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July 28, 2014

Ms. Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

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ENTERED
Office of Proceedings
July 28, 2014
Part of
Public Record

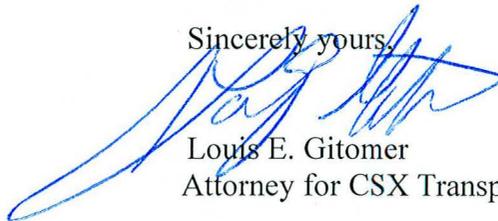
Re: Docket No. FD 35794, *Kan Rail, Inc.–Acquisition and Operation
Exemption–in Wapakoneta, Ohio*

Dear Ms. Brown:

CSX Transportation, Inc. is efileing a Reply to the Motion to Strike or in the
Alternative Reply to CSX Transportation, Inc. Filing Dated July 2, 2014, filed on July 22,
2014 by Kan Rail, Inc.

Thank you for your assistance. If you have any questions, please contact me.

Sincerely yours,



Louis E. Gitomer
Attorney for CSX Transportation, Inc.

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 35794

KAN RAIL, INC.-ACQUISITION AND OPERATION EXEMPTION-IN WAPAKONETA,
OHIO

CSX TRANSPORTATION, INC. REPLY TO MOTION

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Attorneys for: CSX TRANSPORTATION, INC.

Dated: July 28, 2014

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 35794

KAN RAIL, INC.-ACQUISITION AND OPERATION EXEMPTION-IN WAPAKONETA,
OHIO

CSX TRANSPORTATION, INC. REPLY TO MOTION

CSX Transportation, Inc. (“CSXT”) replies in opposition, pursuant to 49 C.F.R. §1104.13(a), to the Motion to Strike or in the Alternative Reply to CSX Transportation, Inc. Filing dated July 2, 2014 filed on July 22, 2014 (the “Motion”) by Kan Rail, Inc. (“Kan Rail”).

By completely ignoring or misreading the Surface Transportation Board’s (the “Board”) regulations, Kan Rail erroneously argues that (1) CSXT was not permitted to file a Reply to both the Verified Notice of Exemption filed by Kan Rail on April 22, 2014 (the “Notice”) and the Response to Request for Supplemental Information filed on June 12, 2014 (the “Supplement”), and (2) if CSXT was entitled to reply, the reply was untimely. Kan Rail then proceeds to submit an impermissible reply-to-reply (49 C.F.R. §1104.13(c)). CSXT will first address the erroneous procedural arguments raised by Kan Rail, and next address Kan Rail’s self-proclaimed “reply” to CSXT’s Reply, which Kan Rail has decided to unjustifiably call a “motion to dismiss” in order to file a reply (See the second unnumbered page of the Motion).

THE MOTION TO STRIKE

Kan Rail first contends that CSXT is not permitted to file a reply to the Notice and the Supplement based on 49 C.F.R. §§1121.1 and 1121.4. Kan Rail is wrong. Section 1121.1 does

not prohibit the filing of a reply. As relevant to this proceeding, Section 1121.1 applies the procedures of Part 1121 to notices of exemption when it states “These procedures also apply to notices of exemption.” Hence, wherever the Part 1121 rules refer to a petition for exemption, they are also referring to notices of exemption.

Kan Rail’s reliance of Section 1121.4 is also misplaced. As a general proposition, Section 1121.4(a) states “public comments are generally not sought during consideration of exemption petition proposals.” The next sentence in Section 1121.4(a) does not invite comments, but it does state “However, the Board may consider during its deliberation any public comments filed in response to a petition for exemption.” Contrary to Kan Rail’s position, the first sentence of Section 1121.4(a) does not prohibit replies. The second sentence infers that it is within the Board’s discretion to consider replies, but it does not indicate that the Board must reject them. Kan Rail, on the first unnumbered page of the Motion, states that “No pleading heretofore has been filed in this exemption proceeding to which a reply is warranted, as this is not a multi-party, let alone adversarial, proceeding.” However, this argument has no relevance to this proceeding and nothing to do with the rules in Part 1121.

Kan Rail asserts that CSXT’s Reply was not timely filed. Not only is there no analysis underlying this statement or any basis for it, but it is factually wrong.

Kan Rail filed the Notice on April 22, 2014. The STB served a decision on April 29, 2014 (the “*April 29 Decision*”), ordering Kan Rail to file supplemental information by May 14, 2014. On May 1, 2014, CSXT filed a Notice of Intent to Participate. After being granted an extension, Kan Rail filed the Supplement on June 12, 2014. CSXT filed the Reply on July 2, 2014, exactly 20 days after Kan Rail filed the Supplement. CSXT does not understand why Kan Rail stated that “Such pleading has not been timely filed” and then cited 49 C.F.R. §1104.13(a). Section 1104.13(a) states “A party may file a reply or motion addressed to any pleading within

20 days after the pleading is filed with the Board, unless otherwise provided.” CSXT became a party with the filing of its Notice of Intent to Participate on May 1, 2014. An accurate counting of days from Kan Rail’s filing of the Supplement until CSXT’s filing of the Reply shows that CSXT’s Reply was timely filed (20 days after the Supplement was filed). An accurate reading of Section 1104.13(a) provides a period of 20 days to file a reply. There was no reason for CSXT to reply to the Notice, which was described by the Board as not providing “sufficient information to allow the Board to make a definitive determination that use of the class exemption at 49 C.F.R. § 1150.31 for acquisitions and operations is appropriate here, additional information is necessary. As a result, Kan Rail’s proposed exemption will not become effective, if at all, until further order of the Board.” *April 29 Decision*, at 1. Moreover, the Supplement is a “pleading.”

CSXT has complied with the Board’s rules in filing the Reply, regardless of Kan Rail’s misstatements and less than candid reference to the Board’s rules. CSXT respectfully requests the Board to deny Kan Rail’s Motion to Strike.

KAN RAIL’S IMPROPER REPLY-TO-REPLY

Kan Rail attempts to characterize CSXT’s Reply as a Motion to Dismiss (Motion at unnumbered second page). It is not. Kan Rail wrongly states that CSXT did “not reply to any documents filed by KAN Rail” (Motion on unnumbered second page). CSXT’s Reply specifically critiqued the Notice and the Supplement, responded to the statements made by Kan Rail, and clarified facts that demonstrate that Kan Rail will not operate as a common carrier, including Kan Rail’s existence as an island railroad with no current ability to access the national railroad system over Track T-8166(B). See CSXT’s Reply pages 4-6.

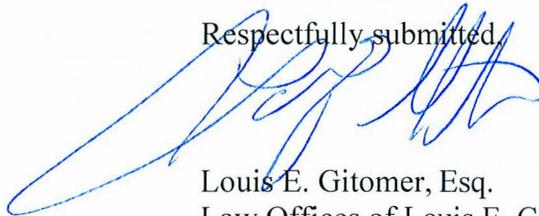
The remedy sought by CSXT was denial of the Notice of Exemption before it took effect, not dismissal as Kan Rail contends. Indeed, Kan Rail even quotes CSXT’s Reply correctly

(Motion on unnumbered second page) as requesting the Board “to **deny** the exemption sought by Kan Rail.” *Black’s Law Dictionary*, Eighth Edition, at 466, defines denial as “a refusal or rejection; esp. a court’s refusal to grant a request presented in a motion or petition.” Dismiss is defined as “[t]o send (something) away; specif., to terminate (an action or claim) without further hearing, esp. before the trial of the issues involved.” *Id.* at 502. There has been a further hearing on the proposed transaction in the form of the Supplement and the CSXT Reply. CSXT and Kan Rail addressed the merits of the Notice. CSXT did not file Motion to Dismiss, it replied to the Notice and Supplement.

Having refuted Kan Rail’s ineffective attempt to redefine CSXT’s Reply as a Motion to Dismiss, CSXT requests the Board to reject Kan Rail’s response (Motion on unnumbered second and third pages) as a prohibited reply-to-reply pursuant to the Board’s rules that state “A reply to a reply is not permitted.” 49 C.F.R. §1104.13(c).

For the foregoing reasons, CSXT respectfully requests the Board to deny Kan Rail’s Motion to Strike, reject Kan Rail’s reply-to-reply, and deny the exemption sought by KanRail.

Respectfully submitted,



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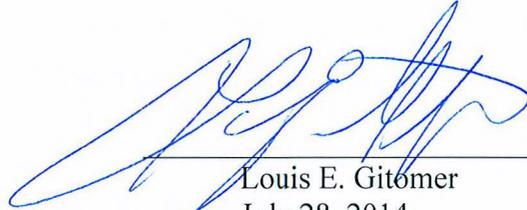
Dated: July 28, 2014

CERTIFICATE OF SERVICE

I hereby certify that I have caused the Reply in Docket No. FD 35794, *Kan Rail, Inc.*—

Acquisition and Operation Exemption—in Wapakoneta, Ohio to be served electronically on:

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Louis E. Gitomer
July 28, 2014