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SEC

SERVICE DATE - FEBRUARY 9, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-103 (Sub-No. 14)

THE KANSAS CITY SOUTHERN RAILWAY COMPANY—  
ADVERSE DISCONTINUANCE APPLICATION—A LINE OF  
ARKANSAS AND MISSOURI RAILROAD COMPANY

Decided: February 5, 1999

On November 30, 1998, Arkansas and Missouri Railroad Company (AMR) filed an adverse discontinuance of trackage rights application under 49 U.S.C. 10903 regarding trackage rights held by The Kansas City Southern Railroad Company (KCS) over an approximately 5.5-mile segment of rail line owned by AMR in Sebastian County, AR, and LeFlore County, OK. Notice of the application was served and published in the Federal Register (63 FR 70182) on December 18, 1998, and the record is now complete.

In a letter filed February 2, 1999, KCS submits that the information contained at Tabs B and C of AMR's reply to protests and comments filed January 29, 1999, bearing Bates stamp numbers KCS-2-C-0001-0010, was designated as confidential by KCS and should not have been disclosed in AMR's public version of the reply. Therefore, pursuant to the protective order in this proceeding served on December 14, 1998, KCS requests that the Board designate as "confidential" all versions of AMR's reply, and: (1) direct AMR to file and serve new public versions of that filing on all parties; (2) direct that all persons receiving such filing who have not signed the confidential undertaking in the protective order return their public version of AMR's reply to KCS's counsel; and (3) direct that all persons who have received AMR's public version and who did sign the confidential undertaking treat the public version as a confidential document.

In a reply filed February 3, 1999, AMR submits that when KCS transmitted the allegedly confidential information in response to discovery requests on January 25, 1999, the cover letter did not indicate that any portion of the enclosed material was to be considered confidential, and the documents themselves were not designated as "confidential." Moreover, AMR argues that the information KCS seeks to protect is neither commercially sensitive nor proprietary and there would have been no basis for a "confidential" designation, even if KCS had done so. However, in the event that the Board finds that the "C" in KCS's Bates stamp was sufficient to comply with the order to designate material "confidential," AMR moves that, pursuant to section 6 of the protective order,<sup>1</sup>

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<sup>1</sup> Section 6 of the protective order provides that:

A person at any time may request by letter that a producing person cancel the

the Board remove the confidential designation for the materials contained in Tabs B and C of its reply.

By letter filed February 4, 1999, KCS states that the documents it produced to AMR were designated either as numbers KCS-2-C-[page number] or KCS-2-P-[page number]. KCS submits that it has universally used this type of Bates numbering system to designate its documents either public or confidential in numerous proceedings, and asserts that it is inconceivable that AMR's experienced counsel would not have understood the significance of the manner of the Bates numbering. Moreover, KCS argues that AMR's request to declassify the documents does not comply with the requirement of section 6 of the protective order because AMR has never discussed the matter with KCS or requested that KCS remove the confidential designation.

AMR's request that the "confidential" designation be removed from the information contained at Tabs B and C of its reply will be denied. Pursuant to section 4 of the protective order, any person filing documents is authorized to designate as "confidential" information that it in good faith contends contains confidential, proprietary, or highly sensitive information. Here, KCS asserts that the information in the documents is confidential and should be protected. Although AMR's inclusion of the documents in the public version of its reply appears to have been inadvertent, AMR has not shown good cause why the documents in question should not be protected. KCS asserts that it followed its customary system of identifying confidential and public material and has affirmed its desire to keep the documents confidential. Therefore, under the circumstances, AMR will be required to file a redacted version of its reply and all parties will be directed to treat the information as confidential.

It is ordered:

1. AMR's request that the "confidential" designation be removed from the information contained at Tabs B and C of its reply filed January 29, 1999, is denied.
2. AMR must file a redacted version of its reply with Board and serve a copy of the redacted version on all parties by February 17, 1999.

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"Confidential" designation of any document (or portion thereof) or discovery response (or portion thereof). Such request should identify with particularity the designated documents (or portions thereof) or discovery responses (or portions thereof) it contends should not be treated as "Confidential," provide the reasons therefor, and explicitly state that it is made pursuant to this paragraph. If such request is denied in whole or in part, the requesting person may file a motion with the Board to have the "Confidential" designation removed as to the information listed in the request. The documents (or portions thereof) or discovery responses (or portions thereof) shall be treated as designated, pending a ruling on such motion. The burden of establishing that such information should not be afforded the protections of this Order shall be on the person filing the motion.

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3. All parties are directed to treat the documents contained at Tabs B and C of AMR's reply filed January 29, 1999, as confidential.

4. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams  
Secretary