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October 18, 2004

VIA HAND DELIVERY

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

Office of the Secretary

October 18, 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 Leave To introduce Additional Evidence, For Hearing To Examine Witness Or To Strike Statement, And For Oral Hearing.

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

ORIGINAL

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

UNITED STATES DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20590
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Attorney for:
KAW RIVER RAILROAD, INC.

Dated: October 18, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34509

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--LEASE EXEMPTION--
THE KANSAS CITY SOUTHERN RAILWAY COMPANY



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

The Kaw River Railroad, Inc. ("KRR"), hereby replies in opposition to the Petition For Leave To Introduce Additional Evidence, For Hearing To Examine Witness Or To Strike Statement, And For Oral Hearing (the "Petition") filed by the Brotherhood of Locomotive Engineers & Trainmen, a Division of the Rail Conference, International Brotherhood of Teamsters ("BLET") on September 28, 2004.¹

REPLY

KRR has no objection to BLET's attempt to update the Board on the employee impact of KRR's lease and operation of the rail lines in Kansas City, KS and Kansas City, MO. KRR objects, however, to the so-called new evidence regarding KRR equipment and the new shippers on the rail lines served by KRR on grounds that the former is irrelevant and the latter is erroneous. BLET is correct in noting that KRR currently does not utilize its own cars in serving the customers on the leased lines. Some of the customers on these lines have their own private

¹ On October 13, 2004, United Transportation Union filed a letter in support of BLET's request to hold oral hearing and oral argument.

cars and for the other customers KRR utilizes cars owned or leased by Kansas City Southern Railway Company (“KCS”), The Burlington Northern And Santa Fe Railway Company, and the Union Pacific Railroad Company. The fact that KRR currently does not own or lease any rail cars is irrelevant to the issues raised by BLET in this proceeding. Most shortline railroads own few, if any, rail cars and, like KRR, rely on their Class I connections to supply the needed cars.

BLET erroneously claims that the two new customers identified by KRR in its Reply are actually customers of KCS and not KRR. One of these customers, Express Sand & Gravel, located along the leased rail lines about a year before KRR commenced operations. Express Sand & Gravel, however, never utilized rail service while KCS was the operator of the leased lines and it was KRR, and KRR’s superior service, that convinced that customer to switch to rail. DaVinci Roofing recently located in warehouse space along the leased lines. While that space may at one time have been occupied by a former KCS customer, the space had been vacant for years. In any event, DaVinci was planning on using motor carrier service until KRR convinced that company to utilize rail. KRR considers these two companies to be new customers, in the sense that they are new to rail service, and KRR’s customers, because it was KRR that attracted them to rail service and it is KRR that directly serves them.

KRR strenuously objects to BLET’s request to examine Arthur E. McKechnie III, the individual that verified KRR’s Reply filing in this proceeding. In support of its request, BLET claims that KRR’s interpretation of the cited decision in Finance Docket No. 32238 is erroneous. Mr. McKechnie verified the factual assertions in KRR’s Reply and not the legal arguments. In any event, the Board is vastly more capable of interpreting a decision of its predecessor than is Mr. McKechnie. BLET also disputes the factual assertions in KRR’s Reply regarding the two new customers and other local customers now directly served by KRR. Under the Board’s Rules

of Practice, oral hearing will only be granted if material facts are in dispute that cannot be properly resolved under modified procedure. 49 C.F.R. § 1112.10. The alleged disputes cited by BLET clearly do not rise to a level warranting an oral hearing. *See Freightliner Corp. & Mercedes-Benz Truck Co. – Rates*, 9 I.C.C.2d 1031, 1033 (1993). BLET raises the same or similar issues here as have been raised in countless rail line sales and leases by Class I railroads to new or existing shortlines. Granting an oral hearing in this proceeding would be tantamount to scraping the rules governing Modified Procedures for the shortline industry, since, under BLET’s theory in this proceeding, all challenged rail line sales would qualify for oral hearing.

Finally, BLET seeks an oral argument in this proceeding on the grounds that the proceeding “is of exceptional importance”, the Board’s interpretation of switching track has “become farcical”, and that an oral argument in this proceeding would somehow limit “the case-by-case approach with its attendant expense of money and time.” Petition at 5-6.

This proceeding involves the lease of 12 miles of rail lines and operating authority over an additional 6.2 miles of rail lines by a small, new railroad. In terms of the length of the line, traffic and revenues involved, this transaction is relatively minor compared to most rail line leases or sales by the Class I carriers to new or existing shortlines. *See e.g.*, STB Docket No. 34503, *Timber Rock Railroad, Inc. – Lease Exemption – The Burlington Northern And Santa Fe Railway Company* (lease of 117.82 miles of rail line) and STB Docket No. 34508, *Central Railroad Company Of Indianapolis – Lease And Operation Exemption – CSX Transportation, Inc.* (lease of 273 miles of rail line).

Nor does this proceeding raise new or unsettled issues of law. The main issue raised by BLET is whether the rail lines involved in this proceeding are excepted tracks and, therefore beyond the Board’s entry jurisdiction under 49 U.S.C. § 10906. The standard for making such a

determination is well established and has been consistently applied by the courts, the Board and the Board's predecessor for decades.

BLET claims that the Board's interpretation of excepted track developed in "disorderly fragments" and has become "farcical". Contrary to BLET's suggestions, the so-called "intended use test" has its genesis in *Texas & Pac. Ry. Co. v. Gulf, Colo. & S.F. Ry.*, 270 U.S. 266, 278 (1926) ("*Texas & Pacific*") and that test has been consistently followed in numerous proceedings over the years. See e.g., *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1056 (1984); Docket No. 33323, *Chicago Rail Link, L.L.C. – Lease and Operation Exemption – Union Pacific Railroad Company* (not printed), served September 2, 1997, *aff'd sub nom. United Transportation Union v. STB*, 169 F.3d 474 (7th Cir. 1999); *Brotherhood of Locomotive Eng'rs v. STB*, 101 F.3d 718 (D.C. Cir. 1996); Finance Docket No. 32394, *Brotherhood of Locomotive Engineers v. Union Pacific Railroad Company and Iowa Interstate Railroad* (not printed), served November 6, 1995; *Effingham RR Co. – Pet. For Declaratory Order*, 2 S.T.B. 606 (1997) ("*Effingham*"), *aff'd sub nom. United Transp. Union v. STB*, 183 F.3d 606 (7th Cir. 1999), *International-G. N. R. Co. Trustee Trackage Rights*, 275 I.C.C. 27, 37 (1949). It is obvious from this and other recent proceedings that BLET simply does not like the results that this well-established and time-tested standard produces.

Finally, contrary to BLET's contention, the "case-by-case approach" for adjudicating the status of rail lines began with *Texas & Pacific* and not an unreported decision in *Effingham*. Nor would an oral argument in this proceeding halt the very case-by-case approach that BLET decries. If BLET is dissatisfied with the intended use test and wants to halt the case-by-case approach, it should seek to have the standard changed by rule and not ad hoc litigation. Cf. *Securities & Exchange Commission v. Chenery Corporation*, 332 U.S. 194 (1947).

As explained in KRR's previous filing, KRR's operations are no different than the hundreds of shortline operations the Board and its predecessor have authorized under Section 10901. Like numerous other small railroads, KRR serves as the bridge carrier between the local customers on the KRR lines and three of the Class I carriers that operate in the area.

Oral argument will serve no useful purpose in this proceeding. The factual and legal issues raised by BLET are routine and not unique. BLET has already had four (4) opportunities to present its position to the Board: in its Petition for Stay, filed May 27th, in its Petition to Revoke filed June 4th, in its Supplemental Petition, filed August 16th, and in its Petition filed September 28th. Repeating its position a fifth time at oral argument will not enhance the validity of its factual arguments or alter the shortcomings of its legal position.

Granting oral argument, however, will require KRR, a new and small railroad, to incur additional legal expenses and disrupt management, all to the ultimate detriment of the shipping public. KRR's monetary and personnel costs associated with responding to BLET in this proceeding will ultimately be borne by KRR's customers.

In summary, KRR respectfully urges the Board to deny the relief requested in the Petition and to issue as expeditiously as possible a decision terminating this proceeding. KRR prefers attending to the needs of its customers over responding to BLET's disagreements with Board policy and well-established principles of law.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Karl Morell", written in dark ink.

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Attorney for:
KAW RIVER RAILROAD, INC.

Dated: October 18, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 2004, I have caused a copy of the foregoing Reply to Petition to be served on all parties of record in this proceeding.

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

Karl Morell