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September 8, 2004

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

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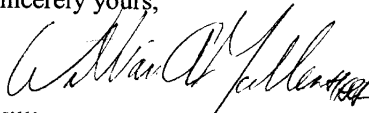
**RE: Kaw River Railroad, Inc.—Acquisition And Operation
Exemption--The Kansas City Southern Railway
Company
Finance Docket No. 34509**

Dear Secretary Williams:

Enclosed please find an original and eleven copies of the Reply of The Kansas City Southern Railway Company to United Transportation Union's Supplemental Petition To Revoke and the Supplemental Petition To Revoke filed by the Brotherhood of Locomotive Engineers & Trainmen. Please acknowledge receipt of this filing by date stamping the eleventh copy of the filing and returning it to the individual making this filing to return to me. A copy of this filing has been served today on all parties of record by hand delivery or other expedited delivery.

Please feel free to contact me if you have any questions.

Sincerely yours,


William A. Mullins

Enclosures

cc: All parties of record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34509

KAW RIVER RAILROAD, INC.



--ACQUISITION AND OPERATION EXEMPTION--

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

**REPLY OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY
TO UNITED TRANSPORTATION UNION'S SUPPLEMENTAL PETITION TO
REVOKE AND TO THE SUPPLEMENTAL PETITION TO REVOKE FILED BY THE
BROTHERHOOD OF LOCOMOTIVE ENGINEERS & TRAINMEN**

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Attorneys for The Kansas City Southern
Railway Company

Dated: September 8, 2004

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34509

KAW RIVER RAILROAD, INC.

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INTRODUCTION AND BACKGROUND

The Kansas City Southern Railway Company ("KCS") hereby replies to United Transportation Union's Supplemental Petition To Revoke ("UTU" or "UTU Supplement") and the Supplemental Petition To Revoke filed by the Brotherhood of Locomotive Engineers & Trainmen ("BLE" or "BLE Supplement"), which were both filed on August 16, 2004. KCS is the lessor of the lines involved in this proceeding. KCS's reply is limited to addressing BLE's erroneous assertion that because the Kaw River Railroad, Inc., ("KRR") transaction resulted in a "loss of 18 jobs" the Rail Transportation Policy requires the exemption to be revoked and the claims that the transaction violates KCS's collective bargaining agreements because KRR is simply the agent of KCS.

ARGUMENT

I. AS A MATTER OF LAW AND FACT, THE EXEMPTION SHOULD NOT BE REVOKED

A. As A Matter Of Law, BLE Has Failed To Establish That The National Rail Transportation Policy Requires The KRR Exemption To Be Revoked

BLE argues that the exemption, which granted KRR authority to lease and operate 7.5 miles of KCS track and to sublease from KCS and operate 4.5 miles of track in Kansas City that is owned by the Kansas City Terminal Railway Company (“KCT”), should be revoked.

According to BLE, the “condition of railroad employees” resulting from a Section 10901 transaction constitutes part of the “public convenience and necessity” test contained at 49 U.S.C. § 10901(c). Therefore, the agency must consider the effect on employees in approving a Section 10901 transaction, even though the agency cannot impose labor protective conditions in such transactions. Based upon this logic, BLE claims that after considering the effects on the employees caused by an exemption from Section 10901, the STB can and should revoke an exemption when there was an undefined impact on the employees. Put simply, BLE is arguing that because some employees in a Section 10901 exempt transaction may be adversely impacted or even lose their jobs, the Board should revoke an exemption. BLE’s arguments should be rejected.

As an initial matter, BLE does not cite to even one case or precedent where the Surface Transportation Board (“STB”) or its predecessor, the Interstate Commerce Commission (“ICC”), revoked an exemption (from the provisions of Section 10901) simply because there was an adverse affect on employees. Indeed, to do so would fly in the face of hundreds of prior cases where the ICC and the STB have allowed non-carriers to acquire existing railroad lines pursuant to an exemption from Section 10901 notwithstanding the fact that such a transaction would result in some employees being adversely affected or losing their jobs. See Class Exemption—Acq. &

Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985), aff'd mem. sub nom. Illinois Commerce Comm'n v. ICC, 817 F.2d 145 (D.C. Cir. 1987) and the hundreds of cases utilizing the class exemption. Likewise, the STB has consistently refused to revoke exemption transactions because some employees were adversely impacted. See GWI Switching Service, L.P.—Operation Exemption—Lines Of Southern Pacific Transportation Company, STB Finance Docket No. 32481 and Genesee And Wyoming Industries, Inc.—Exemption Continuance In Control Of A Nonconnecting Carrier, Finance Docket No. 32482 (STB served Aug. 7, 2001)(STB rejected petitions to reject and revoke a Section 10901 exemption that were filed by BLE and UTU and were based on various theories, including adverse impacts to labor and an assertion that the transaction was really a Section 10906 transaction).

The STB's and ICC's historic, and uniform, refusal to revoke Section 10901 exemptions simply because there was an adverse impact on employees is also entirely consistent with Congressional intent. While the prior version of Section 10901 (prior to the ICC Termination Act of 1995) allowed the ICC to consider employee impacts and to impose labor protective conditions if the ICC deemed it necessary to do so,¹ the existing version does not contain such a provision. Instead, there is absolutely no statutory authority in Section 10901 directing (or even allowing) the STB to provide any protection for employees at all. Indeed, the statute specifically

¹ Like the existing Section 10901, the previous version did not require that the agency revoke an exemption on the basis of adverse employee impacts, but merely allowed the agency to impose labor protective conditions in such transactions if it deemed it necessary to do so. Notwithstanding the ability to impose labor protective conditions in prior Section 10901 transactions, the ICC rarely did so and held that it would only do so in "exceptional circumstances." FRVR Corporation—Exemption Acquisition and Operation—Certain Lines of Chicago and North Western Transportation Co.—Petition for Clarification, Finance Docket No. 31205 (ICC served Jan. 29, 1988), slip op. at 3-4, aff'd sub nom. Railway Labor Executives' Association v. I.C.C., 914 F.2d 276 (D.C. Cir. 1990), cert. denied, 499 U.S. 959 (1991). Here, BLE would go further than simply imposing labor protective conditions, and asks the Board to actually undo the transaction because there may have been some impact on employees. The ICC and STB have consistently rejected such requests in the past and should do so here.

says that a certificate issued under Section 10901 may contain various conditions “*other than labor protection conditions.*” Congress has thus made it clear that this agency is not to impose protections for employees adversely affected by a Section 10901 transaction. See also. Genesee & Wyoming, Inc.—Continuance in Control Exemption—Illinois & Midland Railroad, Inc., STB Finance Docket No. 32863 (STB served Oct. 1, 1997), aff’d per curiam, International Brotherhood of Locomotive Engineers v. STB, 1998 WL 720670 (D.C. Cir. Sept. 14, 1998); and Chicago SouthShore & South Bend Railroad—Operation Exemption—Illinois International Port District, Finance Docket No. 32425 (STB served Apr. 15, 1998), aff’d sub nom. United Transp. Union—Illinois Leg. Board v. STB, 175 F.3d 163 (D.C. Cir. 1999). Revoking an exemption on the basis that some employees were adversely impacted in a Section 10901 exemption would turn this Congressional directive on its head. On the other hand, BLE would have the STB revoke KRR’s exemption because of alleged adverse labor impacts, but Section 10901 argues for the notion that such an exemption not only shouldn’t be revoked, but it should not even be conditioned because of such impacts. BLE’s petition is therefore entirely contrary to STB precedents as well as the provisions of the National Rail Transportation Policy (“RTP”). See e.g., 49 U.S.C. §§ 10101(2)(minimize federal regulatory control), (7)(to reduce regulatory barriers), and 15 (expeditious handling of proceedings).

B. The Facts Do Not Establish That Labor Impacts Were So Severe That Revocation Of The Exemption Is Necessary To Carry Out The RTP

Although it cannot point to a specific statutory provision or case that requires or allows the STB to revoke an exemption solely on the basis of employee impacts caused by the acquisition of a rail line by a non-carrier, BLE nonetheless requests this agency to do so. However, once an exemption has been granted, to revoke that exemption, BLE must prove that the standards of Section 10502(d) have been met. BLE has failed to meet that burden. That

standard allows the agency to revoke the exemption if it determines that application of Section 10901, either in whole or in part, is necessary in order to carry out the RTP. BLE argues that application of the “public convenience and necessity standard” contained in Section 10901 is necessary to carry out the RTP provision concerning wages and safety and suitable working conditions, 49 U.S.C. § 10101(11). However, this argument not only fails as a matter of law, having never been adopted by the STB as a legal basis for revoking an exemption, but it also fails as a matter of fact with respect to this proceeding.

Despite taking discovery and having a significant amount of time to prepare its Supplement, neither UTU’s or BLE’s supplemental pleadings provide any evidence that the transaction resulted in unfair wages, or unsafe or unsuitable working conditions. What evidence BLE does provide is in the form of a verified statement that claims there has been a “severe” impact upon KCS employees, claiming a loss of 18 jobs.

Notwithstanding the fact that the mere loss of employment or a change in working conditions has never formed the legal basis for revoking an exemption from Section 10901, BLE’s comments are also simply inaccurate as a matter of fact. As Kevin D. McIntosh, KCS’s Terminal Superintendent for the Kansas City Terminal explains in the attached Verified Statement (“V.S. McIntosh”), no KCS employee lost their employment with KCS as a result of the transaction. Not one. All of the employees that used to perform the work that is now being done by KRR employees remain employed by KCS, with the exception of one employee who decided to quit the railroad rather than transfer to another job on the KCS. V.S. McIntosh at 2. Furthermore, even after all of the various position changes caused by the transaction occurred and all of the employees had exercised their existing seniority and collective bargaining rights, not one KCS employee lost their job as a result of the transaction. *Id.*

As Mr. McIntosh explains, the confusion lies in the meaning of the word “job.” BLE witnesses Martin and Parker use that word to refer to a specific position or assignment. In that sense, there were 15 “jobs” – assignments – abolished. *But*, the 15 employees whose “jobs” were abolished exercised their seniority to transfer to another job or assignment on the KCS system. While some “bumping” of another person was involved, by the time the “bumping” process took place, not one person involuntarily lost their employment with KCS. V.S. McIntosh at 2. As a result, the KRR transaction resulted in no involuntary workforce reductions. In short, BLE’s witnesses present an inaccurate picture of what actually occurred, as they leave one with the impression that 14 or 18 employees were fired or laid off as a result of the KRR transaction. That did not occur. Accordingly, even if there was legal precedent supporting the revocation of an exemption on the basis that employees were “severely impacted,” which there is not, the Board should not do so here as there is no basis in the record to support the notion that the transaction resulted in unfair wages, or unsafe or unsuitable working conditions, so as to justify application of, rather than exemption from, Section 10901.

II. BECAUSE KRR IS NOT THE AGENT OF KCS, THE TRANSACTION DID NOT VIOLATE KCS’S COLLECTIVE BARGAINING AGREEMENTS

While BLE focuses on labor and other issues, UTU claims that the exemption should be revoked because the transaction was merely a “sham formulated by [KCS] to evade its collective-bargaining agreement obligations.” UTU Supplement at 2. Interestingly, UTU does not assert that the transaction was a sham under the traditional precedents, *i.e.* KRR is really the alter ego of its parent or is a carrier masquerading as a noncarrier, but instead, UTU asserts that that it was a sham because KRR is really just KCS. According to UTU, KCS is basically controlling KRR’s operations and is managing and supervising KRR. Likewise, BLE’s witness

Rogers specifically calls KRR the "agent" of KCS. BLE Supplement, V.S. Rogers at 2.

However, KCS does not own, control, supervise, direct, or otherwise treat KRR as its "agent."

To be an "agent" for KCS, KRR would have to be authorized to actually act on KCS's behalf to "bring about, modify, affect, accept performance of, or terminate contractual obligations" between KCS and third parties. See BLACK'S LAW DICTIONARY 59 (5th ed. 1979). Neither UTU nor BLE makes an attempt to establish facts that would satisfy this definition.

While there is a close working relationship between KCS and KRR, such a relationship does not rise to the level of KRR being KCS's agent. Indeed, as Mr. McIntosh explains, KRR is not subject to KCS's direct supervision. KRR has its own management, employees and locomotives. They have their own work rules, and their employees do not report to Mr. McIntosh. V.S. McIntosh at 3. KRR makes its own work assignments and KCS does not tell KRR when to originate, terminate, or switch traffic. KRR simply brings traffic to KCS for interchange and KCS takes it the same as it does for other carriers. *Id.* Likewise, KCS has no ownership interest in KRR or any of its affiliated companies and is not responsible for the profit or loss of KRR's operations. KRR is simply a new independent company, formed by (and entirely owned by) a third party, providing service to shippers that it has never served before, over a line that it leases. It is not the "agent" of KCS.

In fact, despite the various contractual relationships between the parties, the interaction between KCS and KRR is basically no different than KCS's interactions with other connecting shortlines. It is entirely common for Class I carriers who are spinning off branch lines and other operations to provide the buyers, who are often times start-up companies, with accounting, billing, and car repair, such as KCS does here, but doing so does not mean that the buyer is not a legitimate company or becomes the agent of the seller. There is simply no basis in law or in STB precedent to hold that providing such services means that the buyer is simply the "agent" of the

seller so as to eviscerate the need to obtain Section 10901 authority, or an exemption from that section.

Furthermore, because KRR is not affiliated with KCS, owned by KCS, controlled by KCS, supervised by KCS, and is not KCS's agent, it was not unlawful for KCS, under its collective bargaining agreements, to lease its tracks to KRR and to likewise assign its lease of the KCT operations in a Section 10901 exempt transaction. Both the UTU and the BLE collective bargaining agreements provide that KCS can undertake Section 10901 transactions (or exemptions) and that doing so "*fulfill[s] all of the parties' bargaining obligations that may exist under any applicable statute, agreement or other authority with respect to such transaction,* and shall also be deemed to satisfy the standards for the protection of the interests of employees who may be affected by such a transaction described in [former] 49 U.S.C. 10901(e)." See e.g. Section 3 of Article VII of the May 31, 1996 BLE national labor agreement (emphasis added). Therefore, KCS was fully within its rights to proceed with the transaction without separate bargaining, and proceeding with the transaction was not a change in or a violation of its collective bargaining agreements.²

CONCLUSION

Although taking different approaches, both BLE and UTU have requested that the exemption that allowed KRR to lease and operate KCS's tracks and to also take assignment of KCS's lease and operations of KCT's tracks be revoked. One of the arguments asserted is that

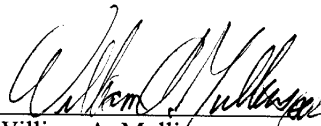
² Although UTU claims the transaction was a sham done to avoid KCS's responsibilities under its collective bargaining agreements, it is not entirely clear whether or not it bases its argument solely on the "agency" theory or also on the notion that the transaction does not qualify under Section 10901. On the other hand, BLE clearly claims the transaction does not qualify under Section 10901 because the transaction, at a minimum, should be considered a Section 10906 transaction. Even if the transaction were a Section 10906 transaction, which it is not, KCS does not concede that the transaction would constitute a violation of its collective bargaining agreements and nothing herein should be construed to hold otherwise.

the transaction cannot qualify as a Section 10901 exempt transaction because KRR is simply the agent of KCS and, accordingly, KCS did not have the right, under its collective bargaining agreements, to undertake the transaction. Such an argument is false. KRR is not the agent of KCS.

Likewise, BLE, though not UTU, asserts that the exemption should be revoked because of alleged "severe" impacts on KCS employees. Such an argument cannot form a legal basis for revoking an exemption. Even if it did, there were no KCS employees who lost their employment with KCS as a result of the transaction. As such, BLE's argument should be rejected.

The KRR transaction is similar, if not identical, to the hundreds of other Section 10901 transactions previously exempted by this Board. As such, the transaction fits squarely within established precedent. To revoke the exemption based upon the false assertions set forth by UTU and BLE would be contrary to both STB policy and precedent. UTU's and BLE's request for relief should be denied.

Respectfully submitted,



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Attorneys for The Kansas City Southern
Railway Company

Dated: September 8, 2004

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34509

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

VERIFIED STATEMENT OF KEVIN D. McINTOSH

My name is Kevin D. McIntosh, and I am employed by The Kansas City Southern Railway Company ("KCS") as the Terminal Superintendent for the Kansas City Terminal. In that capacity, I have direct responsibility for the management and supervision of train operations and personnel in the Kansas City Terminal including, prior to the lease transaction to Kaw River Railroad, Inc. ("Kaw River"), KCS's operations over the Kansas City Terminal ("KCT"), the KCT switching operations, and Mill Street Yard. I am familiar with the transaction which is the subject of this proceeding and the impacts of the transaction on the KCS employees. I was directly responsible for implementation of the changes in KCS's workforce that occurred as a result of the Kaw River transaction. I have read the Verified Statements of Mr. William J. Martin ("V.S. Martin"), Mr. Samuel W. Parker ("V.S. Parker") and Mr. Kenneth M. Rogers that were submitted as part of the Brotherhood of Locomotive Engineers and Trainmen's ("BLE's") supplement to their Petition to Revoke ("Petition"). The purpose of my statement is twofold – (1) to explain why BLE's Petition and the witness statements do not present an accurate statement of the changes in KCS's workforce that occurred as a result of the transaction, and (2) to briefly explain why Kaw River is not the agent of KCS.

The statements by the BLE witnesses present an inaccurate picture of the workforce impacts that actually occurred as a result of the Kaw River transaction. The statement made by Mr. Martin that “18 KCS operating (engineers and switchman) jobs have been lost due to the KRR takeover,” V.S Martin at 2, is simply wrong. Likewise, the original verified statement by Mr. Parker that projected the KCS job loss at 14, V.S. Parker at 2, was also wrong.

No KCS employee lost their job as a result of the Kaw River transaction, not one. All of the employees that used to perform the work that is now done by Kaw River remain employed by KCS, with the exception of one employee who decided to quit the railroad rather than transfer to another job on the KCS. Furthermore, the “bumping process”¹ by KCS employees who performed the work now being done by Kaw River did not result in any other KCS employee somewhere down the line losing their job. There simply has been no net loss of any KCS employee as a result of the transaction.

The confusion lies in the meaning of the word “job.” Mr. Martin and Mr. Parker use that word to refer to a specific position, doing a specific task at a specific time; in other words, a particular job assignment or task. In that sense, there were 15 “jobs” – assignments – abolished. *But*, the 15 employees whose “jobs” were abolished exercised their seniority to transfer to another job or assignment on the KCS system. While some “bumping” of another person was involved, not one person involuntarily lost their employment with KCS. As a result, no one lost their job (as that term is used in the normal sense) because of the Kaw River lease. In short, Mr. Martin’s and Mr. Parker’s verified statements present an inaccurate picture of what actually

¹ I use this term to refer to the exercise of seniority by KCS employees to transfer from their previous assignment to another KCS assignment elsewhere on the system.

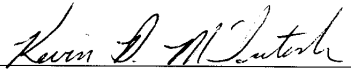
occurred, as they leave one with the impression that 14 or 18 employees were fired or laid off as a result of the Kaw River lease. Quite the opposite is true.

I would also like to briefly discuss the allegation that Kaw River is simply acting as the agent of KCS. As I understand the term "agent," I have always thought that meant that the person may not actually be your employee but they would act like one of our employees. They would be under your direct supervision and perform any tasks upon your direction and order. BLE's witnesses make the argument that Kaw River is simply acting as KCS's agent. This is not the case.

Although Kaw River and KCS have certain contractual arrangements governing that relationship, Kaw River is a separate company not subject to KCS's direct supervision. Kaw River owns, via the lease arrangement, a property interest in the KCS and KCT tracks. They do not simply work over KCS property. Kaw River has its own management, employees, locomotives and cars. They have their own work rules, and their employees do not report to me or according to my direction. I, nor anyone else at KCS, have direct supervision over Kaw River and its operations. I make no work assignments nor do I tell them when to originate, terminate, or switch traffic. They bring traffic to us for interchange and we take it the same as we do for other carriers. Kaw River is clearly a separate company. They can run their operation as they see fit. I do not see how this makes Kaw River the agent of KCS, as I have always understood the meaning of that word.

VERIFICATION

I, Kevin D. McIntosh, verify under penalty of perjury that I have read the foregoing statement and that it is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

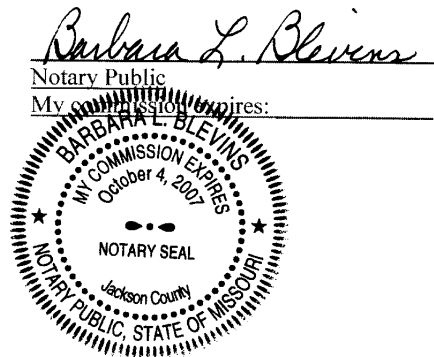

Kevin D. McIntosh

Dated this 3rd day of September, 2004.

STATE OF MISSOURI)
COUNTY OF JACKSON)

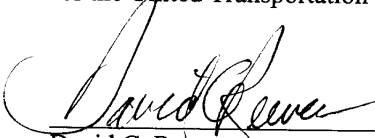
I, the undersigned authority, a Notary Public in and for the State of Missouri, do hereby certify that Kevin D. McIntosh, whose name as Terminal Superintendent for The Kansas City Southern Railway Company, is signed to the foregoing document, and who is known to me, acknowledged before me on this day that, being informed of the contents of said instrument, he, as such officer and with full authority, executed the same voluntarily for and as the act of said corporation on this day.

Given under my hand and official seal this 3rd day of September, 2004.



CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2004, I have caused a copy of the foregoing Reply Of The Kansas City Southern Railway Company To United Transportation Union's Supplemental Petition To Revoke And To The Supplemental Petition To Revoke Filed By The Brotherhood Of Locomotive Engineers & Trainmen to be served on counsel for the Brotherhood of Locomotive Engineers & Trainmen, a Division of the Rail Conference, International Brotherhood of Teamsters and counsel for KAW River Railroad, Inc., via hand delivery or other same-day delivery, and on counsel for the United Transportation Union by overnight service.



David C. Reeves