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July 1, 2019

E-Filed

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: Docket No. AB 1032(Sub No. 2X), Nebraska, Kansas & Colorado
Railway, L.L.C. – Abandonment Exemption – In Decatur,
Norton, and Phillips Counties, Kan., and Harlan County,
Neb.

Dear Ms. Brown:

Attached for filing is the Reply of Nebraska, Kansas & Colorado
Railway, L.L.C. to Landowners' Motion for Declaratory and
Injunctive Relief.

If you have any questions, please contact me.

Sincerely yours,

A handwritten signature in cursive script that reads "Karl Morell".

Karl Morell

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB 1032X

NEBRASKA, KANSAS & COLORADO RAILWAY, L.L.C. – ABANDONMENT
EXEMPTION – IN DECATUR, NORTON, AND PHILLIPS COUNTIES, KAN., AND
HARLAN COUNTY, NEB

REPLY OF NEBRASKA, KANSAS & COLORADO RAILWAY, L.L.C. TO LANDOWNERS'
MOTION FOR DECLARATORY AND INJUNCTIVE RELIEF

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Attorney for:
Nebraska, Kansas & Colorado Railway,
L.L.C.

Dated: July 1, 2019

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB 1032X

NEBRASKA, KANSAS & COLORADO RAILWAY, L.L.C. – ABANDONMENT
EXEMPTION – IN DECATUR, NORTON, AND PHILLIPS COUNTIES, KAN., AND
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Nebraska, Kansas & Colorado Railway, L.L.C. (“NKCR”), hereby replies in opposition to the Motion For Declaratory and Injunctive Relief filed by the Landowners with the Surface Transportation Board (“Board”) on June 11, 2019 (“Motion”).

BACKGROUND

The Landowners are Plaintiffs in two pending proceedings before the Court of Federal Claims. NKCR is in the process of seeking to abandon a number of rail lines and to then transfer the right-of-way to LI RR LLC (“LI”). The Landowners seek to have the Board enjoin NKCR from such a transfer.

REPLY

To obtain an injunction under 49 U.S.C. § 1321(b)(4), the moving party must demonstrate that: (1) 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 the requested relief; (3) that other interested parties will not be substantially harmed; and (4) granting the injunction is in the public interest. *See DeBruce Grain, Inc. v. Union Pacific RR*, 2 S.T.B. 773, 775 n.3 (1997) *citing*

Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc. 559 F.2d 841, 843 (D.C. Cir. 1977). It is the movant's obligation to justify the exercise of such an extraordinary remedy, STB Docket No. AB-398 (Sub-No. 5X), *San Joaquin Valley Railroad Company – Abandonment Exemption – In Tulare and Kern Counties, CA* (not printed), served April 3, 1998, 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 (5th Cir. 1974).

The Landowners have failed to meet the criteria for the granting of an injunction. They have not shown that there is a strong likelihood they will prevail on the merits, that they will suffer irreparable harm in the absence of an injunction, that an injunction would not substantially harm other parties, or that granting an injunction would be in the public interest.

NKCR has under consideration the opportunity to transfer whatever interests it has in the right-of-way to LI. NKCR will do so only in a lawful manner. The Landowners' argument that such a transfer requires prior Board approval under 49 C.F.R. § 1150.31 is misplaced. Section 1150.31 would be applicable only if NKCR transferred an active right-of-way to LI and not the transfer of NKCR's interests in the right-of-way after the abandonment is consummated.

Consequently, there is no likelihood, much less a strong likelihood, the Landowners will prevail on the merits.

The Landowners claim that they will be irreparably harmed in the absence of an injunction. Their contentions, however, do not rise to the level of sustaining a finding of irreparable harm. See STB Finance Docket No. 34145, *Bulkmatic Railroad Corporation – Acquisition Exemption – Bulkmatic Transport Company* (not printed), served December 27, 2001. 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. *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Neither the Board nor the courts have found economic injuries of such a 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; 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.

Moreover, any harm that a Landowner may suffer would be self-inflicted. No one is forcing any of the Landowners to acquire a portion of the right-of-way. The Landowners have failed to explain why they would be obligated to acquire any portion of the right-of-way.

Granting the requested injunction would harm NKCR. A sizable portion of the right-of-way is owned by NKCR in fee. Preventing the sale to LI would significantly delay NKCR's ability to sell its interests in the right-of-way.

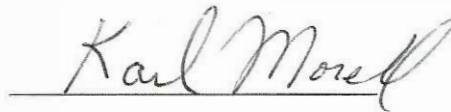
The Landowners have also failed to demonstrate how issuance of an injunction would further the public interest.

To the extent the Landowners seek declaratory relief, the Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to eliminate controversy or remove uncertainty. Docket No. FD 36261, *Ballard Terminal Railroad Company, L.L.C. – Petition For Declaratory Order* (not printed), served June 27, 2019. Here, there is no controversy or uncertainty to eliminate or remove. Further, the Landowners have failed to meet the requirements for issuance of an injunction. Accordingly, NKCR respectfully urges the Board to decline to use its discretionary authority to issue such a declaratory order.

CONCLUSION

NKCR respectfully urge the Board to deny the Landowners' Motion. The Motion falls woefully short of justifying the issuance of an injunction.

Respectfully submitted,

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

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Attorney for:
Nebraska, Kansas & Colorado Railway,

Dated: July 1, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2019, I have caused a copy of the foregoing
Reply to be served on all parties of record.

Karl Morell

Karl Morell