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Before the
SURFACE TRANSPORTATION BOARD



Finance Docket No. 34509

KAW RIVER RAILROAD, INC.-LEASE EXEMPTION-
THE KANSAS CITY SOUTHERN RAILWAY COMPANY

PETITION FOR STAY ^{*/}

ENTERED
Office of Proceedings

MAY 27 2004

Part of
Public Record

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International Brotherhood of
Teamsters

May 27, 2004

*/ Expedited handling is requested, inasmuch as the exemption is filed to become effective, along with changed rail operations, at 12:01 AM, Tuesday, June 1, 2004.

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PETITION FOR STAY

Preliminary Statement

Petitioner, Brotherhood of Locomotive Engineers & Trainmen, a Division of the Rail Conference, International Brotherhood of Teamsters (BLET), petitions the Surface Transportation Board (STB) that it stay the operation of the Notice of Exemption (Notice), filed May 25, 2004, by Kaw River Railroad, Inc. (-KRR), ^{1/} pending disposition of BLET's forthcoming petition to revoke the exemption. BLET intends to file a formal petition to revoke application of the non-carrier line acquisition class exemption within 10 days from action on this petition for stay, assuming prompt response to discovery. 49 CFR §1121.1, et seq. ^{2/}

^{1/}A related filing, Finance Docket No. 34510, Watco Companies, Inc.-Continuance In Control Exemption-Kaw River Railroad, Inc., would become effective only in the event the transaction in the instant Finance Docket No. 34509 should be consummated. BLET does not oppose the transaction in Finance Docket No. 34510, apart from that in Finance Docket No. 34509.

^{2/} BLET is particularly interested in examining the agreements between KRR, KCS, KCT, which have not yet been finalized. (Notice, (c), at 4).

A stay is necessary to prevent irreparable injury to railroad operating employees. A stay will not harm other interests. BLET has a high degree of probable success on the merits, and a stay is in the public interest.

Background

KRR is a newly-formed non-carrier created by Watco to take over an important portion of the switching operations of KCS at Kansas City, MO/KS. Rather than attempt to negotiate under the Railway Labor Act for contracting out the KCS operations to a new Carrier-to-Be for handling KCS's business, KCS has entered to a series of arrangements with KRR to perform the yard and terminal work for KRR. Of course, KRR goes nowhere, and its parent Watco has no other operations in the Kansas City area.

KRR terms its lease with KCS as involving 7.5 miles of KCS trackage, but a greater 10.7 miles of the involved trackage is owned by Kansas City Terminal Railway (KCT), of which 6.2 miles is termed KCT mainline, and 4.5 miles is termed KCT switching trackage.^{3/} Operation by KRR over the KCT switching trackage would be by sublease from KCS's lease with KCT. Operation by KRR over the KCT mainline would be by assignment from KCS's arrangement with KCT; and operation by KRR over the KCT switching trackage would be by sublease from KCS's lease with KCT. (Notice, 3-6).

^{3/} The mileage given in the KRR Notice and accompanying map (Exhibit A) does not include the yard tracks included in the transaction. These yard tracks are the KCT Millstreet Yard, and the KCS Armourdale Yard, and elsewhere.

The map accompanying the verified statement of Samuel W. Parker, Exhibit A (which is taken from the KRR Notice, Exhibit A), indicates the involved trackage.

It is clear that the trackage to be leased, subleased, and operated is switching trackage, and other trackage excepted from STB authority over acquisition or discontinuance. 49 U.S.C. 10906. Indeed, KRR recognizes the fact of switching. (Notice 4,5).

REASONS FOR A STAY

The STB should grant a stay pending disposition of BLET's petition to revoke.

1. High Probability of Success. BLET has a high probability of success on the merits. The non-carrier class exemption is not applicable to excepted trackage, and a "line of railroad" is not here involved. Yard and switching trackage and operations are excepted from STB authorization or discontinuance under 49 U.S.C. 10901. For perhaps the leading case, See: Nicholson v. ICC, 711 F.2d 364 (D.C. Cir. 1983), and decisions cited therein. Cf. Finance Docket No. 34483, SMS Rail Service, Inc.-Petition for Declaratory Order. Since a person does not require authority to lease or otherwise acquire switching trackage, the STB cannot utilize the class exemption to permit acquisition of such trackage.

Moreover, it would be an abuse of the non-carrier line acquisition class exemption to permit a bogus "line of railroad"

classification for the involved trackage. See: V.S. Parker,
Exhibit A. Such trackage is excepted from STB jurisdiction. 49
U.S.C. 10906:

The Board does not have authority under this chapter
over construction, acquisition, operation, abandonment,
or discontinuance of spur, industrial, team, switching,
or side tracks.

KRR clearly recognizes that the purpose of its acquisition
is for switching. (Notice 4, 5). This is not "line of railroad,"
and constitutes an abuse of the class exemption. KRR is to
perform switching, and serving KCS industrial customers in the
stead of KCS.

2. Irreparable Injury. Railroad employees would suffer
irreparable injury if the operation of the Notice is not stayed.
The attached verified statement of Samuel W. Parker shows a job
loss for 14 persons, plus injury to many more through the exer-
cise of seniority. These employees cannot be fully compensated
and the status quo restored if the transaction is not stayed, yet
BLET ultimately prevails..

It is doubtful railroad employees can recover damages for
carrier discontinuance of service ultimately proved unlawful.
See: Railway Labor Executives Ass'n v. Atchison, T. & S.F. Ry.
Co., 430 F.2d 994 (9th Cir. 1970), cert. den. 400 U.S. 1021.

The action of KCS in contracting out work from the KCS/BLET
agreement constitutes a change in the agreement, without follow-
ing the procedures of the Railway Labor Act (RLA). The status quo
must be maintained under the RLA while negotiations are conduct-
ed. The KCS action serves to subvert the RLA. The STB should not

be a party to this process of evading the ordinary process of employee relations.

3. No Adverse Effect on Other Parties. Parties will not be harmed if a stay is entered at this time. KCS has performed operations in this part of the Kansas City terminal for many years. KCS and shippers will not be harmed; nor will other rail carriers, .

4. The Public Interest. The public interest strongly supports a stay. This is not a job loss or dislocation for one or two employees, but would be a major loss of 14 jobs, and the adverse impact upon many more, as demonstrated by Samuel W. Parker.

CONCLUSION

The STB should stay the operation of the Notice of Exemption pending disposition of BLET's forthcoming petition to revoke.

Respectfully submitted,

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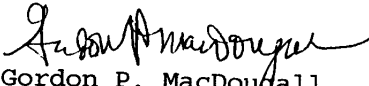
Attorneys for Brotherhood of
Locomotive Engineers & Trainmen,
a Division of the Rail Conference,
International Brotherhood of
Teamsters

May 27, 2004

Certificate of Service

I hereby certify I have served a copy of the foregoing upon
counsel for KRR, by personal service upon Karl Morell, 1455 F
Street, N.W., Washington DC 20005.

Washington DC


Gordon P. MacDougall

VERIFIED STATEMENT
OF SAMUEL W. PARKER

My name is Samuel W. Parker. I am employed by Kansas City Southern Railway Company (KCS) as a locomotive engineer. My seniority with KCS extends from 1977. I serve as General Chairman, on KCS, for Brotherhood of Locomotive Engineers & Trainmen, a Division of the Rail Conference, International Brotherhood of Teamsters. (BLET)

KCS serves the Kansas City area, and switches cars to and from industries over its own trackage, as well as over tracks of the Kansas City Terminal Railroad (KCT), and the tracks of private industries.

My General Committee of Adjustment has jurisdiction over KCS/BLET matters in the Kansas City area. I am familiar with the Notice of Exemption in this proceeding, filed May 25, 2004, and have read the same. I am familiar with the KCS operations in the involved area. Moreover, I am in continual contact with BLET personnel who perform work on the involved trackage.

KCS proposes to contract out certain operations in the Kansas City area as embraced in its Notice. These operations would be transferred to a non-carrier to be named Kaw River Railroad Company, Inc. (KRR), which I am advised is an affiliate of Watco Companies (Watco), based at Pittsburg, Kansas. However, KRR's operations would not connect with the tracks or operations of any other Watco carriers, according to my understanding.

If KRR is permitted to take over the KCS operations, some five(5) regular, and two (2) extra KCS engine assignments would be abolished. These assignments are based at the KCT Millstreet Yard. This yard, and other trackage, are shown in the map attached as Exhibit A to the KRR notice, and I have reproduced the map as Exhibit A to my verified statement.

The KCS job loss would be an estimated 14 engineers and switchmen. In addition to these 14 persons, the adverse impact of the KRR substitution for KCS personnel would not merely be the estimated 14 lost jobs, but by the exercise of seniority, many others would be adversely in the bumping and rolling process. I believe a number of KCS employees would be forced to leave the Kansas City area in order to exercise their seniority.

In the event the transfer should become effective, but at a later date should be found unlawful, the status quo could not be restored. Restoration would be impossible due to the scrambling of positions. Moreover, I know of no provision in our KCS/BLET agreement for damage claims by employees for unlawful carrier discontinuance of service.

The involved trackage is utilized for switching cars to and from industries, sidings, and team tracks. The assignments are in yard service. The trackage does not handle through trains, and interchange is not effected with other carriers on the trackage. The work at Millstreet Yard does include some making up, and receipt of transfer runs, for operation over the KCT trackage termed KCT mainline on Exhibit A, for delivery/receipt with other rail carriers in the Kansas City area.

In my opinion, the KCS plan to contract the work out to a new non-carrier, KRR, would constitute a change in the KCS/BLET collective bargaining agreement.

VERIFICATION

STATE OF LOUISIANA)
COUNTY OF CADDO)

Under the penalties of perjury, I affirm the foregoing verified statement is true and correct as stated.

Dated at
Vivian, LA
May 27, 2004



SAMUEL W. PARKER

