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SERVICE DATE – MAY 23, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34830

KANSAS CITY TRANSPORTATION COMPANY LLC—LEASE AND ASSIGNMENT OF  
LEASE EXEMPTION—KANSAS CITY TERMINAL RAILWAY COMPANY AND KAW  
RIVER RAILROAD, INC.

Decided: May 21, 2007

Kansas City Transportation Company LLC (KCTL), a wholly owned subsidiary of Kansas City Terminal Railway Company (KCT), requests clarification and deletion of a footnote in the notice of exemption in this proceeding that was served and published in the Federal Register at 71 FR 14576 on March 22, 2006. The request for deletion will be denied.

BACKGROUND

In a verified notice of exemption filed on February 22, 2006, KCTL, then a noncarrier, invoked the class exemption at 49 CFR 1150.31 to lease from KCT approximately 25.73 miles of rail line in the Kansas City Terminal District in Jackson County, MO, and Wyandotte County, KS. In the same notice of exemption, KCTL also invoked the class exemption to acquire, by assignment from Kaw River Railroad, Inc. (KRR), the operating and lease rights over 18.2 miles of track, also in the Kansas City Terminal District, that is either owned by KCT and subleased to KRR or owned by The Kansas City Southern Railway Company (KCS) and leased to KRR.<sup>1</sup> The combined 43.93 miles of rail line will be referred to as “the Lines.”<sup>2</sup>

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<sup>1</sup> KRR acquired the right to operate the 18.2 miles of track in 2004 using the Board’s noncarrier class exemption procedure, 49 CFR 1150.31. See Kaw River Railroad Inc.—Acquisition and Operation Exemption—The Kansas City Southern Railway Company, STB Finance Docket No. 34509 (STB served May 3, 2005), petition for judicial review dismissed for lack of standing sub nom. Brotherhood of Eng., Trainmen v. STB, 457 F.3d 24 (D.C. Cir. 2006).

<sup>2</sup> KCT also granted KCTL incidental trackage rights over approximately 60 miles of KCT’s Joint Tracks for access to and from all of the KCT tracks, the KCS Tracks, and the various interchange points.

In the verified notice of exemption, KCTL stated:

KCTL will provide all rail common carrier service on the KCT Tracks (including the KCT Subleased Tracks) and the KCS Tracks pursuant to the transactions proposed herein. KCTL expects to enter into one or more agreements with contract operators, but KCTL will retain the common carrier rights and obligations on this track.

In response, the Board stated in footnote 1 of the March 22 notice of exemption: “Under 49 U.S.C. 10902 and the Board’s rules at 49 CFR 1150.31, if KCTL elects to enter into agreements with contract operators, the operators must file [requests] with the Board for authority prior to commencing operations.”<sup>3</sup>

In a letter filed on April 25, 2006, KCTL informed the Board that the operations over the Lines had been contracted out to KRR and requested clarification and deletion of the footnote. KCTL argued that KRR is not subject to the Board’s licensing authority and under no obligation to obtain such authority prior to commencing operations. According to KCTL, KRR is providing service only in KCTL’s name and pursuant to KCTL’s rules and tariffs. KCTL emphasized that it has retained the common carrier obligation and asserted that KRR is a contract operator functioning solely as KCTL’s agent with no independent operating authority or common carrier status.

The Brotherhood of Locomotive Engineers and Trainmen, a Division of the Rail Conference, International Brotherhood of Teamsters (BLET), filed a reply arguing that neither KCTL nor KRR are common carriers. BLET contends that the operations KRR contracted to perform are excepted from the Board’s licensing authority, whether performed by KRR or KCTL, because they can be characterized as switching in nature.<sup>4</sup>

In a decision served on May 30, 2006, the Board found that KCTL had failed to support its claim that KRR is acting as KCTL’s agent and does not require operating authority. The Board directed KCTL, if it wished to pursue the matter further, to submit a copy of its operating agreement with KRR and of all other documents that govern their relationship as it concerns the proposed operation of the Lines, and a detailed statement of the rights and responsibilities of each entity involved in operating the Lines. Additionally, the Board directed KCTL to cite the agency and court precedent upon which it relies for its position that KRR does not require operating authority from the Board, citing Assoc. of P&C Longshoremen v. The Pitts. & Conneaut, 8 I.C.C.2d 280 (1992) (P&C Dock), and the cases cited therein.

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<sup>3</sup> In a decision served on May 30, 2006, the Board subsequently clarified that footnote 1 should have referenced 49 U.S.C. 10901 and 49 CFR 1150.31 for noncarriers and 49 U.S.C. 10902 and 49 CFR 1150.41 for Class III rail carriers.

<sup>4</sup> The Board denied BLET’s petition to stay the effectiveness of the notice of exemption in a decision served on February 28, 2006 (Stay Decision).

In response, KCTL filed a letter on June 28, 2006, reasserting that it retains the common carrier rights and obligations with respect to the Lines and that KRR is merely acting in KCTL's name as a contract agent fulfilling KCTL's common carrier obligations. The letter included discussions of the rights and responsibilities of the involved entities and of agency and court precedent. Enclosed with the letter was the KCTL-KRR contract (Contract), which KCTL described as "the only document that governs the relationship between the parties." In addition, KCTL cited several agency cases involving carriers that intended to provide service through a contractor.

## DISCUSSION AND CONCLUSIONS

A basic premise of agency law is that the principal accepts liability for the actions of its agent acting within the scope of its authority. See American Soc. of M. E.'s v. Hydrolevel Corp., 456 U.S. 556, 565-68 (1982). The liability provisions of the Contract are sufficient to establish that KRR is not merely an agent of KCTL.

Under the Contract, KRR is responsible for all losses or damages related to the switching services and maintenance work it performs, and it must defend, indemnify, and hold KCTL, KCT, and KCT's owners harmless from any claims resulting from any contract breach or failure on KRR's part. At its own cost, KRR must obtain insurance coverage at least equal to the kinds and amounts set forth in Exhibit F of the Contract.<sup>5</sup> And KRR may not make any claims against KCTL, KCT, or KCS for any operation, maintenance, repair, or renewal that they performed, or failed or neglected to perform, in connection with the Lines and must indemnify and hold KCTL, KCT, and KCT's owners harmless for any track related claims (including claims allegedly resulting from negligence committed by KCTL, KCT, or KCS prior to the joint inspection) arising during the term of the agreement.

Additionally, KRR is solely liable for any claims related to transfer train brake tests, mechanical inspections of rail cars, and bad order repair and for the repair or replacement of any rail cars damaged or destroyed while in its possession. Similarly, in case of derailments, KRR is responsible for the cost and expense of any re-railing, repair, or clean-up, and must indemnify and hold KCTL, KCT, and KCT's owners harmless from all such costs, claims, damages, or other liability.

Based on the evidence of record, it is clear that KRR is more than an agent of KCTL. The liability assumed by KRR alone demonstrates that it is an entity operating in its own right. As such, KRR requires a license from this agency pursuant to 49 U.S.C. 10901.

The agency and court precedent cited by KCTL also fail to support its contention that KRR does not require an operating license. The Board's jurisdiction over contract agents simply was not at issue in these cases. In City of Chicago v. Atchison, Topeka and Santa Fe Railway, 357 U.S. 77 (1958), the issue was whether a Chicago ordinance licensing motor carriers involved in interstate rail transportation was preempted by the Commerce Clause of the Constitution and

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<sup>5</sup> Exhibit F, "Insurance Requirements and Levels of Required Coverage," was redacted.

the Interstate Commerce Act. And in the three notices of exemption cited by KCTL,<sup>6</sup> the acquiring entities merely stated, without more, that they intended to retain contract operators to operate the lines being acquired.

Similarly, the Board's licensing authority over contract agents was not at issue in Bulkmatic Railroad Corporation—Acquisition and Operation Exemption—Bulkmatic Transport Company, STB Finance Docket No. 34145 *et al.* (STB served Nov. 19, 2002, and May 15, 2003) (Bulkmatic), or Clark Shortline Railroad Company—Acquisition and Operation Exemption—Indiana Port Commission, STB Finance Docket No. 32112 *et al.* (STB served May 14, 1998) (Clark). Rather, both cases concerned the Board's licensing authority over rail carriers that intended to hire contract agents.

The Bulkmatic decisions simply affirmed that Board authority was required for Bulkmatic Railroad Corporation (BRC) to acquire and operate the line at issue there and that the Board's licensing authority over BRC was not affected by the possibility that BRC might hire a contract agent to operate the line. And in Clark, the acquiring entities were found to be subject to the Board's licensing authority, notwithstanding that they had contracted with operators to provide rail service, because the acquiring entities had retained the residual common carrier obligation to provide service.

Nor do we find merit to KCTL's effort to distinguish this case from P&C Dock, where the Interstate Commerce Commission (ICC) found a terminal company that performed stevedoring-type operations for the traffic of a rail carrier to be a common carrier itself and subject to the ICC's licensing authority. KCTL's assertion that it accepts its own common carrier obligations does not distinguish this proceeding from P&C Dock. In P&C Dock, as here, the issue was the common carrier status of the agent (here, allegedly KRR), not the status of the principal (here, allegedly KCTL).

We also reject BLET's argument that neither KCTL nor KRR are common carriers subject to the Board's licensing authority. As explained in the Stay Decision, authority from the Board is required, under well-settled, judicially affirmed Board precedent, where a transaction entails a new operation that, by definition, will enable a new carrier to reach territory new to it. Slip op. at 2, citing Effingham RR Co.—Pet. for Declaratory Order, 2 S.T.B. 606, 609-10 (1997), *aff'd sub nom. United Transp. Union v. STB*, 183 F.3d 606 (7th Cir. 1999).

Accordingly, we are denying KCTL's request to delete footnote 1. KRR is directed to file for Board authority.

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<sup>6</sup> See Saginaw Bay Southern Railway Company—Acquisition and Operation Exemption—Rail Line of CSX Transportation, Inc., STB Finance Docket No. 34729 (STB served Sept. 27, 2005); Delphos Terminal Company, Inc.—Acquisition and Operation Exemption—Indiana Hi-Rail Corporation, STB Finance Docket No. 33496 (STB served Oct. 31, 1997); and Hampton Railway, Inc.—Acquisition and Operation Exemption—Willamina & Grand Ronde Railway Company, Finance Docket No. 32716 (ICC served June 29, 1995).

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. KCTL's request that the Board delete footnote 1 in the notice of exemption that was served and published in this proceeding on March 22, 2006, is denied.
2. KRR is directed to file for authority to operate the Lines.
3. This decision is effective on its service date.
4. A copy of this decision will be served on KRR.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams  
Secretary