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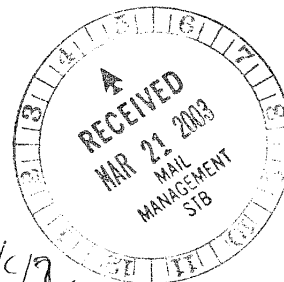
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March 21, 2003

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



RE: Docket No. AB-103 (Sub-No. 15) *2074612*
The Kansas City Southern Railway Company--
Adverse Abandonment--In St. Clair County, IL
and
Docket No. AB-849 *207443*
Gateway Eastern Railway Company--Adverse Abandonment--
In St Clair County, IL

ENTERED
Office of Proceedings

MAR 21 2003

Part of
Public Record

Dear Secretary Williams:

Enclosed please find an original and eleven copies each of (1) The Kansas City Southern Railway Company's Motion to Strike the Rebuttal of Illinois Department of Transportation, and (2) The Kansas City Southern Railway Company's Response to Rebuttal of Illinois Department of Transportation. Both of these documents are filed on behalf of The Kansas City Southern Railway Company and Gateway Eastern Railway Company in connection with the above-referenced proceedings. A copy of each document is contained on each of the three enclosed diskettes in WordPerfect format.

Please acknowledge our filing of the enclosed pleadings by date stamping the eleventh copy of each which are enclosed for that purpose and returning them to the individual making this filing to return to me. If there are any questions about this matter, please contact me.

Sincerely,

William A. Mullins

Enclosures

cc: Thomas J. Healey
All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. AB-103 (Sub No. 15)

**THE KANSAS CITY SOUTHERN RAILWAY COMPANY
--ADVERSE ABANDONMENT--
IN ST. CLAIR COUNTY, IL**

Docket No. AB-849

**GATEWAY EASTERN RAILWAY COMPANY
--ADVERSE ABANDONMENT--
IN ST. CLAIR COUNTY, IL**

**MOTION TO STRIKE THE REBUTTAL
OF ILLINOIS DEPARTMENT OF TRANSPORTATION**

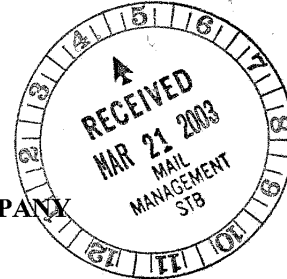
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**Attorneys for The Kansas City Southern
Railway Company and Gateway Eastern
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March 21, 2003

KCS/GWER-2



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KCS/GWER-2

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

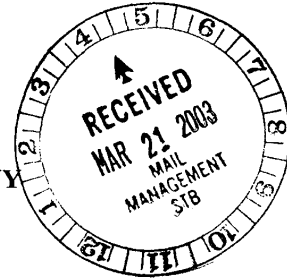
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IN ST. CLAIR COUNTY, IL**

Docket No. AB-849

**GATEWAY EASTERN RAILWAY COMPANY
--ADVERSE ABANDONMENT--
IN ST. CLAIR COUNTY, IL**

**MOTION TO STRIKE THE REBUTTAL
OF ILLINOIS DEPARTMENT OF TRANSPORTATION**



The Kansas City Southern Railway Company ("KCS") and Gateway Eastern Railway Company ("GWER")¹ hereby move to strike the March 17, 2003 Rebuttal of Illinois Department of Transportation ("IDOT's Rebuttal") to KCS's Reply to Petition for Waiver and Exemption ("KCS's Reply"). As acknowledged in IDOT's own pleading, IDOT's Rebuttal is an impermissible "reply to a reply," prohibited by the Surface Transportation Board's ("Board's") regulations at 49 C.F.R. Section 1104.13(c). IDOT has not shown good cause why the Board should waive that regulation. Accordingly, the Board should strike IDOT's Rebuttal from the record. If the Board, however, chooses to accept IDOT's impermissible filing, KCS requests that the Board accept KCS's accompanying Response to Rebuttal of Illinois Department of

¹ Unless specifically referring to GWER's lines or shippers served by GWER, KCS and GWER will be referred to collectively as "KCS" in this reply.

Transportation ("KCS's Response") in accordance with Board precedent and fundamental notions of fairness.

ARGUMENT

I. IDOT'S REBUTTAL IS AN IMPERMISSIBLE REPLY TO A REPLY WHICH SHOULD BE STRICKEN FROM THE RECORD.

A. IDOT's Rebuttal Is A Reply to a Reply.

IDOT's so-called Rebuttal is, in truth, merely an unvarnished reply to a reply. It is IDOT's attempt to get the last word in this proceeding. Because the Board's regulations prohibit replies to replies, the Board should strike IDOT's Rebuttal.

IDOT's Rebuttal is clearly a reply to KCS' Reply. Phrases that appear throughout the filing, such as "KCS and GWER would fault IDOT," IDOT's Rebuttal at 1, "KCS and GWER contend" *id.* at 3, "Contrary to the assertion of KCS and GWER," *id.* at 3, make patently clear that IDOT's Rebuttal is a reply to the evidence and arguments tendered to the Board in KCS's Reply.

The Board's regulations clearly provide that a "reply to a reply is not permitted." 49 C.F.R. § 1104.13(c). This admonition falls within the Board's general provisions governing replies to "any pleading." *See* 49 C.F.R. § 1104.13(a). KCS's Reply was a reply to "any pleading [other than a reply]," namely, to IDOT's Petition for Waiver and Exemption. Thus, IDOT's Rebuttal is an impermissible reply to a reply.

In accordance with this regulation, the Board has stricken replies to replies in numerous instances. For example, in *Lackawanna County Railroad Authority--Acquisition Exemption--F&L Realty, Inc.*, Finance Docket No. 33905, 2001 STB LEXIS 814 (STB served Oct. 22, 2001), the Board struck a "rebuttal" because it found that the pleading constituted a reply to a reply. *See also Capitol Materials Incorporated--Petition for Declaratory Order--Certain Rates*

and Practices of Norfolk Southern Railway Company, STB Docket No. 42068, 2002 STB LEXIS 233 (STB served Apr. 19, 2002). Likewise, the Board should strike IDOT's Rebuttal.

B. IDOT Has Failed To Justify Allowing Its Prohibited Reply To Remain On The Record.

Even though the Board construes 49 C.F.R. § 1104.13(c) liberally "to allow pleadings where they will contribute to a complete record without prejudicing any party or delaying the proceeding,"² IDOT has not shown that good cause exists for acceptance of its Rebuttal, as required by the Board. *See, e.g., CSX Corporation--Control--Chessie Systems, Inc. et al. (Arbitration Review)*, Finance Docket No. 28905 (Sub-No. 27), 1997 STB LEXIS 152 (STB served July 15, 1997) (noting that the prohibition against replies to replies may only be waived upon a showing of good cause). Thus, the Board should strike IDOT's Rebuttal as it has done in similar instances where a party did not show good cause for acceptance of a reply to a reply. *See, e.g., Capitol Materials Incorporated--Petition for Declaratory Order, supra.*

IDOT's Rebuttal does not warrant waiver of the Board's regulation against serial replies. IDOT simply comments on KCS's Reply, reiterates information already provided in the original Petition, and proffers information previously available to IDOT but which IDOT did not think important enough to submit initially. Therefore, IDOT's Rebuttal does not complete the record or otherwise assist the Board in ruling on IDOT's Petition.

Even taken together, IDOT's Petition and Rebuttal by no means constitute a "complete record." Neither pleading comes close to justifying the exemptions and waivers of adverse abandonment regulations sought by IDOT. Just like IDOT's Petition, IDOT's Rebuttal is

² *See, e.g., Reading Blue Mountain and Northern R.R. Co.--Lease and Operation Exemption--Norfolk Southern Ry. Co. and Pennsylvania Lines LLC*, Finance Docket No. 34048 (STB Aug. 1, 2001).

misleading and fails to disclose significant information about the massive highway reconstruction project IDOT plans to pursue.

Nor is IDOT's Rebuttal excused by the fact that IDOT is the party actively seeking waivers and exemptions. A party is not entitled to "the last word" just because it is seeking affirmative relief. *See Illinois Central Railroad Company--Abandonment Exemption--In Perry County, IL*, Docket No. AB-43 (Sub-No. 164X), 1997 STB LEXIS 148 at 7, n.5 ("contrary to Freeman's assertions, our procedures do not entitle Freeman [the party petitioning for relief] to file the closing pleading"); *CSX Corporation--Control--Chessie System, Inc., et al. (Arbitration Review)*, STB Finance Docket No. 28905 (Sub-No. 28), 1997 STB LEXIS 213 at 6 (served Sept. 3, 1997).

In fact, the Board has clearly and emphatically held that replies to replies that merely seek to get in the last word are not permitted. *FMC Wyoming Corp. and FMC Corp. v. Union Pac. R.R. Co.*, Docket No. 42022, 1999 STB LEXIS 2 (STB served Jan. 8, 1999). Essentially, the Rebuttal is merely IDOT's impermissible attempt to get the last word in this proceeding, rather than provide the Board with a complete record. As discussed above and in KCS's Response, the Rebuttal contains significant shortcomings, still failing to provide the Board with adequate information about the massive undertaking IDOT is planning. Thus, the Board should strike IDOT's Rebuttal as an impermissible reply to a reply.

Moreover, the Board should not admit IDOT's Rebuttal into the record because IDOT could have provided all the information the Rebuttal contains in IDOT's original petition. Admitting IDOT's Rebuttal into the record now merely encourages protracted rounds of filing, as parties will sequentially seek to respond to each other's previous round of filings. Accordingly, the Board has held that such a "cumulative" pleading as a rebuttal, after a petition

and reply have already entered the record, does not justify waiver of Section 1104.13(c).

Application of the National Railroad Passenger Corp. Under 49 U.S.C. 24308(a)--Springfield Terminal Railway Co., et. al., Finance Docket No. 33381, 1997 STB LEXIS 101 (STB served May 6, 1997), *see also Capitol Materials Incorporated--Petition for Declaratory Order, supra* at *6, n.7. Because IDOT has not shown good cause why the Board should waive its prohibition against replies to replies, the Board should strike IDOT's Rebuttal from the record.

II. IF THE BOARD DOES NOT STRIKE THE OFFENDING REBUTTAL MATERIAL, IT SHOULD ACCORD KCS AN OPPORTUNITY TO ANSWER IDOT'S REBUTTAL.

IDOT's Rebuttal constitutes an impermissible, unjustified reply to a reply, which should be stricken from the record of this docket. However, if the Board nevertheless accepts IDOT's Rebuttal, Board precedent and fundamental notions of fairness dictate that KCS be allowed to present a responsive pleading. To shield IDOT's Rebuttal from the critical eye of opposing parties without granting KCS an opportunity to address its merits would be patently unfair and a violation of KCS's right to due process.

In other instances where it has waived the prohibition against a reply to a reply, the Board has accorded the opposing party an opportunity to comment on information submitted in the reply to a reply. *See, e.g., Shell Chemical Company, et al. v. Boston Maine Corp., et al.*, No. 41670, 1997 STB LEXIS 394, (STB served Dec. 8, 1997) at *3-4 (accepting both a reply to a reply and a surrebuttal); *Norfolk Southern Ry. Co.--Abandonment Exemption--Between Red Bay and Haleyville, AL in Franklin, Marion, and Winston Counties, AL--In the Matter of a Request to Set Terms and Conditions*, Docket No. AB-290 (Sub-No. 123X), 1993 ICC LEXIS 176 (ICC served Sept. 10, 1993) (allowing a rebuttal that was "properly the subject of a motion to strike" to remain on the record, and according the opponent an opportunity to comment on the

rebuttal); *Gateway Western Railway Company--Construction Exemption--St. Clair County, IL*, Docket No. 32158, 1993 ICC LEXIS 88 (STB served May 11, 1993). In fact, it appears that the Board has never denied a party the opportunity to comment on a reply to a reply in such cases. Thus, if the Board allows IDOT's Rebuttal to remain a part of the record, it should also accept and consider KCS's response to that pleading, filed concurrently herewith.

CONCLUSION

IDOT's Rebuttal should be stricken from the record as an impermissible reply to a reply which does not warrant granting an exception from the Board's regulations at Section 1104.13(c). However, should the Board nonetheless be inclined to allow the offending materials to remain in the record, Board precedent and fundamental notions of fairness dictate that the Board should accept KCS's Response.

Respectfully submitted, this 21st day of March, 2003.

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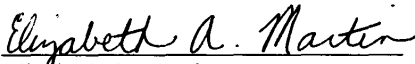

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Attorneys for The Kansas City Southern
Railway Company and Gateway Eastern
Railway Company

March 21, 2003

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "Motion to Strike the Rebuttal of Illinois Department of Transportation," KCS/GWER-2, was served this 21st day of March, 2003, by hand delivery on Applicant's representative Fritz R. Kahn, and by first class mail to all other parties of record in this proceeding.


Elizabeth A. Martin