

ORIGINAL

ILLINOIS COMMERCE COMMISSION
527 E. Capitol Avenue
Springfield, Illinois 62701

RECEIVED
JAN 18 2005

Illinois Commerce Commission
RAIL SAFETY SECTION

United Transportation Union-Illinois)
Legislative Board,)
)
Petitioner,)
)
vs.)
)
The Kansas City Southern Railway)
Company,)
)
Respondent.)

No. T04-0027

**POST-HEARING BRIEF OF
THE KANSAS CITY SOUTHERN RAILWAY COMPANY**

COMES NOW Respondent The Kansas City Southern Railway Company ("KCS"), by and through its attorneys, and for its closing brief, states as follows:

The Shelter Facilities for Transportation Department Employees At KCS' East St. Louis Terminal Are Currently In Full Compliance With the Commission's Regulations

ICC Operating Practices Inspector Robert Wagoner testified at the hearing of this cause that on the date of his last inspection on July 27, 2004, the shelter facilities at KCS' East St. Louis Terminal were in compliance with the Commission's regulations,¹ except for the floor

¹ Although UTU's Complaint alleges violations of the Employee Washroom Act, 820 Ill. Comp. Stat. 230/0.01 to /5 (2004), UTU makes no reference to the Washroom Act in its Post-Hearing Brief other than to say that the Act was violated during the time UTU contends there was no shelter facility whatsoever for KCS' Transportation Department employees at East St. Louis Terminal. *UTU Post-Hearing Brief at 7*. The provisions of the Employee Washroom Act are not as specific as the Commission's regulations relating to shelter facilities for employees and with respect to the locker room floor space requirements are less stringent than the Commission regulations. Perhaps this is why UTU chose not to discuss the alleged inadequacies of the shelter facilities under the Employee Washroom Act. Because UTU has not pointed to any specific provisions of the Employee Washroom Act that were allegedly violated by the shelter facilities once the modular buildings were opened, KCS will limit its discussion to the alleged violations of the Commission's regulations relating to shelter provisions, discussed in UTU's Post-Hearing Brief. At any rate, the Illinois Commercial Transportation Law does not authorize the Commission to assess civil penalties for violations of the Employee Washroom Act. *See* 625 Ill. Comp. Stat. 5/18c-1701 (defining violations of "this chapter" so as not to include violations of the Employee Washroom Act); 625 Ill. Comp. Stat. 5/18c-1704(2) (authorizing civil penalties for violations of "this chapter").

DOCKETED

JAN 18 2005

space requirement for the locker room and ventilation in the lunch rooms. *Wagoner, Tr. at 334:19–335:1* However, Mr. Wagoner’s opinion that the facilities are not currently in compliance with the Commission’s regulations in these two respects is based on his personal interpretation of the regulations, *Wagoner, Tr. at 288:10–289: 5, 294: 20–297: 3, 319:19–326:7*, which he acknowledges is subject to an honest difference of opinion with KCS over how to interpret the regulations defining minimum floor space requirements, *Wagoner, Tr. at 288:10–289:5, 294:20–297:3*, and fails to take into account all the evidence with respect to the ventilation requirements. *Wagoner, Tr. at 322:11, 324:8–326:7*.

With respect to the floor space requirement for the locker rooms, Mr. Wagoner acknowledges an honest difference of opinion between him and KCS as to whether the Commission’s regulations require the locker room in the shelter facility for Transportation Department employees at East St. Louis be counted as one locker room or two given the partition at the south end of the locker room. *Wagoner, Tr. at 288:10–289:5, 294:20–295:17*. Likewise, Mr. Wagoner acknowledges an honest difference of opinion between him and KCS as to whether the floor space requirement should be calculated based on the number of lockers in the facility or just the number of lockers that have been assigned to employees for use. *Wagoner, Tr. at 296:6–297:3*. KCS submits that there also is an honest difference of opinion between Mr. Wagoner and KCS as to whether the regulation that requires lunch rooms to be “adequately ventilated” means that a separate exhaust fan must be installed in each lunchroom. *Wagoner, Tr. at 319:19–326:7*. At any rate, Mr. Wagoner acknowledges that he must defer to the Commission on what the regulations require with respect to these issues. *Wagoner, Tr. at 295:18–295:22, 320:18–321:21*.

The United Transportation Union (“UTU”) contends that Mr. Wagoner made an inadequate inspection and is wrong in his judgment as to what issues remain outstanding in terms of compliance. *Szabo, Tr. at 413:18–416:16*. UTU contends that in addition to the two issues Mr. Wagoner says remain unresolved, KCS’ shelter facility at East St. Louis is currently not in compliance with the Commission’s regulations in the following respects: (1) the locker and shower facilities for female employees are inadequate, *UTU Post-Hearing Brief at 10–11*; and (2) the modular building that currently houses the shelter facility is “not adequate or suitable for the purpose intended” and may not be used as a shelter facility notwithstanding technical compliance with the Commission’s regulations. *UTU Post-Hearing Brief at 18–22*.

KCS submits that: (1) the locker room it has provided for its Transportation Department employees at East St. Louis meets the floor space requirements of the Commission’s regulations based on the plain and fair meaning of the regulations; (2) the regulations do not require separate exhaust fans in lunch rooms where the ventilation is otherwise “adequate”; (3) the locker and shower facilities for female employees at East St. Louis are fully compliant with the pertinent Commission regulations; and (4) the modular building housing the shelter facility is adequate and suitable for the purpose intended.

Locker Room Floor Space Requirements

Section 1545.140 of Title 92 of the Illinois Administrative Code provides that:

Locker rooms, except those in camp cars, shall have not less than eighty square feet of floor space for the first ten employees, or fraction thereof, and for each additional employee, not less than four additional square feet shall be added thereto. Employees, as used herein, refers to employees to whom lockers have been assigned.

The locker room for Transportation Department employees at East St. Louis is located in a modular building that replaced an older, deteriorating brick building. The locker room has 62

lockers. *Eddy, Tr. at 66:16–66:19; Burner, Tr. at 213:21–214:2; KCS Ex. 7.* The total floor space in the locker room is 300.7 square feet.² *Haney, Tr. at 461:3–461:18; KCS Ex. 7.* There is a floor-to-ceiling partition at the west end of the locker room with a doorway in it that divides the locker room into two areas. *Eddy, Tr. at 137:20–138:3; Wagoner, Tr. at 289:14–290:7; KCS Ex. 7.* The area west of the partition contains three rows of lockers, each with six lockers, two of the rows being back-to-back, with open floor space of 90.64 square feet. *KCS Ex. 7.* The area east of the partition contains three rows of lockers, one with 21 lockers, one with seven lockers, and one with 16 lockers, with floor space of 210.06 square feet. *KCS Ex. 7.*

The door has been removed from the doorway in the partition between the two sides of the locker room. *Wagoner, Tr. at 289:6–289:13; Haney, Tr. at 454:3–454:13.* There is a row of 6-1/2 foot tall lockers on the west side of the partition that back against the partition and extend the entire length of the partition from the south exterior wall to the door opening. *Eddy, Tr. at 136:19–139:16; Wagoner, Tr. at 289:19–290:7; KCS Ex. 7.* Even if there was no partition wall in the locker room, this row of lockers would form an effective barrier between the two sides of the locker room and prevent anyone from walking from one side to the other except through the opening in the row of lockers where the doorway now exists in the partition, *Eddy, Tr. at 136:19–139:16; Wagoner, Tr. at 289:19–290:14.*

Both sides of the locker room are used as a single locker room by male Transportation Department employees. *Wagoner, Tr. at 299:4–299:17.* Female Transportation Department

² Mr. Wagoner acknowledged that KCS Exhibit 7 correctly summarizes his measurements of the floor space in the locker room. *Wagoner, Tr. at 286:19–287:21.* Although Mr. Wagoner testified that he added up the total square footage from his measurements to be 293 square feet, *Wagoner, Tr. at 286:1–286:4,* it appears that Mr. Wagoner's math is off as shown by the calculations at the bottom of KCS Exhibit 7. KCS Trainmaster Greg Haney testified that he rounded off the dimensions shown on KCS Exhibit 7 to the nearest half foot and used an electronic calculator to calculate the total square footage of the locker room. The number Mr. Haney got was 301 square feet. *Haney, Tr. at 460:12–461:9* Counsel for KCS stated for the record that his staff did the calculations before the hearing using an electronic calculator and the dimensions shown in KCS Exhibit 7 without rounding off any of the dimensions and got 300.7 square feet. *See Tr. at 461:11–461:18.*

employees have their own locker room in another building. *Wagoner, Tr. at 311:2–312:17*; *Haney, Tr. at 461:22–463:6*. Mechanical Department employees have their own separate locker room in another building. *Haney, Tr. at 437:6–437:20*.

KCS currently has 61 Transportation Department employees who work out of East St. Louis. *Haney, Tr. at 490:6–498:15*. Only 36 of these employees have been assigned lockers. *Haney, Tr. at 456:6–456:8*. Any employee who requests a locker is assigned a locker, but not all Transportation Department employees have asked for a locker. *Haney, Tr. at 456:9–456:11*. Employees may not use a locker unless they have signed up for a locker and have been assigned a locker by the trainmaster since the trainmaster needs to keep track of which employees are using which lockers. *Haney, Tr. at 524:13–525:7*. Because there are extra lockers, a few Transportation Department employees use more than one locker. *Haney, Tr. at 524:21–525:7*. Two lockers are used to store supplies for the bathroom. The cleaning contractor uses a third locker to lock up his cleaning supplies. *Haney, Tr. at 522:15*.

KCS submits that under the Commission's regulations, floor space requirements for the locker room should be calculated based on (1) the number of employees who have been assigned lockers as opposed to the total number of lockers in the locker room, and (2) the locker room being treated as a single locker room rather than as two locker rooms when it is one contiguous space that is used for a single purpose. On this basis, the required floor space for the locker room in the shelter facility for KCS Transportation Department employees at East St. Louis is 184 square feet. $(80 + ((36 - 10) \times 4) = 184)$

Even if the Commission interprets its regulations to require that floor space be calculated based on the total number of lockers (62) instead of the number of employees assigned lockers, the locker room in the shelter facility for KCS Transportation Department employees at East

St. Louis still satisfies the Commission's regulations if the locker room is treated as a single locker room. Under this interpretation of the regulations, the required floor space for the locker room is 288 square feet. $(80+((62-10)\times 4)=288)$

Likewise, if the Commission interprets its regulations to require that each side of the locker room be treated as a separate locker room, the locker room still satisfies the Commission's regulations if the floor space requirement is calculated based on the number of lockers assigned to employees (36) instead of the total number of lockers. Under this interpretation of the regulations, the required floor space is 224 square feet. $((80+((10-10)\times 4)))+(80+((26-10)\times 4))=80+144=224)^3$

Mr. Wagoner acknowledges that the locker room as presently configured meets code if the regulations are interpreted in one of the manners described above. *Wagoner, Tr. at 288:14, 342:2-343:5.*

Only if the floor space requirement is calculated based on the total number of lockers (62) and the locker room is treated as two separate locker rooms rather than as one locker room does the locker room as presently configured fail to satisfy the Commission's regulations. When calculated based on this interpretation of the regulations, the floor space requirement is 328 square feet. $((80+((18-10)\times 4)))+(80+((44-10)\times 4))=112+216=328)$

Section 1545.140 defines the floor space requirement for locker rooms in terms of the number of employees and then expressly states that: "Employees, as used herein, refers to employees to whom lockers have been assigned." Ill. Admin. Code tit. 92, § 1545.140. This

³ This calculation assumes that the number of lockers in each "room" that are assigned to employees bears the same proportion to the total number of lockers that are assigned as the number of lockers in each "room" bears to the total number of lockers (i.e., since 29% of the lockers are in the west "room," 29% of the assigned lockers are in the west "room"). The total required square footage for the two "rooms" is the same regardless of how the locker assignments are distributed, but it could make a difference as to whether each "room" satisfies the floor space square footage requirement under this interpretation of the regulations.

language leaves no room for argument as to whether the floor space requirement is to be calculated based on the number of employees who are assigned lockers or the number of lockers in the facility. Mr. Wagoner's only justification for using the total number of lockers to calculate the floor space requirement is that unassigned lockers are "still taking up space . . ." *Wagoner, Tr. at 342:2-342:17*. However, there is no logic to this rationale since floor space is measured between lockers and does not include space occupied by lockers. *See KCS Ex. 7*. The regulation stipulates that the floor space requirement is to be calculated based on the number of employees who have been assigned lockers because floor space is occupied by employees who use lockers, not by employees who do not use the lockers. *Cf. Employee Washroom Act, 820 Ill. Comp. Stat. 230/2 (2004)* ("The floor space necessary for the employees to dress in such washroom shall not be less than seven square feet *per employee regularly dressing in such washroom at any one time.*") (emphasis added).

Mr. Wagoner's justification for counting the locker room as two locker rooms instead of one is the existence of a partition across the south end of the locker room. Mr. Wagoner testified that he wants to be consistent in his inspections and does not want to have to decide on a case-by-case basis whether a facility has one locker room or two and, therefore, automatically counts the locker room as two locker rooms if there is any kind of "divider" in the locker room. *Wagoner, Tr. 290:15-291:8*. However, Mr. Wagoner acknowledges that "these two rooms are a single locker room being used by the same set of employees." *Wagoner, Tr. at 299:4-299:6*. Furthermore, he acknowledges that counting the locker rooms as two locker rooms rather than as one locker room makes a big difference in the floor space requirement because additional square footage is required for the first 10 employees. *Wagoner, Tr. at 298:15-299:3*. When a locker room is treated as a single locker room, those first 10 employees are counted only once; but

when a locker room is treated as two locker rooms, those first 10 employees are counted twice. *Wagoner, Tr. at 298:15–299:3*. This makes no sense when there is but a single set of employees using both ends of the locker room.

Mr. Wagoner acknowledges that it is ultimately up to the Commission to decide how this regulation should be interpreted. *Wagoner, Tr. at 295:18–295:22*. The plain and fair meaning of the regulation is that the locker room in question should be treated as a single locker room, not two, and/or the floor space square footage requirements should be calculated based on the 36 employees who have been assigned lockers in the locker room. If the Commission accepts KCS' position on either of these points, the locker room complies with the regulation.

Adequate Ventilation in the Lunch Rooms

Section 1545.210 of Title 92 of the Illinois Administrative Code provides as follows:

When a lunch room is provided by the company, it shall be adequately ventilated, reasonably heated, properly screened, provided with the necessary covered receptacles for the disposal of waste matter and shall be kept in clean and good care.

Mr. Wagoner testified that he believes this regulation requires the installation of a forced air exhaust fan in any lunch room that is equipped with a microwave or other heating appliance that could produce fumes or smoke. *Wagoner, Tr. at 263:1–263:18, 321:22–322:5*.

Mr. Wagoner acknowledges that if there are no appliances in a lunchroom that could cause something to burn, the regulations do not require a forced air exhaust fan in the lunchroom.

Wagoner, Tr. at 321:22–326:3.

Of the three locations where Transportation Department employees have been given permission to eat their lunch, only the trainmaster's building is equipped with a microwave or other appliance for heating food. *Burner, Tr. at 229:8–229:15, 232:6–232:10; Wagoner, Tr. at 263:5–263:18; Haney, Tr. at 480:13–480:15*. It is Mr. Wagoner's opinion that the lunch room

in the trainmaster's building has to have a forced air exhaust fan to comply with the regulation that requires lunchrooms to be "adequately ventilated." Mr. Wagoner acknowledges that the Commission's regulations do not require a forced air exhaust fan at either of the other two locations that are used as lunchrooms. *Wagoner, Tr. at 263:5-263:18*. Mr. Wagoner acknowledges that this is just his personal interpretation of the regulation and he must defer to the Commission on whether the regulation requires installation of a forced air exhaust fan in a lunchroom that has appliances for heating food. *Wagoner, Tr. at 320:8-321:21*. The UTU apparently contends that exhaust fans are required in all of the lunch rooms whether or not they are equipped with appliances for heating food. *UTU Post-Hearing Brief at 9-10*.

Section 1545.210 does not impose a *per se* requirement for installation of forced air exhaust fans in lunchrooms. This regulation simply requires that lunch rooms be "adequately ventilated." The uncontested testimony on the issue of ventilation in the lunch rooms is that the modular buildings in which the lunch rooms are housed are equipped with central heating, cooling and ventilation systems that operate 24 hours per day, 365 days per year, and are controlled by a thermostat in each building to which the employees have full access. *Eddy, Tr. at 120:17-121:6; Haney, Tr. at 467:18-468:13*. None of the witnesses who testified had any complaints that these buildings are too hot or too cold or have inadequate movement of air in the buildings. *See, e.g., Eddy, Tr. at 123:18-124:17; Burner, Tr. at 227:18-228:2; Haney, Tr. at 480:3-480:9*.

There was no testimony that smoke or fumes from cooking appliances has ever been a problem in any of the lunchrooms. Trainmaster Haney testified that he has never received a complaint from any employee that there were fumes or smoke in any of the lunchrooms from cooking appliances. *Haney, Tr. at 480:3-480:9*. Furthermore, Trainmaster Haney testified that

if a microwave or other appliance produced fumes or smoke, they could be effectively dissipated by opening a window and turning on the fan for the central heating and cooling system (i.e., turning the switch on the thermostat from “auto” to “manual”). *Haney, Tr. at 478:14–480:2.* Mr. Wagoner acknowledged that this could be done and that he did not take this into account in advising KCS that an exhaust fan was needed in the lunchroom in the trainmaster’s building. *Wagoner, Tr. at 325:10–326:7.* Thus, even under Mr. Wagoner’s interpretation of the regulation, the lunchrooms are in compliance with the regulation that requires “adequate ventilation” in lunch rooms since the modular units are equipped with fans that can be turned on to pull fumes or smoke out of the lunchroom.

Locker and Shower Facilities for Female Employees

Mr. Wagoner acknowledges that KCS, having made a separate locker room available for female employees, is in compliance with § 1545.160 relating to dressing rooms for women. *Wagoner, Tr. at 310:9–313:21, 314:15–315:5.* The women’s locker room is located in a restroom in the building that houses the Superintendent’s office, 50-75 feet from the building that houses the shower facility for Transportation Department employees. *Eddy, Tr. at 64:13–65:11.* The UTU, however, contends that KCS must provide a separate shower facility for female employees in the women’s locker room. *UTU Post-Trial Brief at 11.*

Section 1545.130 of Title 92 of the Illinois Administrative Code relating to shower facilities, provides in relevant part as follows:

- a) General Requirements
 - 1) Showers shall be required when such facilities are necessary at specified locations to protect employees whose work involves exposure to poisonous, infectious or irritating material or to excessive dirt, heat fumes or vapors or other materials or substances injurious to health.
 - 2) Such shower facilities shall be provided in conjunction with lockers, or dressing room facilities as required by this Part.

Section 1545.160 of Title 92 of the Illinois Administrative Code relating to dressing rooms, provides in relevant part that:

- a) Where six or more women who are required to change clothing are employed at any one time, a dressing room shall be provided for their use.
- b) Where more than one but less than six women who are required to change clothing are employed and a dressing room is not provided, room space shall be provided, properly screened for privacy and made suitable for the use of women employees in lieu of a dressing room.
- c) Dressing rooms shall be conveniently located for the workers for whose use they are intended.

There are two female employees working for KCS at East St. Louis. *Szabo, Tr. at 405:15–405:16; Haney, Tr. at 462:4–462:9.* The female employees have been provided a locker room in the restroom in the Superintendent's building. *Haney, Tr. at 462:4–463:6.* There are three lockers in this locker room. *Haney, Tr. at 462:10–462:12.* There is not a separate shower facility for female employees. *Burner, Tr. at 200:3–200:13.* The shower facility for Transportation Department employees is in the bathroom in the building that houses the locker facility for the male transportation employees. *Eddy, Tr. at 63.11–63:21.* The door to the bathroom has a latch and can be locked to prevent anyone from entering the bathroom when it is occupied. *Burner, Tr. at 237:11–237:22.* In this manner, an employee can shower in privacy. *Eddy, Tr. at 141:5–141.21.* The building that houses the shower facility is 50-75 feet from the Superintendent's building where the women's locker room is located. *Eddy, Tr. at 64.13–64.11.* A female employee who wishes to shower may retrieve her clothing from her locker, walk the 50-75 feet to the bathroom that has the shower facility, shower in privacy, and change her clothes in the bathroom. *Haney, Tr. at 466:4–466:10.*

Mr. Wagoner acknowledges that under the Commission's regulations, KCS is not required to have a separate locker room for women since there are fewer than six female employees and that KCS could have complied with the regulations by simply putting up a screen

in the locker room to provide privacy for women to change clothing. *Wagoner, Tr. at 311:2–312:17*. Mr. Wagoner also acknowledges that the regulations do not require a separate bathroom or shower facility for female employees as long as the bathroom and shower facility has a door that can be shut and locked to protect the privacy of the occupant. *Wagoner, Tr. at 310:17–313:11, 314:15–315:5*. According to Mr. Wagoner, the bathroom and shower facilities at East St. Louis are in compliance with the Commission’s regulations. *Wagoner, Tr. at 315:1–315:5*.

The UTU’s Complaint does not allege that KCS is required by the Commission’s regulations to provide a separate shower facility for female employees. *See UTU Complaint*. At the hearing, KCS preserved its objection to the Commission considering any claim that KCS is required to provide a separate shower facility for its female employees by timely objecting to any evidence on the issue on the grounds that it was not raised by UTU’s Complaint. *Eddy, Tr. at 65:12–66:4*.

Although UTU claims that the issue of a separate shower facility for female employees was raised by specification No. 5 of paragraph 4 of UTU’s Complaint, *Eddy, Tr. at 65:22–66:1*, that paragraph alleges violation of §1545.160 for failure to “make any accommodation for women employees who use the changing area” and makes no reference to showers. *UTU Complaint at 2*. Nor does the UTU’s complaint make any reference to § 1545.130, which is the regulation relating to shower facilities. *UTU Complaint at 2*. Indeed, the only allegation in UTU’s Complaint relating to showers is that in specification No. 3 of paragraph 4, which alleges that the shower facility KCS provides for employees did “not have an ample supply of hot water.” *UTU Complaint at 2*. The issue of hot water for the shower was resolved well before the date of the hearing in this case. *Burner, Tr. at 186:16–186:20*.

In any event, the shower facility KCS provides for its Transportation Department employees at East St. Louis complies with § 1545.130. *Wagoner, Tr. at 315:1–315:5*. This shower facility is available to both men and women and affords privacy to the user. There was no testimony that this shower facility was inadequate given the number of employees who wish to shower at the end of their shift.

Furthermore, given the reasonably convenient proximity of this shower facility to the women's locker room, it cannot be said that the shower is not "provided in conjunction with lockers or dressing room facilities as required by [Part 1545]." Ill. Admin. Code tit. 92, §1545.130(a)(2). The Commission may take judicial notice of the fact that 50-75 feet is not an unreasonable distance for an employee to have to walk from their work station to the nearest restroom facility. Likewise, it is not an unreasonable distance for an employee to walk from their locker to the shower facility.

No female employee at East St. Louis has complained to Trainmaster Haney about the accommodations for female employees, except that one of the two female employees has told Haney that as a union employee, she would rather not be in the same building as the management employees, but the facility itself is okay. *Haney, Tr. at 463:7–464:7*. There is no basis in the record for the Commission to conclude that the present facilities for female employees at East St. Louis fail to comply with the Commission's regulations.

The Modular Building Is Reasonably Adequate and Sufficient for the Intended Purpose

Mr. Wagoner takes no exception to the adequacy and sufficiency of the shelter facilities KCS has provided for its Transportation Department employees at East St. Louis except for his contention that (1) the locker room for male employees does not meet the floor space requirements under his interpretation of the Commission's regulations, and (2) a forced air

exhaust fan is needed in the lunch room in the trainmaster's building. *Wagoner, Tr. at 333:19–335:1*. However, UTU contends that KCS should not be permitted to house shelter facilities for its Transportation Department employees in a modular building even if the facilities comply with the letter of the Commission's regulations. *UTU Post-Hearing Brief at 21*. UTU contends that the modular building used by KCS to house the shelter facility for its Transportation Department employees at East St. Louis is not "adequate and sufficient" for the intended purpose and should be replaced with a building of some other type of construction, although UTU does not specify what type of construction it believes is needed. *UTU Post-Hearing Brief at 22*.

UTU cites no legal authority for the proposition that a modular building is not "adequate and sufficient" for use as a shelter facility under the Commission's regulations. The single case cited by the UTU in its post-hearing brief does not so hold. Furthermore, the record belies UTU's contention that the modular building KCS uses for its shelter facility for Transportation Department employees at East St. Louis is inadequate and insufficient for its intended purpose. *See* photographs attached hereto as Appendix A, taken in mid-June 2004, which all witnesses agree depict the facilities as they appeared on the day before the first day of hearing in this case, *KCS Exs. 1–6; see also Eddy, Tr. at 80:3–80:22, 86:20–89:22; Haney, Tr. at 442:12–443:5*, and sketch attached hereto as Appendix B showing dimensions and layout of crew facility. *KCS Ex. 7; see also Wagoner, Tr. at 286:19–288:6; Haney, Tr. at 460:12–460:20*.

The single Commission decision cited by the UTU, *Brotherhood of Railroad Trainmen v. Chicago, Burlington & Quincy Railroad Co.*, No. 31923, 23 Ill. Commerce Comm'n Opinions & Orders 388–394 (April 18, 1944), does not stand for the proposition that a modular building that otherwise complies with the requirements of the regulations may not be used to house shelter facilities. In *Brotherhood of Railroad Trainmen*, the Commission ordered the respondent

railroad to construct a new building at a location where there was no existing shelter facility whatsoever for switch crews that reported to work at that location and at another location where the only shelter facility was an old box car body that was described as being in a dilapidated condition, unsanitary, infested with mice, heated only with a coal stove, resting on the ground with dirt piled up around the base to insulate it against the cold, and lacking any kind of running water. *Id.* at 389–91. The facilities described in that case clearly failed to comply with the applicable code.⁴

In the instant case, the modular building KCS uses for its shelter facility for Transportation Department employees at East St. Louis is fully compliant with the Commission’s regulations. *See discussion, supra. pp. 1-12.* There is no contention that these modular buildings are today in a dilapidated condition, unsanitary, mice-infested, improperly heated, or lacking running water as was the case in the *Brotherhood of Railroad Trainmen*. The modular building is of modern construction, sits on concrete blocks off the ground, and is anchored to the ground. *KCS Exs. 1–6; Eddy, Tr. at 92:2–93:18.* KCS uses the same type of modular building for its Transportation Department employees that it uses for its Mechanical Department employees and for its management employees at East St. Louis, including the trainmaster and the superintendent of transportation. *Eddy, Tr. at 92:2–93:18; Haney, Tr. at 437:6–438:22.* The superintendent’s office is located in a modular building that is twice as wide as the other three modular buildings at East St. Louis; however, extra space is needed in the superintendent’s building to accommodate a large conference room that is used for disciplinary hearings, where labor and management are both represented and witnesses are called to testify on

⁴ The complaint in *Brother of Railroad Trainmen* was apparently based on the Illinois Employee Washroom Act.

direct and cross-examination. *Eddy, Tr. at 168:21–169:20; Haney, Tr. at 443:14–445:9; KCS Ex. 6.*

UTU's principal complaint regarding the "adequacy and sufficiency" of the modular building to serve as a shelter facility for Transportation Department employees is that the locker room is "cramped." *See UTU Post-Hearing Brief at 20–21.* UTU complains that the aisles between the lockers "are not much wider than a man's shoulders"⁵ and there is not enough room for employees to sit down while changing clothes. *UTU Post-Hearing Brief at 20–21.* However, there was no testimony offered on the record at the hearing to support a finding that employees have experienced difficulty walking down the aisle between lockers, accessing their lockers, or changing their clothes in the locker room. The only testimony offered by any employee who has worked at East St. Louis regarding the locker room was that of Local Vice Chairman Don Eddy. Mr. Eddy's testimony on this subject is set out verbatim below:

The space is cramped. It's—you just don't have the room to be able to—*not to say spread out and do what you need* but, you know, most locker rooms that I've been in, and this is just, you know, speaking off the hip, you know, you have enough room to fit at your locker, change your boots, change your clothes, do what you will, you know, sit down and relax a little bit and the locker room now—I mean, they've removed lockers in order to create some space.

But, I mean, you're still—you're bumping into each other. If you get two crews, and what I mean by crews, I'm talking about six people. You know, you're just kind of walking into each other everywhere you turn around.

Eddy, Tr. at 39:3–39:17 (emphasis added).

Mr. Eddy qualified his testimony by acknowledging that he was *not* saying that there was insufficient room "to spread out and do what you need," but rather he was comparing the locker

⁵ UTU bases this argument entirely upon testimony by UTU State Legislative Director Joseph Szabo that UTU Local Vice Chairman Don Eddy's shoulders are 28 inches wide, *Szabo Tr. at 401:10–401:15*, and that one of the aisles between lockers is only 36 inches wide. *KCS Ex. 7.* The other aisles are at least 40 inches wide. *Szabo Tr. at 401:10–401:15.* The Hearing Examiner may take judicial notice of the fact that Mr. Eddy has exceptionally broad shoulders. Furthermore, there was no testimony that Mr. Eddy or any other KCS employee has experienced any difficulty navigating the aisles between the lockers or accessing the lockers.

room in the shelter facility with “most locker rooms that [he has] been in,” which he says have room to “sit down and relax a little bit.” *Eddy, Tr. at 39:3–39:17*. On cross-examination, Mr. Eddy acknowledged that this comparison was to gymnasium locker rooms, not to railroad shelter facility locker rooms. *Eddy, Tr. at 95:9–96:6*. Furthermore, Mr. Eddy’s complaint of “kind of walking into each other everywhere you turn around” did not amount to testimony that the aisles were too narrow for employees to navigate past one another or that there was insufficient room to change clothes. Indeed, the photographs of the locker room clearly rebut any such claim. *KCS Exs. I, 4*. Mr. Wagoner certainly did not note any such problem based on his inspections of the locker room.

The modular building used for the shelter facilities for Transportation Department employees at East St. Louis are in full compliance with the Commission’s regulations and are adequate and sufficient for the intended purpose. Although the UTU is dissatisfied with the shelter facilities because they are housed in modular buildings, the subjective judgment of the UTU is not material to the issue of whether the facilities comply with the Commission’s regulations. The regulations place responsibility for compliance on the KCS. Accordingly, KCS has the right to decide how to meet that responsibility. As long as the facilities comply with the regulations, it matters not that UTU believes there is a better way to do the job. To the extent UTU’s complaint is based upon its subjective opinion that a different type of building would be better than the modular buildings used by KCS, that complaint is not cognizable under the Commission’s jurisdiction to hear complaints that an employer has failed to comply with the Commission’s regulatory directives.

Based on the Commission's Guidelines for Assessment of Civil Penalties, Penalties Are Not Warranted For Those Instances of Non-Compliance Shown By the Evidence

Section 1704(2) of the Illinois Commercial Transportation Law grants the Commission discretionary authority to assess civil penalties. 625 Ill. Comp. Stat. 5/18c-1704(2). The Commission is free to not assess any penalties at all. *See* 625 Ill. Comp. Stat. 5/18c-1704(2) (“The Commission *may* assess . . . a civil penalty”) (emphasis added); *see also Boles Trucking, Inc. v. O'Connor*, 486 N.E.2d 362, 370 (Ill. App. Ct. 1985) (stating that Ill. Admin. Code, tit. 92, § 1440.10 “defin[es] the standards to be utilized in determining *whether* civil penalties should be imposed”) (emphasis added).

The Commission has adopted the following guidelines to govern its exercise of discretion in the assessment of civil penalties.

The following guidelines shall be observed in the assessment of civil penalties.

- a) The Standard of Lack of Mitigating Circumstances. In both situations set forth below, it shall be the burden of the respondent to establish a reason why the civil penalty should be mitigated.
 - 1) The violation's occurrence was attributable to causes beyond respondent's control.
 - 2) The violation's occurrence was attributable to action by the Commission which precluded compliance.
- b) The Standard of Lack of Good Faith or Intent
 - 1) Included under this standard is the past compliance history of the respondent.
 - 2) Under this standard, the Commission shall consider whether a violation is the result of willful conduct or comes about through mistake, inadvertence or negligence.
- c) The Standard of Ability to Pay. The commission shall consider the financial ability of the respondent to pay the penalties assessed.
- d) Degree of Harm to Public; Extent of Violative Conduct. Commission shall consider the extent of violative conduct which affected the public interest.
- e) Financial Benefit Accruing to the Violator. The Commission shall consider the amount of money which accrued to the respondent as a result of its illegal activities.

Ill. Admin. Code, tit. 92, § 1440.10. This section has been construed as “defining the standards to be utilized in determining whether civil penalties should be imposed.” *Boles Trucking, Inc. v.*

O'Connor, 486 N.E.2d 362, 370 (Ill. App. Ct. 1985). A separate section, § 1440.20, has been held to establish the formula for assessing the amount of such penalties if the Commission determines that penalties are warranted under § 1440.10. *Boles Trucking*, 486 N.E.2d at 370.

In the case at hand, the instances of non-compliance shown by the evidence do not warrant the imposition of civil penalties under § 1440.10.

KCS acknowledges that the shelter facility for its Transportation Department employees at East St. Louis was not always in full compliance with the Commission's regulations during the transition between demolition of the building that housed the old shelter facility and setting up the new modular building to house the new shelter facility. However, the following circumstances demonstrate that this is a case where the Commission in the sound exercise of its discretion should refrain from assessing penalties against KCS based on the guidelines in § 1440.10:

1. Some of the circumstances giving rise to non-compliance could not be anticipated and, thus, were beyond the control of KCS. § 1440.10(a)(1). KCS believed that the new modular building could be moved to its permanent location within four days after vacating the old building for demolition, but, in fact, it took much longer than that. Furthermore, problems developed in getting a cleaning contractor hired, and unanticipated plumbing problems arose.
2. KCS does not have a past history of non-compliance. § 1440.10(b)(1)
3. Non-compliance was not the result of willful conduct, but rather came about through inadvertence. § 1440.10(b)(2). KCS made a good-faith effort to bring the facilities into compliance and the only outstanding issues today are a matter of good faith differences of opinion as to how the regulations should be interpreted.
4. Non-compliance did not adversely affect the public interest in that it did not result in illness or injury to any of KCS' employees. § 1440.10(d)
5. KCS did not profit from the non-compliance. § 1440.10(e). There is no evidence or suggestion that KCS profited as a result of the difficulties it experienced in bringing the new shelter facility into compliance after vacating the old building.

The evidence that supports a finding by the Commission that these five factors mitigate against imposition of sanctions is discussed below.

KCS's non-compliance with the Commission's regulations arose from KCS' voluntary effort to replace an aging building that housed the shelter facility for its Transportation Department employees at East St. Louis with a modern modular building. Prior to the fall of 2004, the shelter facility at East St. Louis was an old, two-story building, *Haney, Tr. at 434:12–434:18*, that was described by the Local Vice Chairman of the UTU as “kind of run-down,” *Eddy, Tr. at 15:19*, and “pretty shoddy.” *Eddy, Tr. at 96:10–16:13*. The old building had plumbing that was leaking into the ceilings and walls, floor drains that would not drain, sinks that would not drain, electrical problems, and was in a generally deteriorated condition. *Haney, Tr. at 434:19–435:14*. Prior to the modular building being brought in, there was an old caboose at East St. Louis where crews sometimes ate their lunch. The caboose was infested with mice. *Eddy, Tr. at 96:18–97:6*.

The new building that was put up as the shelter facility for Transportation Department employees at East St. Louis was a modular building that was moved onto the site of the old building after the old building was demolished. *Eddy, Tr. at 169:21–170:11*. The new building was moved onto the site of the old building because there was a concrete pad and water, electrical, and communication lines already in place at that location, which would make it easier to get a new facility up and running as quickly as possible. *Eddy, Tr. at 169:21–170:11; Burner, Tr. at 300:2–301:22*. Before demolition began on the old building, KCS set up the modular unit with an electrical generator and an electrical water supply system across the street at a temporary location on a parking lot. *Haney, Tr. at 507:22–508:7*. KCS expected to have the old building torn down and the new modular building placed on the pad where the old building had been

located and ready for use as a shelter facility in a matter of four days. *Haney, Tr. at 507:22–508:13.*

On October 12, 2003, KCS advised its Transportation Department employees at East St. Louis to clear out their lockers in the old building because the old building was going to be torn down and a new building put up at the same location. *Szabo, Tr. at 355:1–356:7.* There was no testimony offered at the hearing in this cause as to exactly when the Transportation Department employees vacated the old building; however, on October 23, 2003, they were advised that they could resume using their lockers in the old building because the opening of the new building had been delayed. *See UTU Ex. 1.*

UTU claims that Transportation Department employees were without any shelter facility whatsoever based on the testimony of UTU Local Vice Chairman Don Eddy that it was about a month between the date the Transportation Department employees were first told to vacate the old building and the date the modular units were moved to their permanent location, *UTU Post-Hearing Brief at 6–7*; however, in making this claim, UTU ignores the fact that the modular building was set up at a temporary location on the parking lot across the street before being moved to its permanent location on the site of the old building, *Haney, Tr. at 507:22–508:7*; that Transportation Department employees were allowed to resume using their lockers in the old building on October 23, 2003, when the move to the permanent location was delayed, *UTU Ex. 1*; and that toilet facilities and a lunchroom were available to Transportation Department employees during this time in the trainmaster's building. *Eddy, Tr. at 115:21–116:22, 118:2–118:18.*

On October 31, 2003, KCS advised its Transportation Department employees at East St. Louis to vacate the old building by November 3, 2003, and that the new building would be

available by November 1, 2003. *UTU Ex. 2.* Although UTU State Legislative Director Joseph Szabo claimed in a letter dated November 10, 2003 to Michael Steed, Railroad Safety Program Administrator, that no shelter facility was available as of the date of his letter, Szabo's letter does not acknowledge that a temporary facility was available on the parking lot across the street or that Transportation Department employees could use facilities in the trainmaster's building.

UTU Ex. 3. There was no testimony as to the exact date the modular building was moved from its temporary location on the parking lot to its permanent location at the site of the old building or how long this took; however, it is apparent that the modular building was moved to its permanent location sometime before November 11, 2003, because that is the date ICC Operating Practices Inspector Robert Wagoner made his first inspection of the shelter facility and the new modular building was at its permanent location at that time. *Wagoner, Tr. at 244:19–245:22.*

Thus, there is no testimony to support the UTU's claim that KCS' Transportation Department employees at East St. Louis had no shelter facility whatsoever for a one-month period of time between mid-October and mid-November 2003 since temporary facilities and alternative facilities were available during that time. *Eddy, Tr. at 115:21–116:22, 118:2–118:18; Haney, Tr. at 507:22–508:7.* Furthermore, there is no testimony regarding the adequacy or inadequacy of the temporary and alternative facilities during that time. All the testimony in this case regarding the adequacy or inadequacy of the shelter facility focused on the condition of the new modular building from and after November 11, 2003, the date of Mr. Wagoner's first inspection of the facility. *Wagoner, Tr. 244:19–245:22.*

The shelter facility for Transportation Department employees was not in full compliance with the Commission's regulations on the date of Mr. Wagoner's first inspection of the facility, which was apparently just after the new modular building was moved from its temporary

location on the parking lot across the street to its permanent location on the site of the old building that had been demolished. *Wagoner, Tr. at 245:17–246:20, 300:3–301:22.*

Mr. Wagoner sent a letter dated December 12, 2003, under the signature of Mr. Steed, to Gregory Haney, KCS Trainmaster at East St. Louis, noting the deficiencies and asking that they be corrected within 30 days. *Wagoner, Tr. at 244:19–245:6, 248:16–250:13; UTU Ex. 6.* The photographs marked as UTU Group Exhibit 1 were taken by UTU Local Vice Chairman Eddy on November 22, 2003, *Eddy, Tr. at 22:9–23:6*, which was before Mr. Wagoner's letter was sent to Mr. Haney.

Mr. Wagoner did a follow-up inspection on January 13, 2004, *Wagoner, Tr. at 252:5–252:7*, and sent a letter dated January 23, 2004, again under Mr. Steed's signature, to Trainmaster Haney, regarding the deficiencies noted in the inspection of January 13, 2004. *Wagoner, Tr. at 308:17–309:9; UTU Ex. 9.* Although KCS had done some work in response to Mr. Wagoner's letter of December 12, 2003, there were still several areas of non-compliance. *Wagoner, Tr. at 255:8–257:15.* A cleaning service had been hired by KCS, but had quit after one week. *Wagoner, Tr. at 257:6–257:15.* Trainmaster Haney was working on getting another cleaning service hired through the railroad's procurement bureaucracy. Meanwhile, Mr. Haney was cleaning the bathrooms in the crew facility and other buildings on the property (including the trainmaster's office) himself. *Wagoner, Tr. at 306:4–306:19.* This circumstance provided a major incentive to Mr. Haney to get a cleaning contractor lined up as quickly as possible. *Haney, Tr. at 472:12–473:4.*

Mr. Wagoner testified that based on his experience, a railroad can't be expected to turn a facility around in 30 days. They need ample time to respond to the inspector's report and line up a contractor to make the corrections. *Wagoner, Tr. at 253:1–253:7.* Mr. Wagoner understood

when he made his first inspection of the new shelter facility that KCS had torn down an old building and moved the new modular building onto the site of the old building and needed time to retrofit the new modular building. This is why he granted KCS time to address the deficiencies noted in his inspections. This had been his practice with all railroads. *Wagoner, Tr. at 300:2–301:22.* Based on his own experience in the railroad industry, Mr. Wagoner was aware that there is a lot of paperwork and auditing and accounting requirements that must be met in contracting with vendors or suppliers. Consequently, he was sympathetic with Mr. Haney's position in trying to bring the facility into compliance. *Wagoner, Tr. at 307:1–307:11.* Mr. Wagoner felt that Trainmaster Haney and Superintendent Dancy were dealing with him in good faith. *Wagoner, Tr. at 301:2–301:22.*

Mr. Wagoner is aware that KCS responded to his letter (sent out under Mr. Stead's signature) regarding the first inspection because Mr. Stead told him that he had received a response from KCS. *Wagoner, Tr. at 302:21–303:15.* Although Mr. Wagoner did not receive copies of KCS correspondence to Mr. Stead, Mr. Wagoner acknowledged that it was appropriate for KCS to direct its responses to Mr. Stead and not to Mr. Wagoner since Mr. Wagoner's letters to KCS went out under Mr. Stead's signature. *Wagoner, Tr. at 292:6–293:18, 302:6–302:20.*

In his letter to KCS dated January 23, 2004, Mr. Wagoner did not express any frustration or unhappiness with KCS' responsiveness in correcting the deficiencies. *Wagoner, Tr. at 308:17–309:9.* The letter advised KCS that a follow-up inspection would be performed in April. *UTU Ex. 9.*

At some point after the January 13, 2004 inspection, Mr. Wagoner received a telephone call from Trainmaster Haney requesting a copy of the regulations, *Wagoner, Tr. at 269:15–269:21,* and a telephone call from Tom Healey, an attorney with KCS in Kansas City, asking for

Mr. Wagoner's suggestions on what the KCS needed to do to bring the shelter facility into compliance with the Commission's regulations. *Wagoner, Tr. at 270:9-271:13*. On February 18, 2004, KCS Transportation Superintendent Taulton Dancy sent a letter to Mr. Stead advising Mr. Stead of what KCS had done in response to Mr. Stead's letter of January 23, 2004. *Wagoner, Tr. at 292:12-292:20; UTU Ex. 11*. Mr. Dancy's letter also raised an issue as to how the Commission's regulations relating to locker room floor space were to be interpreted and whether separate toilet facilities had to be provided for female employees. *Wagoner, Tr. at 294:5-296:5; UTU Ex. 11*. Mr. Stead responded to Mr. Dancy's letter with a letter dated March 4, 2004, stating that it appeared KCS had made progress in addressing the deficiencies noted during the inspection of January 13, 2004. *Wagoner, Tr. at 315:6-316:19; UTU Ex. 12*. Mr. Wagoner did not take exception to Mr. Stead's characterization of KCS' progress in addressing deficiencies. *Wagoner, Tr. at 315:6-316:19*.

Mr. Wagoner next inspected the crew facility at East St. Louis on April 13, 2004, and sent a letter to KCS, again under Mr. Stead's signature, dated April 19, 2004, listing the deficiencies that had been noted on the date of that inspection. *Wagoner, Tr. at 261:4-262:10; UTU Ex. 14*. The deficiencies noted during the inspection of April 13, 2004, were inadequate floor space in the locker room (according to Mr. Wagoner's interpretation of the regulations), lack of a separate changing area for female employees, lack of exhaust fans and covers for trash receptacles in the lunch rooms, and insufficient chairs for the lunch rooms. *Wagoner, Tr. at 262:11-268:4; UTU Ex. 14*. Mr. Wagoner acknowledges that there were sufficient chairs in the lunch room in the building that houses the locker room for male Transportation Department employees if only three employees took lunch at one time as represented to him by KCS, but the chairs in the lunchroom in the trainmaster's building did not fit under the table, which was

necessary if that room was going to be used as a lunch room. *Wagoner, Tr. at 266:5–267:12, 265:8–265:22.* In addition, the exhaust fan in the bathroom in the building that houses the locker room for male Transportation Department employees was not working properly on the day of the inspection, although Mr. Dancy reported that it had been working earlier. *Wagoner, Tr. at 267:18–268:12.*

Mr. Wagoner's final inspection was on July 27, 2004. *Wagoner, Tr. at 275:20–276:7.* Mr. Wagoner did not prepare a letter regarding the results of that inspection. *Wagoner, Tr. at 281:14–281:17.* Based on what he saw on the date of his final inspection on July 27, 2004, Mr. Wagoner believes the shelter facilities at East St. Louis are now in compliance with the Commission's regulations except for Mr. Wagoner's interpretation of what the regulations require as far as floor space in the locker room for male Transportation Department employees and a separate exhaust fan for the lunch room in the trainmaster's building. *Wagoner, Tr. at 333:19–335:1.* These are both issues on which there is a reasonable difference of opinion as to how the regulations should be interpreted. *Wagoner, Tr. at 288:15–289:5, 294:20–295:17, 296:12–297:3, 319:19–326:7.*

Specifically, with respect to floor space in the locker rooms, there is a disagreement as to whether the regulations require that the locker room for male Transportation Department employees be counted as one locker room or two locker rooms given the partition across the south end of the building and whether floor space is to be calculated based on the number of lockers in the facility or just the number of lockers that have been assigned to employees for use. *See discussion supra at pp. 3-8 of this Brief.* With respect to exhaust fans for the lunch rooms, there is a disagreement as to whether the requirement that lunch rooms be "adequately ventilated" requires a separate exhaust fan in each lunchroom that is equipped with appliances

for heating food. *See discussion supra at pp. 8-10 of this Brief.* Mr. Wagoner acknowledges that he must defer to the Commission on what the regulations require with respect to these two issues. *Wagoner, Tr. at 295:18–296:5, 320:18–320:20, 321:17–321:21.*

In addition, Mr. Wagoner acknowledges that in offering his opinion that KCS failed to comply with the regulation relating to “adequate ventilation” in the lunch rooms by not having a separate exhaust fan in the lunchroom in the trainmaster’s building, he did not take into account the fact that fumes or smoke from use of the microwave at that location (the only lunch room equipped with a microwave or other cooking appliance) could be dissipated by opening the windows and turning the fan in the central heating and cooling unit to “on” (i.e., “manual”). *Wagoner, Tr. at 321:22–322:5, 324:13–326:7.*

Mr. Wagoner testified that KCS dealt with him in good faith and made an effort to bring the shelter facilities into compliance. *Wagoner, Tr. at 300:2–301:22, 303:6–304:11.*

Mr. Wagoner testified that there have been times in his three years with the Illinois Commerce Commission where he has dealt with companies he felt were not dealing with him in good faith or making an effort to come into compliance, but this was not the case with the KCS. *Wagoner, Tr. at 303:6–304:11.*

KCS took regular steps toward bringing the facility into compliance. *See, e.g., Wagoner, Tr. at 315:6–316:19.* KCS even made an effort to bring the locker room into compliance in accordance with Mr. Wagoner’s interpretation of the regulations despite a difference of opinion as to what the regulations required as far as floor space. *Wagoner, Tr. at 293:19–294:4.* KCS removed lockers and tried to come within Mr. Wagoner’s interpretation of the regulations every time they talked. *Wagoner, Tr. at 293:19–294:4.* Mr. Wagoner acknowledges that KCS took a big step toward his position on this issue by removing lockers on two occasions and trying to

comply based on the total number of lockers instead of the number of lockers assigned to employees. *Wagoner, Tr. at 297:12–299:6.*

KCS made efforts with the UTU and the Commission to resolve the issues raised by UTU's Complaint prior to the hearing. *Haney, Tr. at 485:20–486:13.* KCS permitted the UTU to inspect and photograph the shelter facilities as often as it wanted and by as many different people as wanted to participate. *See, e.g., Eddy, Tr. at 22:4–23:4, 39:18–40:16, 71:7–72:13; Burner, Tr. at 196:6–196:14, 203:1–203:14, 205:21–206:2; Szabo, Tr. at 354:17–355:11, 392:2–393:1.* Superintendent Dancy and Trainmaster Haney met with UTU representatives on at least one occasion each to discuss the shelter facilities, *Burner, Tr. at 178:2–178:8, 191:16–191:21; Szabo, Tr. at 367:16–367:21,* and an attorney for KCS telephoned the UTU's State Legislative Director in an effort to reach a settlement. *Szabo, Tr. at 373:21–375:6.*

It was the desire of the KCS to resolve these issues by taking steps toward the UTU's position in order to get the case resolved; however, that effort was not successful. *Haney, Tr. at 485:20–486:9.* The UTU, on the other hand, has been unreasonable in the position it has taken in this case—purposely not taking photographs of the shelter facilities on the date of the final inspection, which would have shown the facilities in compliance, *Eddy, Tr. at 76:22–78:18,* demanding that the modular building be eliminated as “not adequate nor suitable for the intended purpose” and “an abomination,” *UTU Brief at 18–22,* and claiming that the Commission's highly experienced and impartial Operating Practices Inspector, Mr. Wagoner, made an inadequate inspection and is wrong in his judgment as to what issues have been resolved and what issues remain outstanding in terms of compliance. *Szabo, Tr. at 413:15–415:16.*

Finally, it is important to note that there is no claim by the UTU or the ICC Operating Practices Inspector that anyone has suffered any illness or injury as a result of the shelter facility

having not been in full compliance at the various times mentioned in the evidence. *See, e.g., Eddy 101:9–101:22; Wagoner, Tr. at 305:11–305:21.* Indeed, Mr. Wagoner testified that he would have taken “more radical steps” if he believed any employee’s health was being jeopardized. *Wagoner, Tr. at 305:18–305:21.*

Under these circumstances, no useful purpose would be served by imposing penalties on KCS, either for past non-compliance with respect to the items KCS acknowledges were not fully in compliance at various times between November 11, 2003 and April 13, 2004, or the items that are at issue today based on the honest difference of opinion between KCS and Mr. Wagoner as to how the regulations should be interpreted with respect to floor space in the locker room and ventilation in the lunch rooms. The Commission should issue a decision on the presently unresolved issues of floor space requirements in the locker room and ventilation in the lunch rooms, and if either of those issues are decided against KCS, order KCS to take corrective action within 90 days, and retain jurisdiction of this matter to insure compliance. Otherwise, the UTU’s complaint should be dismissed based on KCS being in full compliance today and KCS having made a good faith effort to achieve compliance from and after the date KCS was first contacted by the Commission about the issues of non-compliance.

Respectfully submitted,



Paul M. Brown #03125999

Thompson Coburn
One US Bank Plaza
St. Louis, MO 63101
(314) 552-6000
(314) 552-7000 Fax

Of Counsel:
Thompson Coburn LLP

Attorney for Respondent The Kansas City
Southern Railway Company

ILLINOIS COMMERCE COMMISSION
527 E. Capitol Avenue
Springfield, Illinois 62701

United Transportation Union-Illinois)
Legislative Board,)
)
Petitioner,)
)
vs.)
)
The Kansas City Southern Railway)
Company,)
)
Respondent.)

No. T04-0027

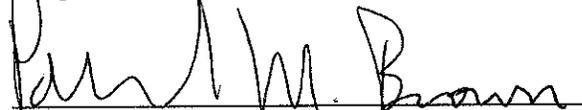
CERTIFICATE OF SERVICE

PLEASE TAKE NOTICE that on the 12th day of January 2005, the attached Post Hearing Brief of The Kansas City Southern Railway Company was filed and a copy of same forwarded by U.S. Mail, postage prepaid, to each of the following:

Timothy C. Lapp
Hiskes, Dillner, O'Donnell,
Marovich & Lapp, Ltd
16231 Wausau Avenue
South Holland, IL 60473

Steve Matrisch
Illinois Commerce Commission
527 East Capital Avenue.
Springfield, IL 62701

Respectfully submitted,



Paul M. Brown #03125999
Thompson Coburn
One US Bank Plaza
St. Louis, MO 63101
(314) 552-6000
(314) 552-7000 Fax

Attorney for Respondent The Kansas City
Southern Railway Company

Of Counsel:
Thompson Coburn LLP