr. Kahn in footnote 2 of his January 20 "petition," City's counsel served as MCT's counsel in the AB 290 (sub-no. 139X) proceeding. Mr. Kahn is concerned that this notation will be regarded as an "ad hominem" attack on counsel for the City. One supposes by this that Mr. Kahn feels it brings discredit upon the City's counsel. Since it does not, City does not regard it as an "ad hominem" but instead as irrelevant. City is somewhat more concerned about the "ad hominem" nature of other claims by TRRA that the Notice of Exemption contained information that was false or misleading. That is not the case.

presumed to succeed the prior owner in terms of ensuring discharge of the common carrier obligation over the line. See Common Carrier Status of States, 363 I.C.C. 132, 133 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). Indeed, in Southern Pacific Transportation Company-- Abandonment Exemption -- Los Angeles County, CA, AB 12 (Sub-no. 139X), 8 ICC2d 495 (1992), this Board quoted with approval the result in City of Austin, TX -- Acquisition -- Southern Pacific Transportation Company, F.D. 30861(A). served Nov. 4, 1986. There the Commission held that Austin "assumed a common carrier obligation, even though it did not intend to operate the line itself, because by acquiring full ownership of the line it necessarily assumed responsibility for contracting with, and ensuring continued service by, a rail operator." Where the party acquiring ownership of the rail line arranges for an operator, it is sometimes said that the party acquiring ownership has a "residual" common carrier obligation to ensure service in the event the operator (either by lease or agreement) ceases to provide service.⁴ City of Venice unquestionably acquired all the railroad interests in the two mile rail line at question here in 1958. The situation is no different from a situation where a shipper acquires a line and then contracts

⁴ In its "petition for reconsideration," TRRA itself notes cases holding that the lessor of a rail line has been held to have a residual common carrier obligation requiring it to provide service upon termination of a lease. TRRA Jan. 20 Petition at 5, citing Hoboken Railroad, 257 ICC 739, 744 (1944); Livestock Terminal Service Co. Abandonment, 257 ICC 1, 7 (1944).

with the carrier from whom it acquired the line to run it. Both have a common carrier obligation (although one or the other may have grounds to seek an exemption). See Conrail Abandonment in Jeannette, PA, 366 ICC 384, 387 (1982). As the Commission explained in the Conrail case, ordinarily both the non-operating owner and the operator are "common carriers with respect to the line."

ICC's discussion in Onondaga County Industrial Development Agency -- Acquisition and Operation Exemption -- Lines of Consolidated Rail Corporation, F.D. 32287, served July 7, 1994, is also instructive. ICC explained that the transaction there was similar to a "sale and lease back ... where a public agency, in order to preserve rail service, will buy a line from a railroad and either lease it back to the carrier or give the carrier trackage rights over the line." 1994 ICC Lexis 110 at *7. ICC explained, citing Maine DOT, 8 I.C.C.2d 835 (1991) (on which TRRA places its chief reliance), that "in many of these cases the state agency seeks to avoid any common carrier obligation arising out of its acquisition of the rail line." However, despite the fact that Onondaga had granted "exclusive trackage rights to conduct freight operations" back to Conrail, the Commission noted that "[h]ere, Onondaga has assumed the common carrier obligation, thus providing the people who rely on this service another entity -- in this case a local government -- on which they might depend." 1994 ICC Lexis 110 at *7. In other words, when a state or local government acquires an

operating rail line and then leases it back or grants back the freight trackage rights, it may qualify for a finding of no common carrier status, or it may qualify for an exemption from that status. However, if it does not seek such relief, then it assumes a residual common carrier obligation.

If a government entity wishes a determination that it is not assuming "common carrier" status when it acquires rail property, then it is supposed to seek such a determination that the ICC or STB lacks jurisdiction (or will grant an exemption) in advance. ICC and this Board have repeatedly reiterated this requirement, and it is manifest in Maine DOT, on which TRRA relies. City of Venice, after looking into local files, Lexis-Trans, and the STB website, has been unable to locate any proceeding in which it sought a determination that it was not a common carrier despite its acquisition of all Illinois Terminal's rail line in 1958.

In its "comments" at p. 4, TRRA relies on Illinois Term. R.Co., 327 ICC 70 (1958).⁵ In that case, Illinois Terminal sought a determination that the transaction by which it transferred its interests in the two-mile line of railroad at issue here was outside the Commission's jurisdiction. If Illinois Terminal had been granted what it sought, then maybe

⁵ TRRA is correct that the Illinois Terminal Railroad case approved the sale and leaseback transaction. However, although invited to determine that the transaction was non-jurisdictional, the ICC refused, and pointedly asserted that the transaction was jurisdictional. In short, the decision does not stand as a de facto or de jure exemption of the City from rail regulation, much less a determination of no jurisdiction.

TRRA would be correct in its arguments. However, ICC pointedly rejected Illinois Terminal's position. 327 ICC at 71. ICC instead held that due to loss of control over the property by Illinois Terminal, the railroad had to obtain prior approval from ICC before entering into the transaction. 327 ICC at 74-75. ICC viewed the transaction as analogous to a situation in which a railroad abandoned its line in favor of a parallel track over another common carrier. 327 ICC at 74. This language, of course, is most compatible with viewing the City as holding a common carrier obligation (using ICC's analogy, as the common carrier with the parallel track), or at least a residual obligation.

City of Venice was apparently not a party before the Commission in the 1958 proceeding. So far as City is aware, the City neither sought nor was granted an "exemption" from ICC regulatory jurisdiction. It would follow that in acquiring the property, City of Venice also acquired a common carrier obligation, and, as the common carrier owner of a railroad line on which a common carrier operator is providing service, the owner as well as the operator require abandonment authorization. E.g., Conrail Abandonment, supra. Here only the operator (Norfolk & Western, as successor to Illinois Terminal) obtained an abandonment authorization. See AB-290 (Sub-no. 139X), 59 Fed. Reg. 14669 (March 29, 1994). City of Venice is seeking such an authorization through this proceeding.

TRRA's argument then becomes confusing. On the one hand,

TRRA seems to argue that this Board should retroactively overturn the Illinois Terminal decision, and find that the transaction in fact was not within the Commission's jurisdiction. To this end, TRRA argues that commencing with Maine DOT, 8 I.C.C. 2d 835 (1991), this Board has allowed state agencies to acquire railroad rights of way without themselves becoming rail carriers through determinations that the transaction were outside the Board's regulatory jurisdiction. In the Maine DOT decision, ICC noted that jurisdictional determinations of the sort at issue are based on specific facts of a transaction and the agency cautioned that "any similar transactions should ... be submitted ... in advance, together with a copy of the agreement between the railroad and the entity acquiring its right-of-way, for a jurisdictional determination." 8 I.C.C. 2d at 838. On the one hand, TRRA seems to suggest that under Maine DOT and related cases, although ICC asserted jurisdiction over the underlying transaction involved here in 1958, it would not have done so today.

The short answer is that even if TRRA were correct that Maine DOT would govern the 1958 transaction if the 1958 transaction were to have occurred in 2003 or 2004, the events under which City of Venice accrued its obligation occurred in 1958. The City neither sought nor obtained a jurisdictional determination that it had no common carrier obligation at that time. Instead, in 1958, ICC indicated that it viewed the transaction as so impacting the discharge of common carrier

obligations that the transaction clearly fell within the Board's jurisdiction.

Another answer is that even if City of Venice would have qualified for an order relieving it of any common carrier obligation, in the nature of residual or otherwise, City did not seek it. As Onondaga County Industrial Development Agency, supra, indicates, the possibility that the public agency might have successfully sought to avoid common carrier obligations, residual or otherwise, does not mean that it must be deemed to have done so when it has clearly purchased all the rail line in question and has never sought to avoid those obligations.

This Board does not grant abandonment authority retroactively. See Phillips Co. v. Denver and Rio Grande Western RR Co., 97 F.3d 1375, 1377 (10th Cir. 1996). Once the common carrier obligations arose by reason of the transaction in 1958, they cannot be retroactively erased. They may only be discontinued prospectively by authority of this Board, either through an exemption or an abandonment proceeding. Since there is no "exemption" procedure available for parties other than the holders of the common carrier obligation themselves, see Phillips Co. v. Denver and Rio Grande Western RR Co., supra, 97 F.3d at 1378, it follows that if TRRA wishes to secure the abandonment of City of Venice's common carrier obligation, it must follow the procedures for an adverse abandonment

application.⁶

City of Venice acknowledges that in the years since 1958, ICC/STB has adopted regulations as well as issued case law that carve out ways for state and local governments to acquire rail property without also acquiring common carrier obligations. For example, under 49 C.F.R. § 1150.21 ("modified certificates"), ICC adopted a program under which state and local governments can acquire abandoned lines or lines authorized for abandonment, and contract with an to provide rail service. If appropriate procedures are followed, only the operator has a common carrier obligation. But no one argues that this program is applicable here. Similarly, in Maine DOT, on which TRRA does rely, the State agency acquired the underlying rail assets, but the railroad retained a railroad easement. Indeed, in all the cases on which TRRA relies, a railroad appears (a) to have retained or obtained a freight rail easement (generally perpetual),⁷ (b) the parties disavowed any intent to transfer any common carrier obligation to the governmental entity acquiring rail assets,⁸ and/or (c) alternatively the government entity specifically was

⁶ It is rather pointless for TRRA to engage in that task since City of Venice is seeking to accomplish the same end through this Board's fast-track "two year out of service exemption procedure" (49 C.F.R. § 1152.50).

⁷ E.g., Wisconsin DOT -- Petition for Declaratory Order, F.D. 34181, served August 1, 2002; Georgia DOT -- Acquisition Exemption, F.D. 34057, served April 30, 2002.

⁸ E.g., State of Vermont -- Acquisition Exemption, F.D. 33830, served June 8, 2000.

legally barred from assuming any common carrier obligation.⁹ Equally important, in all the cases, the transaction was submitted to ICC or STB for a determination of no jurisdiction in advance. Here, Illinois Terminal did not retain any rail easement, the City bought a rail line and then leased it, and although the railroad (not the City) submitted the transaction to ICC in advance, the agency determined that it very much had jurisdiction and would assert it. ICC did not grant any exemption to anyone from its regulatory jurisdiction, nor determine lack of such jurisdiction in respect to the City. The case at bar is a situation in which a railroad sells a rail line to a third party and leases it back. The third party customarily accrues a common carrier obligation (sometimes called a residual obligation as a lessor) in such cases. E.g., Onondaga County Industrial Development Agency, supra.

In short, assuming arguendo the City under current law might qualify for an "exemption" from common carrier regulation, the City is not seeking same. The City only seeks lawfully to terminate pursuant to 49 C.F.R. § 1152.50 the common carrier obligation it believes it accrued in acquiring the line in 1958.

TRRA seems to suggest that the City cannot employ § 1152.50 because it is only available to railroads. If the City has a common carrier obligation, then it has a right (as a railroad) to terminate that obligation by exemption procedure. This Board

⁹ E.g., North Carolina State Ports Authority--Acquisition Exemption -- North Carolina Ports Railway Authority, F.D. 34258, served Oct. 31, 2002.

in essence allows any party who owns, or acquires, rail property to be a "railroad" for purposes of acquiring or abandoning a common carrier obligation. No special qualification is required. Compare 49 U.S.C. § 10901 (any "person" may acquire a railroad).

Under 49 C.F.R. § 1152.50, the Notice of Exemption may be reopened if it was based on false or misleading information. Perhaps some of TRRA's remarks are aimed at trying to meet that test. But City of Venice submitted no false or misleading information. TRRA's sole claim, in the end, is that City of Venice has no common carrier obligation to abandon. This is a legal issue on which the City has made a good faith determination that, under applicable precedent, it does have an obligation. The City in good faith is attempting to follow procedures to terminate that obligation so that the McKinley Bridge renovation can move forward without hindrance.

City suspects that TRRA's real beef here is Madison County Transit's "statement of willingness" invoking 16 U.S.C. § 1247(d). If this Board issues a Notice of Interim Trail Use pursuant to that "statement," the City expects (as it indicated in its Notice of Exemption, Ex. B, p.12) to convey certain rail property to MCT for interim trail use and possible future rail, including rail passenger, use. As TRRA seems to acknowledge (e.g., in its January 20 "petition" at p. 6), MCT has a program of seeking to preserve rail corridors in Madison County for future rail (including light rail) use, and interim trail use.

But this does not mean that the Board's jurisdiction should be distorted, or its precedent ignored, simply because TRRA claims 3/4 mile of the rail line allegedly as owner of the underlying land and (as putative owner) wishes to secure collapse of the rail corridor. This Board's role in issuing NITU's is ministerial. Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990); South Kansas and Oklahoma RR Co. -- Abandonment Exemption -- in Crawford, et al. Counties, AB 471 (Sub-no. 4X), served June 26, 2003. TRRA's displeasure with a NITU, like the opposition by any other claimant to the underlying fee estate to rail corridor preservation, is not in and of itself grounds either to decline to issue a NITU, or to reject the notice of exemption. Again, the only real issue posed by TRRA is whether or not City has a common carrier obligation as to the two miles of rail line it purchased in 1958. If the City did accrue a common carrier obligation, as City believes it did, then the Notice of Exemption should remain in effect (subject to a later NITU), so that efforts to repair the McKinley Bridge will not be hindered. If the City was disabled from accruing a common carrier obligation, as TRRA contends, then the Notice may be vacated and the proceeding dismissed. There is in no event any reason to "stay" anything, and McKinley Bridge is a major countervailing reason not to do so.

V. Conclusion

TRRA is mistaken in its claim that the City never accrued a common carrier obligation. For this reason, the relief it seeks

in its December 29 "comments" must be denied.

TRRA's January 20 "petition for reconsideration" should be stricken either as a reply to a reply, or as redundant of the December 29 "comments."

If the TRRA January 20 "petition" is not stricken, then City reserves the right to file a further Reply, but regards the relief sought in that petition as identical to the relief sought in TRRA's December 29 comments. Consistent with the arguments above, all relief should be denied TRRA, however it chooses to package its pleadings and however many times it repeats its argument.

Respectfully submitted,



Charles H. Montange
426 NW 162d St.
Seattle, WA 98177
(206) 546-1936
for City of Venice

Certificate of Service

I hereby certify that copies of the foregoing were posted by U.S. Mail, postage pre-paid, first class or equivalent, on 22 January 2004, upon Fritz Kahn, 1920 N Street, NW (8th Fl.), Washington, D.C. 20036-1601 and Rebecca R. Jackson, Bryan Cave LLP, 211 No. Broadway (36th Fl.), St. Louis, MO 63102. The foregoing was also faxed to Mr. Kahn on that date.

