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April 12, 2011

VIA E-FILING

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

ENTERED
Office of Proceedings
APR 12 2011
Part of
Public Record

Re: STB Ex Parte No. 705
Competition In The Railroad Industry

Dear Ms. Brown:

In accordance with the Notice served on January 11, 2011 and the Decision served on February 4, 2011, both issued in the above-referenced proceeding, enclosed are the "Initial Comments Of The Kansas City Southern Railway Company" to be submitted as part of the record in this proceeding.

If there are any questions concerning this filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

Enclosures

cc: Warren K. Erdman
W. James Wochner
David C. Reeves

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX PARTE NO. 705

COMPETITION IN THE RAILROAD INDUSTRY

INITIAL COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

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**Attorneys For The Kansas City Southern
Railway Company**

Dated: April 12, 2011

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX PARTE NO. 705

COMPETITION IN THE RAILROAD INDUSTRY

INITIAL COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

**Primum non nocere
(First, Do No Harm)**

This well known phrase, having its origins in the Hippocratic Oath should guide the Surface Transportation Board ("STB" or "Board") as it conducts this proceeding. As this matter moves forward, some very large shippers, and their associations, lawyers, lobbyists and consultants, will tell the Board that the current transportation regulatory system is sick and needs to be cured by radical new treatments. These advocates, often much larger than the railroad patients on which they seek to impose their "cures," will argue that the railroads' recent return to relative financial health and vitality is a sign of a sick regulatory system that needs to be fixed. Many of these parties likely have not even attempted the Board's available "cures," and will say that they have heard that those treatments are too difficult or don't work.

The Kansas City Southern Railway Company ("KCS" or "Kansas City Southern") believes that the Board's existing regulatory system works where it needs to work for those shippers that use it. Moreover, the Board has been adapting its regulations and processes continuously since the Staggers Act to make those systems more accommodating to shippers. KCS, as the smallest of the Class I railroads, asks the Board to be mindful that discarding the Board's carefully-developed regulatory treatments for radical new ones has the potential to do

great harm, particularly to carriers like KCS, whose systems differ in fundamental ways from those of the largest carriers. Any attempt to impose broad-based changes could have the unintended consequence of first harming railroads like KCS and other smaller railroads, which provide crucial competitive alternatives in the marketplace.

COMMENTS

KCS appreciates the opportunity to participate in this proceeding and to share KCS's perspective on these important issues. The Board has requested comments on several issues, including whether the Board should reconsider its prior precedents and approaches with respect to bottleneck rates, terminal access, and reciprocal switching. KCS does not intend to address all aspects of these issues and notes that these issues are being addressed in the comments being filed by the Association of American Railroads ("AAR"), in which KCS joins. Instead, KCS herein shows that the Board has been more than responsive to shipper concerns and that the existing precedents and approaches work when they need to. Moreover, were the Board to decide that fundamental changes are necessary, KCS asks the Board to carefully consider the unique role KCS and other small railroads play in the marketplace, and the prospect that changes to the existing precedents could have a disproportionate adverse impact on smaller carriers such as KCS.

I. THE BOARD HAS MADE SIGNIFICANT PROGRESS IN RESOLVING SHIPPERS' CONCERNS AND THIS PROGRESS SHOULD BE ALLOWED TO WORK BEFORE ANY WHOLESALE CHANGES ARE MADE

The fundamental struggle at the crux of this proceeding is mostly a struggle between very large shippers and very large railroads. The shippers allege high rail rates and unresponsiveness to service requests. Railroads point to the documented successes of the Staggers Act and to their remarkable service and safety record. Indeed, it is undeniable that the U.S. freight rail system is

the envy of the world.¹ Why is it the envy for the world? Because the Interstate Commerce Commission ("ICC" or "Commission") and the STB, taking their guidance from the Staggers Act, implemented a balanced regulatory approach.

Rejecting the extremes, the ICC and the Board have taken a balanced approach. This has allowed railroads to return to relative financial health. This renewed financial health has allowed the rail industry to increase investment in new capacity, improve productivity, and implement new technologies, all of which, overall, have lowered rail rates from pre-Staggers levels, increased service options, and helped shippers better compete in the global economy. While all shippers may not have benefited equally, the vast majority of shippers have experienced benefits from the Staggers Act and the ICC's and STB's implementation of that Act.²

Despite this balanced approach, some large shippers continue to argue that the ICC and the STB have not done enough to address their concerns over rates and service. Is this perception accurate? When one examines the numerous decisions made by both the ICC and the STB over the years with respect to rate and service issues, the pattern indicates that far from being unresponsive to shipper concerns, the agency has continually responded with changes favored by shippers. These changes have resulted in significant improvements in the ability of shippers to challenge rates and otherwise use the regulatory process to prevent railroads from abusing whatever market power they possess. Yet, despite these changes, and despite the fact

¹ *America's Freight Railroads: Global Leaders*, Association Of American Railroads, June, 2010 (citing several sources including the Federal Railroad Administration and the World Bank).

² Laurits R. Christensen Assoc., Inc., A STUDY OF COMPETITION IN THE U.S. FREIGHT RAILROAD INDUS. & ANALYSIS OF PROPOSALS THAT MIGHT ENHANCE COMPETITION: REVISED FINAL REPORT ES-5 (2009); Grimm, C. and C. Winston, *Competition In The Deregulated Railroad Industry: Source, Effect and Policy Issues*, in S. Peltzman and C. Winston, eds, DEREGULATION OF NETWORK INDUSTRIES: THE NEXT STEPS, Brookings, Washington D.C. 41-72 (2000); Winston, C., T. Corsi, C. Grimm, and C. Evans, THE ECONOMIC EFFECTS OF SURFACE FREIGHT DEREGULATION, Brookings Institution, Washington, D.C. (1990).

that shippers now have access to a fair regulatory process for the resolution of rate and service complaints, during this proceeding the Board will be asked to do even more. The Board will be asked to reverse years of precedent and to do so in a manner that would fundamentally change the structure of the rail industry, resulting in great harm. The Board should resist these requests.

Instead, the existing processes and procedures, especially the more recent changes, should be allowed time to prove whether they provide shippers with adequate remedies and protections. If, after several years, the Board's changes have proven inadequate, then the Board can make appropriate changes to reflect those inadequacies, but it should not make those changes now. Doing so now would impose a cure much worse than any perceived problem with the health of the regulatory system, doing great harm.

A. The ICC And STB Have Been Responsive To Shipper Concerns

One of the first major shipper/railroad disputes after adoption of the Coal Rate Guidelines³ involved whether to adopt a productivity adjustment to the rail cost adjustment factor ("RCAF"). Section 203 of the Staggers Act required the ICC to publish the RCAF. The RCAF index was intended to reflect the impact of inflation. Rates that rose no faster than the index were generally protected from a rate reasonableness challenge. When the Commission initially published the index in 1981,⁴ it did so in a manner that reflected the impact of inflation, but rejected proposals to restate this input index by recognizing the impact of improved productivity on the cost of rail outputs. After years of experience with the index and several attempts by the shipper community and by Congress to require a productivity adjustment, the Commission agreed in 1989 to the shippers' requests, and adopted procedures requiring the

³ Coal Rate Guidelines--Nationwide, 1 I.C.C.2d 520 (1985), aff'd, Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987)("Coal Rate Guidelines").

⁴ Railroad Cost Recovery Procedures, 364 I.C.C. 841 (1981)

adjustment of the quarterly index for a measure of productivity.⁵ Neither the railroads nor the shippers were entirely satisfied, but significant movement toward the shipper position had occurred.

This pattern of shippers clamoring for the Board to respond to perceived inequities in the regulatory process and the Board responding to those claims by making changes to address the concerns - with such changes almost always favoring the shippers but never quite satisfying their appetite - has happened time and time again, with the pace of such responses picking up substantially over the past few years.

1. **Efforts To Improve The Rate Complaint Process For Bulk Commodities And Large-Volume Shipping**

Ever since adoption of the Coal Rate Guidelines, there have been shipper complaints that the rate complaint process was too costly, too cumbersome, too time consuming, and was stacked against the shipper. The ICC attempted to resolve some of these issues, but the issue continued to gather attention following creation of the STB. One of the STB's first attempts to respond to these complaints was in 1998, when the Board responded to concerns that the complexities of meeting the market dominance test were making rate complaints too expensive and too time-consuming. The Board responded by modifying its market dominance rules to eliminate the railroads' ability to use evidence relating to product and geographic competition to rebut any market dominance claims. Market Dominance Determinations – Product and Geographic Competition, 3 S.T.B. 937, remanded sub nom. Assn. of American Railroads v. STB, 237 F.3d 676 (D.C. Cir. 2001).⁶

⁵ Railroad Cost Recovery Procedures-Productivity Adjustment, 5 I.C.C.2d 434 (1989), aff'd sub nom. Edison Electric Institute, et al. v. ICC, 969 F.2d 1221 (D.C. Cir. 1992).

⁶ In revising its regulations, the Board acknowledged that product and geographic competition do constrain railroad pricing, but nevertheless determined to eliminate consideration of those

Notwithstanding this shipper friendly change, shippers continued to assert that the rate complaint process was too expensive. In 2003, the Board initiated and concluded yet another proceeding⁷ to streamline the process for resolving stand alone cost ("SAC") cases brought under the Coal Rate Guidelines standard. The Board proposed, and eventually adopted several measures to achieve this end, including: requiring mandatory, non-binding pre-complaint mediation between the shipper and railroad under STB auspices; a discovery approach tailored to experience in SAC cases; and the establishment of an informal expedited process for resolving discovery disputes using Board staff.

In 2005, the Board held yet another series of hearings on the SAC methodology; again focused on ways to further streamline large rate case litigation. These hearings resulted in the decision in Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1) (STB served October 30, 2006). In that decision, the Board adopted several procedural and substantive changes to the SAC test, almost all of which were recommended by the shippers. The goal was to make it faster, easier, and less costly for a shipper to bring a rate complaint.

Cumulatively, all of the changes over this decade-long period largely accomplished the shippers' goal of making application of the SAC methodology less complex. Indeed, since adoption of these changes, there have been several rate complaint cases filed and decided. Most of these ended up in negotiated settlements or decisions granting rate relief for the shippers.

constraints because their consideration made market dominance determinations unduly complex. Market Dominance Determinations – Product and Geographic Competition, 3 S.T.B. 937, 1998 STB LEXIS 1003 *21, n. 49 (STB served Dec. 21, 1998).

⁷ Procedures To Expedite Resolution Of Rail Rate Challenges To Be Considered Under The Stand Alone Cost Methodology (STB Ex Parte No. 638) (STB served April 3, 2003).

2. Efforts To Improve The Process For Smaller-Volume Shipping

The Commission and the Board have also continued to respond to shippers' concerns about the availability of rate relief for smaller-volume shipments. In 1986, the ICC initiated a proceeding (Ex Parte No. 346 (Sub-No. 2)) soliciting suggestions for how to decide rail rate cases where application of SAC was too costly or traffic too infrequent and dispersed for a SAC analysis. In 1987, the ICC proposed two alternative simplified tests that had been developed by its staff as potential methodologies. The ICC tried applying each of these tests to individual cases, but ultimately concluded that neither measure was suitable as a standard of reasonableness.

Trying again for an appropriate test of reasonableness, ICC staff developed two other potential reasonableness measures. In the meantime, the AAR developed and offered for consideration its own proposal. The ICC sought public comment on all of these measures in late 1992, but subsequently postponed comments to enable interested parties to explore how each of these measures was produced. The ICC hosted technical workshops in February and April of 1993. In the end, in a 1995 Decision, the ICC concluded that it could not pursue the AAR model because that model was inconsistent with the Coal Rate Guidelines approach and was biased towards the railroads in its assumptions. The ICC further concluded that, in a decade-long search, it had been unable to identify a satisfactory means of simplifying the SAC analysis in a way that would adhere to the theory, and approximate the results, of the Coal Rate Guidelines.

In 1995, Congress told the ICC/STB to try again, directing the Board to "establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case." 49 U.S.C. 10701(d)(3). In response, taking the lessons from its decade long search, the

Board adopted the guidelines set forth in Rate Guidelines – Non-Coal Proceedings, 1 S.T.B. 1004 (1996) (Simplified Guidelines). However, between their adoption and issuance of new guidelines in 2007, no shipper presented a case under that methodology.

As it was becoming clear that the Simplified Guidelines were inadequate, the Board held public hearings in April 2003 and July 2004 to examine why those guidelines had not been used by shippers and to explore ways to improve them. The Board concluded that significant changes were necessary. In 2007, the Board adopted Simplified Standards for Rail Rate Cases, STB Ex Parte No. 646 (Sub-No. 1) (STB served September 5, 2007), which established new simplified methodologies for assessing the reasonableness of rates involving small shipments and small shippers. Once again, the Board largely adopted the proposals favored by the shippers. In large part, at least to date, the numerous changes appear to have succeeded in making such cases more feasible, as rates cases involving small-volume shipping have been brought and have resulted in rate reductions for the shippers who brought them.

3. Efforts To Improve the Process for Handling Service Complaints

Not only have there been efforts to improve the rate complaint process, but the STB, especially recently, has taken several significant steps to enhance the ability of shippers and consumers to address service and other complaints and to review the practices of the rail industry. These efforts have included adoption of rules and procedures specifically designed to resolve service complaints, including providing shippers complaining of perceived service inadequacies physical access to another railroad,⁸ changes in the Board's structure and programs,

⁸ See Rail Service In The Western United States; Joint Petition For Service Order, STB Ex Parte No. 573, Service Order No. 1518, (STB served Oct. 31 and Dec. 4, 1997, and Feb. 17 and 25, 1998)(providing access to alternative railroads to resolve merger related service problems); Expedited Relief for Service Inadequacies, STB Ex Parte No. 628 (STB served Dec. 21, 1998)(adopting permanent rules applicable to service problems); see also Denver Rock Island

and several recent cases finding certain practices by the railroads to be unreasonable.⁹ All of these changes were designed to facilitate better access to the agency for shippers and consumers.

One of the success stories is the establishment and improvement of the Board's Rail Customer and Public Assistance Program. The program began in 2000 and has grown dramatically since. The program is used by both shippers and railroads to resolve disputes before they give rise to formal complaints and legal challenges. The program is staffed by attorneys and former employees of shippers and railroads who have significant experience in the industry. Working with the parties, the staff seeks to find a middle ground satisfactory to both sides and because it is an informal program, parties can withdraw at anytime and bring a formal complaint before the Board. Topics handled by this office have included railroad-car supply and service issues, claims for damage, interchange issues, employee complaints and community concerns.

In addition to Rail Customer and Public Assistance Program, the ICC and the Board have established several advisory councils for the purpose of bringing shippers and the railroad together to exchange information and help resolve industry-wide concerns. The Railroad-Shipper Transportation Advisory Council (RSTAC) consists of 15 appointed members representing large and small shippers, and large and small railroads. The RSTAC is specifically designed for shipper/railroad issues. The Rail Energy Transportation Advisory Committee (RETAC) was established in July 2007 to provide advice and guidance to the Board regarding

Railroad--Alternative Rail Service--Lines of Kansas Southwestern Railway, L.L.C., Finance Docket No. 33762 (STB served June 16, 1999); American Plant Food Corporation Alternative Rail Service--Line of Texas Northeastern Railroad, Finance Docket No. 33795 (STB served Dec. 7, 1999).

⁹ Rail Fuel Surcharges, STB Ex Parte No. 661 (STB served Jan. 26, 2007); Arkansas Electric Cooperative Corporation – Petition For Declaratory Order, STB Finance Docket No. 35305 (STB served March 3, 2011)(finding rail carrier's tariff requiring a rail shipper to limit the loss of coal dust from the top of coal cars during transit to be an unreasonable practice as written).

the transportation by rail of energy resources (including, but not necessarily limited to, coal, ethanol, and other biofuels). RETAC is comprised of 23 voting members, representing a balance of stakeholders with an interest in energy transportation by rail, including large and small railroads, coal producers, electric utilities, the biofuels industry, and the private railcar industry. The oldest such advisory group is the National Grain Car Council ("Council"), founded by the ICC in 1994, and made up of a balanced representation of executives knowledgeable in the transportation of grain, including members from the Class I railroads, representatives from the Class II and Class III railroads; members representing grain shippers and receivers; and members representing private rail car owners and rail car manufacturers. The purpose of the Council is to allow the members to discuss openly the issues affecting the grain transportation industry.

Clearly, the Board has been responsive to issues well beyond developing alternative processes for handling complaints involving rates. The adoption of the various programs and advisory councils, and the Board's willingness to impose access remedies to resolve service issues or to find certain railroad practices unreasonable, shows that the Board is not simply a tool of the railroad industry, unresponsive to the concerns of the shippers, as some shipper groups allege. Given that these programs appear to be working, there is no need to impose more intrusive remedies, such as the requirement to quote a bottleneck rate or provide enhanced terminal access, to resolve concerns that are being addressed.

B. Given The Changes, Shippers Should Proceed Under Existing Processes And Procedures Before Fundamental Changes Should Be Considered

The point in discussing the numerous proceedings attempting to address shipper concerns is to provide some historical context to the existing proceeding. The issues raised in this proceeding have been dealt with for over 25 years. The ICC and the Board, especially, have consistently responded to shipper concerns regarding the complaint process. As noted, even in

recent years, the Board has taken significant steps to expedite rail rate cases by streamlining and simplifying the complaint process as never before. For major rate cases, the Board issued processing guidelines, put limits on discovery, developed a standardized procedure for submitting SAC evidence, simplified the market dominance procedure, and improved the negotiation and mediation process. The same can be said with respect to the rate complaint process for small shipper and small shipments. Likewise, the Board has adopted procedures and processes to deal with service and other complaints and to facilitate better communication between the railroads and the shippers. In making these changes, the Board has been careful to accommodate shipper concerns without jeopardizing the fundamental structure and financial health of the freight rail industry.

Because of these changes, it is now clear that shippers have adequate remedies to address unreasonable rates and practices that result from the exercise of market power, and that the existing regulations protect against abuses of market power. Yet, despite the existence of these remedies, and the successful use of them, some shippers believe the Board has not gone far enough. Rather than being content with the revised and modernized process, these shippers want the Board to adopt radical changes in the fundamental structure of the industry by requiring railroads to offer rates for their shortest haul which would undermine the essential economic necessity that allows the U.S. rail industry to maintain and expand its enormous capital infrastructure. These same shippers want railroads to make their property available for use by other railroads that neither invested in that property nor maintain a network geared toward serving that particular shipper. These various shipper proposals are not designed to deal with particular factual circumstances in which the railroads have been shown to be exercising undue market power, as the existing rules and regulations adequately deal with that, but rather, these

changes aim at one thing: shifting revenues from the rail industry to certain groups of shippers. The simple desire to shift revenues from one industry to the other cannot, and should not, form the basis for radical changes in the regulatory structure, especially when such changes would, in effect, nullify 25 years of efforts by the ICC and the STB to accommodate the shippers' concerns.

In this proceeding, the burden of establishing why the existing regulations and precedents should be changed rests squarely on the shoulders of the shippers. The shippers must answer, with clear and convincing evidence, why is it, after 25 years of changes largely in their favor, that existing remedies cannot resolve their concerns. Perhaps even more importantly, even if they establish that some changes are needed, these same shippers need to establish why narrow remedies and narrow changes to existing precedents aren't the appropriate measures, rather than wholesale revocations of existing precedents. Indeed, if not carefully done, the medicine they ask the Doctor to prescribe to the railroads may actually do more harm than good and could ultimately lead to the unintended consequences of reducing competition rather than enhancing it. KCS will be carefully reviewing the opening comments of all of the parties to this proceeding for answers to these important questions, and will, as appropriate, provide further comment in reply or at the oral hearing.

II. DUE TO ITS SIZE AND NETWORK STRUCTURE, FUNDAMENTAL CHANGES IN THE BOTTLENECK AND TERMINAL SWITCHING PRECEDENTS COULD HAVE A DISPROPORTIONATE IMPACT ON KCS

As the smallest of the Class I carriers, KCS is especially concerned about the potential unintended consequences that could result from major changes in this Board's precedents, especially where such changes could allow large carriers and large shippers to force KCS to

short haul itself or allow its competitors access to points on its network when the revenues from such traffic are necessary for maintaining the entire KCS network.

Unlike its much larger competitors, KCS operates much like a regional or short line carrier, juggling the need to raise capital and improve service, yet, at the same time, competing against the larger carriers for market share while also operating as a interline partner with these very same carriers. In contrast, the four largest carriers dominate the railroad landscape. As KCS has pointed out on a number of occasions, rail mergers in recent decades have created several large railroads with enormous market reach who present a formidable challenge to KCS's ability to compete on rates and routing.¹⁰

As a result of the current market structure, there are significant differences in operating characteristics and market power between the larger carriers and KCS. For example, the vast majority of the traffic transported by the four largest Class I carriers (on average, 70% or more)¹¹ is handled in single-line service where the same carrier serves both the origin and the destination. Serving both the origin and destination for such a large amount of traffic, as these largest carriers

¹⁰ One only needs to look at the 2009 annual domestic revenues for the Nation's Class I carriers to understand that there is a dramatic difference between KCS (and CP) and the larger carriers:

BNSF Railway	\$ 14.1 billion
Union Pacific Railroad	\$ 14.1 billion
CSX Transportation, Inc.	\$ 8.2 billion
Norfolk Southern Corporation	\$ 7.9 billion
Canadian National Railway (U.S. Operations)	\$ 1.9 billion
The Kansas City Southern Railway Company	\$ 860 million
Canadian Pacific Railway (U.S. Operations)	\$ 699 million

Railroad Facts, 2010 Edition (Association Of American Railroads)(2009 revenues).

¹¹ 2009 Freight Commodity Statistics (FCS). The FCS has traffic for all the Class I carriers broken down by local, forwarded, received, and bridged. "Local" traffic constitutes "single-line" traffic. For 2009, the percentage of local, or single-line traffic, was as follows: BNSF (72.6%); CN (U.S. Ops)(48%); CP (U.S. Ops)(9.2%); CSX (83.3%); KCS (U.S. Ops)(14.8%); NS (70.3%); and UP (63.5%).

do, creates the potential for market power with respect to some shipments. For these shipments, the STB's rate and service complaint procedures are viable tools to prevent the railroads from taking undue advantage of that market power.

KCS's much smaller size, geographic reach and traffic patterns make it different than the larger Class I carriers. Only 14.8% of KCS's traffic is single line traffic. The vast majority of KCS's traffic – approximately 85% - KCS either receives from, or delivers to, other carriers. As a result, KCS has very little market power because it is, in many respects, as dependent upon the larger carriers as are the shippers and the shortline industry. This is one reason why KCS has not been the subject of any formal rate or service complaint at the ICC or the STB in over 25 years.

As a result of the differences in size, scope, and market power of rail carriers, the Board needs to carefully evaluate any proposed remedies or changes advocated by the parties to this proceeding. Efforts by this Board to reverse the bottleneck and terminal access precedents could have the unintended consequence of disproportionately harming smaller railroads like KCS who provide an important competitive balance in the industry, potentially leading to even further loss of competitors in the industry.

For example, take a utility plant that is solely served by KCS at destination. KCS does not directly serve the major coal origins. As a result, to serve coal receivers on its lines, KCS must rely entirely on coal received in interchange. Because current precedent allows KCS to agree with the origin carrier on a workable, mutually-acceptable point of interchange, the interchange point for such coal is usually Kansas City. The utility plant benefits from the origin competition between the various carriers to the interchange point with KCS. Interchanging at Kansas City then allows KCS to obtain revenues sufficient to not only cover the actual cost of

the movement from Kansas City to the destination, but also to provide a reasonable contribution to maintain the mainline network from Kansas City to the ultimate destination.

If existing bottleneck precedent were altered, and given that KCS does not directly serve any major coal origins, KCS could be forced to short haul itself and to take the coal in interchange at or near the destination. If there is no mechanism for KCS to maintain the same contribution from this new short-haul interchange point as it would have received by taking the coal at Kansas City, then there would be a significant reduction in the revenues available to support KCS's network, despite the fact that no abuse of market power by KCS had occurred.

Depriving KCS of the revenue necessary to maintain its current network would weaken it as a competitive force, and thus degrade the ability of its network to support service to other customers. This weakening would likely result in KCS being consolidated with a larger competitor, actually *reducing* competition and resulting in the precise opposite effect of what the Board (and shippers) would desire.

This is but one example of a remedy that is under consideration in this proceeding which would actually do more harm than good. As a result, the Board must be mindful that proposed remedies could have a different impact on KCS and other smaller carriers than they would on larger Class I's. While KCS does not believe that any changes with respect to the bottleneck and terminal access provisions are needed at this time and joins in the comments of the AAR, KCS also wishes to remind the Board and the shipping community that the consequences of subjecting all rail carriers to identical new radical regulatory treatment would not be the same.

KCS recognizes that there may be some shippers who have reason to think that they have not enjoyed the full benefits of competition. However, that does not mean that the Board should apply radical new remedies, such as the requirement to quote a bottleneck rate or to provide

terminal access, simply to deal with the few instances of alleged abuse. The proper remedy, and one that the Board has employed before, is for that particular party to seek redress under existing precedents based on a claim of rate or market abuse in a specific instance.

CONCLUSION

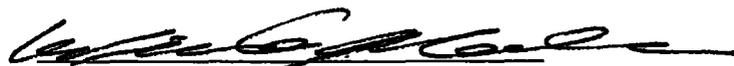
KCS shares the views of AAR that the Board does not need to modify or reverse its existing precedents in order for shippers to have adequate rate and service remedies at the Board. Indeed, the Board has made significant progress over the past decade in making the rate complaint process, for both SAC and non-SAC cases, easier, faster and cheaper for shippers. Some such changes have clearly sacrificed accuracy in favor of expediency in the rate challenge process, in some ways compromising the fairness of the process to the railroads. The STB has also significantly improved the communication between the shippers and the rail industry and adopted significant changes to resolve non-rate issues, such as service or other complaints. This progress appears to have borne fruit as the shippers have filed more and more rate and other complaints and have won significant cases over the past several years and obtained several settlements.

Given this progress, the shippers bear a heavy burden to prove that the Board should jettison its work over the past 25 years and instead adopt proposed radical remedies which would change the fundamental structure of the rail industry. Due to its limited network and the fact that the majority of its traffic is interline traffic, any fundamental changes to existing precedent would weaken KCS's ability to continue to compete against the larger carriers and would have a similar effect on other smaller carriers. Such a result would be exactly opposite of what the Board should be promoting. Such a result would impose a cure worse than the disease, violating

the first imperative of the doctors' Hippocratic Oath: do no harm. The Board should resist the call for such fundamental changes and allow its existing processes and procedures to work.

Respectfully Submitted,

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Dated: April 12, 2011

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