

ORIGINAL

212090

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34509

KAW RIVER RAILROAD, INC.
-ACQUISITION AND OPERATION EXEMPTION-
THE KANSAS CITY SOUTHERN RAILWAY COMPANY

PETITION FOR LEAVE TO INTRODUCE ADDITIONAL
EVIDENCE, FOR HEARING TO EXAMINE WITNESS
OR TO STRIKE STATEMENT, AND FOR ORAL HEARING

ENTERED
Office of Proceedings

SEP 29 2004

SEP 28 2004
RECEIVED

HAROLD A. ROSS
General Counsel
1548 Standard Building
Cleveland OH 44113

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

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

Due Date: September 28, 2004

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34509

KAW RIVER RAILROAD, INC.
-ACQUISITION AND OPERATION EXEMPTION-
THE KANSAS CITY SOUTHERN RAILWAY COMPANY

PETITION FOR LEAVE TO INTRODUCE ADDITIONAL
EVIDENCE, FOR HEARING TO EXAMINE WITNESS
OR TO STRIKE STATEMENT, AND FOR ORAL ARGUMENT

Preliminary Statement

Petitioner, Brotherhood of Locomotive Engineers & Trainmen, a Division of the Rail Conference, International Brotherhood of Teamsters (BLET), petitions the Surface Transportation Board (Board) for (1) Leave to Introduce Additional Evidence, (2) Hearing to examine witness or to strike his statement, and (3) oral argument before the Board.

I. Additional Evidence. The Board should receive the attached Supplemental Verified Statement of William J. Martin. The information to be adduced was not available at the time of his initial verified statement, dated August 2, 2004; the information is relevant to issues of (a) employee impact, (b) equipment of Kaw River Railroad, Inc. (KRR), and (c) so-called KRR "new shippers" at Kansas City.

II. Witness Examination The KRR submission, filed September 8, 2004, contains the verification of Arthur E. McKechnie II, who claims to know the facts stated therein. However, BLET does not understand the KRR's official (Asst. Secretary) to be familiar with railroad operations at the Kansas City Terminal. BLET desires to examine Mr. McKechnie on the following subjects, and suggest that his statement be stricken in the absence of examination:

A. F.D. No. 32238, AT&SF & GWRW-Lease Exemption-KCT. The KRR's verification purports to describe the former ICC's decision in F.D. No. 32238, The Atchison, Topeka and Santa Fe Railway Company and Gateway Western Railway Company--Lease Exemption--Kansas City Terminal Railway Company(served Feb. 24, 1994) (ATSF-GWRW/KCT), as involving a sublease of a portion of that same trackage by KRR, and in which the ICC purportedly found the trackage not to constitute excepted trackage under 49 CFR 10906. (KRR Reply, 9/8/04, 6-7).

We dispute Mr. McKechnie's conclusions on the character of this trackage. The decision in ATSF-GWRW/KCT is attached hereto. The ICC found the tracks did not qualify for the "joint use" exception for switching trackage, so that the lease was subject to 49 U.S.C. 11323.^{1/} .

The apparent confusion by KRR is with respect to the two sentences of §10906(a)--the first dealing with arrangements between carriers for the joint use of switching tracks--and the second sentence dealing with the general rule of excepted track

^{1/} Although KRR captioned its notice of exemption as a "Lease," the Board changed it to "Acquire and Operate." Nevertheless, KRR unlike KCS, continues to caption its pleadings as "Lease."

jurisdiction. In ATSF-GWWR/KCT, the ICC's finding that the trackage was switching track subject to its jurisdiction, under 49 U.S.C. 11323 or exemption therefrom, was an acknowledgement that the tracks are otherwise excepted trackage. KRR invoked the non-carrier acquisition class exemption to acquire the involved trackage; as such, it did not invoke the carrier provisions of §10906(a)-first sentence.

Thus, contrary to KRR's official, the ICC's decision in ATSF-GWWR/KCT strongly supports BLET's view that the trackage is excepted switching trackage, and not subject to STB acquisition jurisdiction.

B. "New Shippers." BLET desires to examine Mr. McKechnie on his claim that KRR has attracted two "new shippers." (KRR Reply, 9/8/04, 8, 10-11). We dispute this claim. See: Supp. V.S. of William J. Martin, attached.

C. Local Customers and Bridge Carrier. BLET desires to examine Mr. McKechnie on his claim for "local customers" and KRR's role as a bridge carrier between local customers on KRR's line and three of the Class I carriers that operate in the area. (KRR Reply, 9/8/04, 8, 10). It is our understanding that KRR has no local customers, and that any "bridge" movements are for the account of KCS.

As mentioned in the BLET Supp. Pet. to Revoke, KRR does not hold itself out to the public as a carrier; indeed, KRR is not listed in the OPSL tariff. (BLET Supp. Pet., 8/16/04, 14-15). In short, KRR does not meet the requirements for entitlement to an agency franchise as a common carrier. Cf. F.D. No. 34486, Ohio Valley Railroad Company-Acquisition and Operation Exemption-

Harwood Properties, Inc. (served Sept. 28, 2004) (Evansville).^{2/}

III. Oral Argument. This proceeding is of exceptional importance to the railroad industry, shippers, and railroad employees. This is the first known attempt by a major carrier to "contract out" a major freight yard in a major metropolitan area. Moreover, Kansas City is a key gateway for railroad traffic.

Oral argument would be especially appropriate. Each of the two major operating unions are represented, along with a major class I carrier and a major short-line operator (through Watco Companies). Of course, other interests might be invited to participate.

Oral argument would be timely, inasmuch as the apparent goal of some is to extend the non-carrier acquisition class exemption for the spin-off of lines of railroad, so as to embrace the traditionally excepted yard and switching trackage. The line of railroad class exemption, 49 CFR 1150.31, was established in a rulemaking proceeding. Class Exemption-Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985). The yard and switching track exemption has come about in disorderly fragments, where the agency decisions have wrestled with labeling switching track to be "line of railroad" and "entire line" such as to become farcical. It renders mockery of Justice Brandeis opinion in Texas & P.C. Ry.Co. v. Gulf, Colo. & S.F. Ry., 270 U.S. 266 (1926).

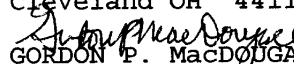
^{2/}Moreover, it is doubtful whether KCS would give KRR a free hand to solicit KCS customers for interchange with other carriers at Kansas City, so as to short-haul KCS. In cases such as Effingham, Bulkmat-ic, and other examples, the newly-created carrier was listed in OPSE, but usually was able to effectively interchange with one carrier, without special considerations. Here, KRR is not published or mentioned in the standard railroad guides.

The case-by-case approach, said to have begun with the unreported Effingham decision, and followed by others, most recently mentioned in Evansville, supra, strongly support oral argument, in the hope of limiting the case-by-case approach with its attendant expense of money and time. Of course, BLET hopes to confine the traditional yard and switching exception to its proper boundaries. One result of the spread of this unwarranted extension of the noncarrier acquisition class exemption has been to poison stable labor management relations, a situation which recently threatened consequences at the very Kansas City facilities herein.

CONCLUSION

The Board should grant leave for the introduction of additional evidence, hold a hearing to allow examination of KRR witness (or strike the statement in its entirety), and assign the proceeding for oral argument.

Respectfully submitted,

HAROLD A. ROSS
General Counsel
1548 Standard Building
Cleveland OH 44113

GORDON P. MACDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

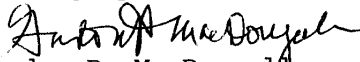
Attorneys for Brotherhood of
Locomotive Engineers & Trainmen,
a Division of the Rail Conference,
International Brotherhood of
Teamsters.

September 28, 2004

Certificate of Service

I hereby certify I have served a copy of the foregoing upon
all parties of record by first class mail postage-prepaid.

Washington DC


Gordon P. MacDougall

EC

SERVICE DATE

FEB 24 1994

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 32238

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY AND
GATEWAY WESTERN RAILWAY COMPANY--LEASE EXEMPTION--
KANSAS CITY TERMINAL RAILWAY COMPANY

Decided: February 17, 1994

By joint petition filed January 29, 1993, Kansas City Terminal Railway Company (KCT), The Atchison, Topeka and Santa Fe Railway Company (ATSF), and Gateway Western Railway Company (GWR) seek an exemption under 49 U.S.C. 10505 from the prior approval requirements of 49 U.S.C. 11343-45 for: (1) ATSF to lease 41.62 miles of KCT's main line and connecting tracks (Joint Tracks); and (2) GWR to lease 25.68 miles of KCT's switch and yard tracks (Switch Tracks). The lines are located within the Kansas City, MO-Kansas City, KS terminal. The Railway Labor Executives' Association, Transportation Communications International Union and United Transportation Union filed comments on behalf of employees.¹

According to the petition, KCT was organized in 1906 by the trunk-line railroads serving the Kansas City area. In 1909, KCT and its owners² entered into an operating agreement under which KCT: (1) constructed the Kansas City, MO, Union Station and certain tracks connecting the station and KCT's other railroad facilities with its owners' tracks; (2) permitted its owners to use the Joint Tracks; and (3) provided switching service and other terminal railroad services for freight and passenger operations of its owners. In addition, National Railroad Passenger Corporation (Amtrak) uses KCT tracks for access to its own tracks and station facilities.

Petitioners indicate that KCT's operations have declined in recent years due to the transfer of passenger traffic to Amtrak, the closing of Union Station, and the decrease of freight switching for shippers and consignees on the Switch Tracks. At present, KCT's operations are confined to maintaining track, signaling and dispatching trains over the Joint Tracks, and to providing limited switching service. The petitioners indicate that KCT proposes to lower its maintenance and operating costs and eliminate overhead expenses by restructuring its operations and corporate organization.

¹ On May 14, 1993, The Brotherhood of Maintenance of Way Employees, Brotherhood of Railroad Signalmen, and Sheet Metal Workers International Association (Unions) jointly filed objections to the exemption request alleging that labor protection conditions proposed by petitioners were inadequate. On January 31, 1994, however, the Unions withdrew their objections to the exemption after reaching agreements with the carriers that ameliorate their concerns and accepted labor conditions proposed by the carriers.

² KCT's current owners are: Union Pacific Railroad Company (one-fourth); Burlington Northern, Inc. (one-sixth); and ATSF, GWR, Southern Pacific Transportation Company; Kansas City Southern Railway Company; Norfolk Southern Railway Company; Chicago North Western Transportation Company; and Soo Line Railroad Company (one-twelfth each).

As part of the restructuring, KCT's owners were requested to submit bids to lease the Joint Tracks and Switch Tracks. After meetings held under auspices of the Federal Railroad Administration pursuant to 49 U.S.C. 333(d),³ KCT accepted ATSF's proposal to lease the Joint Tracks and GWR's proposal to lease the Switch Tracks. After restructuring, KCT will continue to provide train dispatching service, thus insuring that all users will have access to lines within the terminal.

ATSF's lease of the Joint Tracks requires it to maintain the tracks and improve the lines as specified by KCT. According to petitioners, ATSF will maintain the lines at lower cost and greater efficiency than KCT. The parties estimate that the lease will achieve savings of over \$1.2 million during the first 6 years. Allegedly, the lease will not change operations in the Kansas City terminal other than to improve track conditions and reduce expenses. The lease also reserves the existing operating rights of all other users over the tracks.

GWR's lease of the Switch Tracks requires it to perform reciprocal switching service at lower costs than KCT's present rates. For example, KCT's rate for reciprocal switching to or from Armco Steel/International Mill is \$300 per loaded car; GWR will charge \$200 per loaded car. For other industries, KCT currently charges \$300 per loaded car for reciprocal switching; GWR will charge \$225 per loaded car. For intraplant switching, KCT currently charges \$300 per car; GWR will charge \$275 per car. According to the parties, the GWR lease will have no effect on railroad operations. GWR has agreed to provide the same switching service currently performed by KCT, without discrimination, to maintain all of covered KCT's switching and yard tracks at their current maintenance levels, and to make upgrades when requested by KCT.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 11343(a)(2), prior approval by the Commission is required for a rail carrier to lease the property of another rail carrier.⁴ Under 49 U.S.C. 10505, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny of the proposed leases under 49 U.S.C. 11343-11345 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of considering these transactions, an exemption will expedite regulatory decisions and reduce barriers to entry and exit [49 U.S.C. 10101a(2) and (7)], and foster sound economic conditions and encourage efficient management [49 U.S.C. 10101a(3), (5) and (10)]. In addition, the transaction will ensure continued efficient operation of carriers using the Kansas City terminal, enhancing a sound transportation system with effective competition [49 U.S.C. 10101a(4)]. Other aspects of the rail

³ This provision authorizes the Secretary of Transportation to develop and plan various types of coordination projects among railroads including joint use of tracks.

⁴ We have also considered qua sponte whether the proposed lease of the Switch Tracks is subject to our jurisdiction. We have determined that the transaction does not fall within the joint use exception of 49 U.S.C. 10907(a) and hence is subject to our jurisdiction.

transportation policy are not affected adversely. For example, competition will be preserved by ensuring that a sound rail system continues to meet public needs and that unnecessary regulatory expenses are avoided.

The transaction is limited in scope. The transaction involves ATSF's lease of a total of 41.62 miles of Joint Tracks and GWR's lease of a total of 25.68 miles of Switch Tracks within the Kansas City terminal. The proposal involves only a change in operators; existing service and operations will not change.

Regulation is not needed to protect shippers from the abuse of market power. There is little prospect that these leases could result in market abuse stemming from lost or diminished competition. Rather, shippers would benefit by the lower switching charges of GWR and the improved and lower maintenance cost under ATSF's lease.

Employee protection. Under 49 U.S.C. 10505(g)(2), we may not use our exemption authority to relieve carriers of their statutory obligation to protect the interest of employees. Petitioners do not object to the imposition of the conditions set forth in Mendocino Coast Ry.--Lease and Operate, 354 I.C.C. 732 (1978) and 360 I.C.C. 653 (1980). These conditions are ordinarily imposed in lease transactions.

This transaction does not involve a change in carrier operations and will have no effect on historic properties. Therefore, it is exempt from environmental reporting requirements under 49 CFR 1105.6(c)(2)(i) and from historic reporting requirements under 49 CFR 1105.8(b)(1).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. 10505, we exempt from the requirements of 49 U.S.C. 11343-11345 the lease by ATSF and GWR of the above-described lines subject to the employee protection conditions in Mendocino Coast Ry.--Lease and Operate, 354 I.C.C. 732 (1978) and 360 I.C.C. 653 (1980).

2. Notice will be published in the Federal Register on March 27, 1994.

3. This exemption is effective March 27, 1994.

4. Petitions for stay must be filed by March 7, 1994. Petitions to reopen must be filed by March 17, 1994.

By the Commission, Chairman McDonald, Vice Chairman Phillips, Commissioners Simmons and Philbin.

(SEAL)

Sidney L. Strickland, Jr.
Secretary

SUPPLEMENTAL VERIFIED
STATEMENT OF WILLIAM J. MARTIN

My name is William J. Martin. I am the same person of same name that submitted a verified statement in this proceeding, dated August 2, 2004.

I have read the submissions, filed September 8, 2004, by Kansas City Southern Railway Company (KCS), and by Kaw River Railroad, Inc. (KRR).

Certain events have occurred since my August 2 statement. On September 7, the switchmen's extra board was cut again, with four furloughs; on September 9, the board was cut again, with three furloughs. The involved individuals were M. Adams, G. Ogle, B. Werling, N. Smith, W.L. Jackson, J.A. Wallace, and D.M. Coleman. Of these seven, two went to the GWWR Road, and the remaining were reactivated on the KC yard extra board.

These displacements of switchmen resulted from the exercise of seniority as described in my August 2 verified statement; that is, engineers displace switchmen who, in turn, affect the extra board and/or result in displacements outside the KC terminal. The result is a loss in employment, displacement to less desirable work at perhaps less desirable locations, and reduced earnings for those remaining on the KCS payroll. Of course, merely adding persons to an extra board does not create more work; it serves to spread the available work and earnings for those on the board.

KCS employees consider the KRR work to be our work. Although KRR may lease locomotives outside the KCS fleet, I am unaware of any freight car equipment owned or leased by KRR, since my August

2 statement, contrary to the apparent view of KCS Terminal Superintendent McIntosh, at p. 3.

KRR asserts that KRR has been successful in attracting two new customers, which were not formerly served by KCS, naming Express Sand & Gravel, at the 12th Street Yard (KRR Reply, 9/8/04, 10, 11); and DaVinci Roofing Materials, which I understand is the old XL2 (KCS customer) spot next to Colgate in KCS Armordale Yard. (KRR Reply, 9/8/04, 11).

The Express Sand & Gravel customer is not a KRR customer. Rather, it is a KCS customer, and was the subject of the attached August 3, 2004 press release issued by KCS, not KRR.

The DaVinci customer is simply the replacement of one KCS customer for another KCS customer at the same location.

VERIFICATION

STATE OF KANSAS)
COUNTY OF WYANDOTTE)

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

/s/ William J. Martin

WILLIAM J. MARTIN

Dated at
Lenexa, KS
September 28, 2004



New TransLoad Center opens in downtown Kansas City, Mo.

On July 27th, the first car was unloaded at a new KCS served TransLoad Center (TLC) at 12th Street in downtown Kansas City, Mo. Express Sand and Gravel is operating the TLC that currently handles lime with three acres of outside storage, 30 car spots and an undercar conveyor that is used to unload lime. A truck scale will be added by the end of the year.

"We anticipate this TLC to handle 200 cars in its first year and project that will double within the next two years," said Rich Weigel, assistant vice president transload operations. "At this time, we're looking for other building materials-related customers for the facility."