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May 28, 2004

**VIA HAND DELIVERY**

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W., Suite 715  
Washington, DC 20423-0001

ENTERED  
Office of Proceedings

**MAY 28 2004**

Part of  
Public Record

**RE: Finance Docket No. 34509, Kaw River Railroad, Inc. -- Lease  
Exemption – The Kansas City Southern Railway Company**

Dear Secretary Williams:

Attached for filing are the original and ten copies of the Reply To Petition For Stay.

Please time and date stamp the extra copy of the Reply and return it with our messenger.

If you have any questions, please contact me.

Sincerely yours,

Karl Morell

Enclosures

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 34509  
\_\_\_\_\_

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

REPLY TO PETITION FOR STAY  
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Attorney for:  
KAW RIVER RAILROAD, INC.

Dated: May 28, 2004

BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34509

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

REPLY TO PETITION FOR STAY



The Kaw River Railroad, Inc. ("KRR"), hereby replies in opposition to the Petition For Stay ("Petition") filed by the Brotherhood of Locomotive Engineers & Trainmen, a Division of the Rail Conference, International Brotherhood of Teamsters ("BLET") on May 27, 2004. The rail lines KRR seeks to lease and sublease from The Kansas City Southern Railway Company ("KCS") are not excepted trackage under 49 U.S.C. § 10906. Moreover, as BLET readily acknowledges, the operating authority KRR is acquiring by assignment from KCS is over main line tracks owned by the Kansas City Terminal Railway Company ("KCT").<sup>1</sup>

**BACKGROUND**

On May 25, 2004, KRR filed its Notice of Exemption, pursuant to 49 C.F.R. Part 1150, Subpart D—Exempt Transactions, to permit KRR to lease and sublease certain rail lines in the Kansas City, KS and Kansas City, MO area and to obtain operating rights over main line tracks owned by KCT in that same area. The exemption is scheduled to become effective on June 1,

<sup>1</sup> BLET readily acknowledges that KRR is seeking authority to operate over main line tracks: "Operation by KRR over the KCT mainline would be by assignment from KCS's arrangement with KCT...." Petition at 3.

2004. In the Notice of Exemption, KRR explained that it will be utilizing the leased and subleased rail lines “to serve customers and perform switching operations.” Notice at 5.

### **REPLY**

The standards governing disposition of a petition for stay are: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)(“*Petroleum Jobbers*”). It is the movant’s obligation to justify the exercise of such an extraordinary remedy, *Cuomo v. United States Nuclear Regulatory Comm.*, 772 F.2d 972, 978 (D.C. Cir. 1985), and the movant carries the burden of persuasion on each of the four elements required for the extraordinary relief. *Canal Authority of Fla. V. Callaway*, 489 F.2d 567, 573 (5<sup>th</sup> Cir. 1974). As is demonstrated below, BLET has failed to meet its burden under each of the four criteria.

### **BLET Is Not Likely To Prevail On The Merits**

BLET’s sole contention in support of its Petition is that the tracks at issue in this proceeding are switching tracks and, therefore, excepted from the Board’s entry jurisdiction under Section 10906. BLET’s only support for this contention is the assertion that some of the functions KCS now performs on these rail lines are switching operations. Contrary to BLET’s contention, the rail lines being leased and subleased and over which KRR is obtaining operating authority are not subject to the exception set forth in Section 10906. KRR may not lawfully

lease these rail lines and operate over the lines absent prior authorization by the Board under Section 10901.

As pertinent here, Section 10906 sets forth an exception to the Board's jurisdiction under Section 10901 for the operation "of spur, industrial, team, switching, or side tracks." 49 U.S.C. § 10906. In determining whether a particular track segment is excepted from Board jurisdiction pursuant to Section 10906, the courts, the Board and the Board's predecessor, the Interstate Commerce Commission ("ICC"), focused on the intended use of the track and not on the nomenclature used by a party in describing the track or the use of the track by the prior operator. Finance Docket No. 32394, *Brotherhood of Locomotive Engineers v. Union Pacific Railroad Company and Iowa Interstate Railroad* (not printed), served November 6, 1995; *Brotherhood of Locomotive Eng'rs v. STB*, 101 F.3d 718 (D.C. Cir. 1996) ("*BLE v. STB*"); STB Finance Docket No. 33323, *Chicago Rail Link, L.L.C. – Lease and Operation Exemption – Union Pacific Railroad Company* (not printed), served September 2, 1997; *Effingham RR Co. – Pet. For Declaratory Order*, 2 S.T.B. 606 (1997); *United Transportation Union v. STB*, No. 98-1469, slip op. (7<sup>th</sup> Cir. February 25, 1999).

Under the Board's now well established intended use test, the jurisdictional status of leased track is determined, not by its historic character or use, but by the tenant's intended use in the context of the larger purpose and effect of the transaction. In *BLE v. STB*, at 728, the intended use test was affirmed, subject to the qualification that the focus on use must not obscure "the larger purpose and effect of the transaction at issue." KRR will continue to perform certain switching operations on the involved rail lines. KRR, however, will also utilize the involved rail lines to serve new shippers and interchange traffic with three Class I railroads. Thus, the

trackage, in KRR's hands will constitute "an extended or additional railroad line" within Section 10901 and not switching track excepted from the Board's jurisdiction under Section 10906.<sup>2</sup>

In *Texas & Pacific Railway Co. v. Gulf, Colorado & Santa Fe Railway Co.*, 270 U.S. 266, 278 (1926), the Supreme Court looked beyond the immediate use of the trackage and examined the "purpose and effect" of its construction:

"If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad ... although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks."

In its Notice, KRR specifically indicated that one of the uses KRR will make of the rail lines is serving new customers. Notice at 5. The map attached to the Notice identifies some of the new customers KRR will be serving: Procter and Gamble, Meridian Rail, Total Distribution, Ace Pallet, Thomas & Associates Wholesale Lumber, Inland Containers, KC Hardwood, KC Railcar, Colgate Palmolive, Kaw River Shredding, Kansas City Star, Constar Plastics, and Darling. KRR will also work diligently to locate new customers on the involved rail lines. In addition, KRR will be interchanging traffic moving to and from the shippers located on the involved rail lines with KCS, Union Pacific Railroad Company and The Burlington Northern And Santa Fe Railway. Because KRR is able to serve new shippers, KRR's operations over these lines are subject to the Board's jurisdiction under Chapter 109, including the Board's licensing authority in Section 10901. *See BLE v. STB* (If the transaction enables a tenant to reach new customers or territory, the ICC may not decline jurisdiction under Section 10906).

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<sup>2</sup> Although not determinative here, KCS has utilized the involved trackage, at least in part, as "through lines" for line-haul service.

Moreover, KRR is seeking to obtain operating authority over 6.2 miles of main line tracks. KRR will traverse this trackage in order to serve the shippers in the area and to interchange traffic with other carriers. BLET cannot possibly suggest that such use of main line trackage falls within the ambit of Section 10906. *See* Finance Docket No. 32238, *The Atchison, Topeka And Santa Fe Railway Company And Gateway Western Railway Company – Lease Exemptions – Kansas City Terminal Railway Company* (not printed) served April 1, 1994 (Stay denied of the proposed lease of KCT’s main line and connecting tracks by one carrier and the lease of KCT’s switch and yard tracks by another carrier).

BLET’s reliance on *Nicholson v. I.C.C.*, 711 F.2d 364 (D.C. Cir. 1983), *cert denied*, 467 U.S. 1056 (1984) (“*Nicholson*”) is misplaced and its reliance on STB Finance Docket No. 34483, *SMS Rail Service, Inc. – Petition for Declaratory Order* (“*SMS*”) is puzzling. In *Nicholson*, the court affirmed an ICC finding that the yard track at issue was outside of the ICC’s jurisdiction under Section 10901 by virtue of former Section 10907(b), because the yard track was to be used only for storage, switching and classification and because no shippers were located in the vicinity of the yard or would be directly served from the yard. In *SMS*, the Board has not issued any substantive decision.

#### **Denial Of The Stay Will Not Cause BLET Irreparable Harm**

An administrative decision is not ordinarily stayed without an appropriate showing of irreparable harm. *Permian Basin Area Rate Case*, 390 U.S. 747, 777 (1968). BLET has failed to demonstrate that any employee of KCS will suffer irreparable harm in the absence of a stay.

BLET alleges that 14 KCS employees will lose their jobs as a result of this proposed transaction. Foremost, BLET’s allegation is highly speculative. In any event, the allegation, even if accurate, does not rise to the level of sustaining a finding of irreparable harm. The

showing of “mere injuries, however substantial, in terms of money...expended in the absence of a stay” do not constitute irreparable injury because adequate compensatory relief can be had at a later date. *Petroleum Jobbers*, at 925. Neither the Board nor the courts have found economic injuries of this nature to be irreparable because they are compensable through reparations. *See* Finance Docket No. 30965 (Sub-No. 1), *Delaware and Hudson Railway Co. – Lease and Trackage Rights Exemption – Springfield Terminal Railway Company* (not printed), served July 15, 1988. Indeed, the claimed loss of 72 employees was deemed inadequate by the Board to support a showing of irreparable harm. *See* STB Finance Docket No. 33326, *I&M Rail Link, LLC – Acquisition and Operation Exemption – Certain Lines of Soo Line Railroad Company D/B/A Canadian Pacific Railway* (not printed), served April 4, 1997.

#### **A Stay Would Harm Shippers And KRR**

KRR, as a short line operator, intends to improve service to the shippers located on the involved lines. Thus, delaying the implementation of the involved transaction will have a material, adverse effect on the shippers by delaying the benefits they will realize once KRR commences operations on the involved lines. A stay would also produce significant harm to KRR. KRR has already staffed up to commence operations on June 1<sup>st</sup>. Any delay in KRR’s operations will cause KRR to incur significant expenses, result in a loss of business that will be unrecoverable and cause uncertainty among its employees and the shippers located on the involved rail lines.

#### **A Stay Is Not In The Public Interest**

BLET has failed to demonstrate how issuance of a stay would further the public interest. On the other hand, the proposed change in operations is intended to increase the efficiency of rail operations in the area and improve service to the shippers on the involved rail lines. For at least

two decades, the Board and its predecessor have consistently applied the view that the public interest is served by encouraging the formation of short line and regional carriers. Consequently, granting the stay is contrary to the public interest.

#### CONCLUSION

KRR respectfully urges the Board to deny BLET's Petition. The Petition falls woefully short of meeting the criteria for a stay. Because KRR will utilize the involved rail lines to serve numerous new customers and interchange traffic with other railroads, the trackage does not fall within the ambit of Section 10906. Also, BLET has failed to demonstrate irreparable injury or that the public interest supports the stay. Contrary to BLET's contentions, KRR and the shippers located on the involved rail lines will be adversely affected by a stay.

Respectfully submitted,



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Attorney for:  
KAW RIVER RAILROAD, INC.

Dated: May 28, 2004

**CERTIFICATE OF SERVICE**

I hereby certify that on this 28<sup>th</sup> day of May, 2004, I have caused a copy of the foregoing  
Reply to the Petition For Stay to be served on counsel for BLET, via hand delivery.

A handwritten signature in cursive script, reading "Karl Morell", is written over a horizontal line.

Karl Morell