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SERVICE DATE - LATE RELEASE FEBRUARY 6, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33995

SF&L RAILWAY, INC.–ACQUISITION AND OPERATION EXEMPTION–TOLEDO
PEORIA AND WESTERN RAILWAY CORPORATION BETWEEN LA HARPE AND
PEORIA, IL

STB Finance Docket No. 33996

KERN W. SCHUMACHER AND MORRIS H. KULMER–CONTINUANCE IN CONTROL
EXEMPTION–SF&L RAILWAY, INC.

STB Docket No. AB-448 (Sub-No. 2X)

SF&L RAILWAY, INC.–ABANDONMENT EXEMPTION–IN HANCOCK, MCDONOUGH,
FULTON AND PEORIA COUNTIES, IL

STB Finance Docket No. 34282¹

WESTERN ILLINOIS RAILWAY COMPANY–ACQUISITION EXEMPTION–TOLEDO,
PEORIA & WESTERN RAILWAY CORPORATION

Decided: February 6, 2003

We are denying the petition to stay the effectiveness of our decisions ordering (1) SF&L Railway, Inc. (SF&L) to reconvey to Toledo, Peoria and Western Railway Corporation (TP&W) SF&L's interest in the line it had acquired in these proceedings (the La Harpe Line or the Line) and (2) TP&W to refund to SF&L the original purchase price plus interest by February 10, 2003. However, we are directing Western Illinois Railway Company (Western Illinois) not to exercise the authority it obtained in STB Finance Docket No. 34282 to acquire the assets of the Line from TP&W following

¹ These proceedings are not consolidated; they are being considered together for administrative convenience.

reconveyance from SF&L, and we are ordering TP&W not to transfer any part of the Line without authority from us.

BACKGROUND

Under 49 U.S.C. 10901(a)(4), our authorization is required for a noncarrier to purchase a rail line. We may, however, exempt a class of persons from our regulatory requirements when we find that a full examination of a proposed transaction is not necessary. 49 U.S.C. 10502(a). Pursuant to that exemption authority, our predecessor agency, the Interstate Commerce Commission (ICC), adopted a class exemption that allows a noncarrier to purchase and operate a rail line upon 7 days' notice. Adoption of the class exemption, of course, does not mean that we cannot reach the transactions covered by the exemption. First, we can block a transaction before the 7-day notice has elapsed. Second, recognizing that Congress had directed the agency to use its exemption authority liberally and provide an after-the-fact remedy when appropriate,² the ICC noted that there could be occasions on which it would need to revoke such an exemption. Class Exemption—Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810, 812 (1985). As particularly relevant in these proceedings, the ICC cautioned that, in cases of abuse, the agency could untangle an exempted transaction by requiring divestiture of the acquired line. Id.

In this case, SF&L invoked that class exemption in February 2001, to acquire an operating easement over, and the rail, ties, and certain improvements on, a 71.5-mile segment of rail line in Illinois (between milepost 194.5 at La Harpe and milepost 123.0 at Peoria) from TP&W in STB Finance Docket No. 33995. The owners of SF&L, Messrs. Kern W. Schumacher and Morris H. Kulmer, in STB Finance Docket No. 33996, invoked a related class exemption allowing them to continue in control of SF&L when it became a rail carrier.³

We subsequently revoked the exemptions in these two cases in a decision served on October 17, 2002 (SF&L-La Harpe), and ordered SF&L to reconvey its interest in the La Harpe Line to TP&W. Based on the evidence before us, we found that SF&L had abused our processes by buying the Line not to operate it but to sell it for salvage. Because the class exemption that SF&L had invoked was for acquiring rail lines to operate them rather than to salvage them, we found that our processes had been abused, and we ordered the parties to restore the status quo ante.

² See H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 105 (1980).

³ The notices of exemption were served and published in the Federal Register at 66 FR 9410-11 on February 7, 2001.

SF&L and Messrs. Schumacher and Kulmer asked us to reopen and reconsider that decision. On January 31, 2003, we denied that request. We ordered SF&L to reconvey the La Harpe Line to TP&W by February 10, 2003; clarified the price to be paid to SF&L upon reconveyance of the Line; dismissed as moot a petition that SF&L had filed in September 2002, in STB Docket No. AB-448 (Sub-No. 2X), for authority to abandon the La Harpe Line;⁴ and denied a motion filed by TP&W to substitute itself for SF&L in that abandonment proceeding.

On February 5, 2003, SF&L and Messrs. Schumacher and Kulmer filed the instant petition to stay our January 31, 2003 decision.

DISCUSSION AND CONCLUSIONS

To obtain an administrative stay, the movant must show: (1) that there is a strong likelihood that it will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958) (Petroleum Jobbers). It is the movant's obligation to justify the exercise of such an extraordinary remedy, Cuomo v. United States Nuclear Regulatory Comm., 772 F.2d 972, 978 (D.C. Cir. 1985), and it carries the burden of persuasion on all of the elements required for such extraordinary relief. Canal Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974). Here, the petitioners have failed to demonstrate that they are entitled to a stay pending judicial review under any of the criteria.

Denial of a Stay Will Not Cause Petitioners Irreparable Harm. As petitioners recognize, "mere injuries, however substantial, in terms of money . . . expended in the absence of a stay" do not constitute irreparable injury because of the possibility of receiving adequate compensatory relief at a later date. See Petroleum Jobbers, 259 F.2d at 925. Should the Board's decision be remanded by the Court, adequate relief would be available.

Petitioners' allegation of irreparable harm is premised on the possibility that, upon reconveyance of the line to TP&W pursuant to the Board's order, TP&W might sell the property as an active line of railroad to a willing purchaser and immediately pass the proceeds of such a sale to its corporate parent, RailAmerica, Inc., leaving TP&W cashless and preventing SF&L from later reaching those proceeds should the decision be overturned. We understand that concern and will address it. By this decision, we order TP&W not to convey any portion of its interests in the Line pending the

⁴ Notice of that petition was served and published in the Federal Register at 67 FR 59596, on September 23, 2002.

completion of judicial review of these proceedings, unless TP&W receives further authority from us to do so. Were we to authorize any transfer, we would expressly condition such authority on TP&W's retaining or protecting the receipts from the sale, through a requirement for escrow, bond, or similar mechanism. In addition, we would review the terms of any transfer to assure that the Board could effectively implement any remand by the reviewing Court.

Consistent with this new requirement, we will order Western Illinois not to exercise the exemption authority that it obtained in Western Illinois Railway Company–Acquisition Exemption–Toledo, Peoria & Western Railway Company, STB Finance Docket No. 34282 (STB served Dec. 20, 2002), to acquire an interest in the Line after it is reconveyed to TP&W, as that authority did not contain the protective provisions to which we are now committed.

Petitioners Are Not Likely to Prevail On the Merits. Petitioners contend (Petition at 4) that they are likely to prevail on the merits because we did not permit them to file a full application (providing additional information) upon revoking the exemption authority by which SF&L acquired the Line. Absent an intent to operate the rail line indefinitely, SF&L could not successfully apply for authority under any statutory provision, including 49 U.S.C. 10901(a)(4), which it cites. We had already found that SF&L did not intend to do so.

SF&L contends that it may invoke section 10901(a)(4) to acquire a rail line even when it does not intend to operate the line, because the provision contains the phrase “acquire or operate.” To be sure, SF&L could have acquired the Line and then arranged for someone else to operate it.⁵ But section 10901 does not give SF&L a right to acquire a rail line for purposes of scrapping it. Upon buying a line the owner assumes a common carrier obligation. Until that obligation is extinguished through the exercise of abandonment authority obtained under 49 U.S.C. 10903, the line's owner has a continuing obligation to provide common carrier service. See Hayfield N. R.R. v. Chicago, & N.W. Transp. Co., 467 U.S. 622, 628 (1984). Only after abandonment is authorized and exercised would anyone be free to salvage the rail, ties, and physical assets in what had been a rail line. Prior to an authorized abandonment, a prospective purchaser of a rail line must have the requisite intent to continue to operate the line to fulfill the common carrier obligation that is attached to that line.

In short, we see no reason to change our interpretation of the applicable statute because it is reasonable, gives credence to the common carrier obligation inherent in owning a rail line in interstate commerce, and is likely to be affirmed on review.

⁵ The disjunctive in the quoted phrase indicates that a person seeking operating rights on a rail line owned by another needs our authority to acquire operating rights over a line, just as a purchaser of a rail line (who thereby assumes the common carrier obligation attached to that line) needs our authority for such a purchase.

A Stay Would Harm Shippers and the Public Interest in Continued Service on This Line.

Citing unspecified “track conditions” as the basis for an embargo,⁶ SF&L has not operated the Line since the day after we first ordered that party to reconvey the Line to TP&W (October 17, 2002). Upon reconveyance, TP&W has pledged to recommence rail service on the Line immediately. Thus, granting a stay would harm shippers and be contrary to the public interest in continued provision of common carrier service on an active rail line.

On balance, the availability of relief to SF&L, in the unlikely event that the reviewing court should remand our decision, and the public’s interest in recommencing rail service on this Line, favor the denial of a stay pending judicial review.

It is ordered:

1. The request for stay is denied.
2. Western Illinois is ordered to delay exercise of the authority acquired in STB Finance Docket No. 34282 pending further order of the Board, which will be issued upon the completion of judicial review of these proceedings.
3. Toledo, Peoria and Western Railway Corporation may not transfer any of its interests in the rail line that is the subject of these proceedings to any person prior to the completion of judicial review without first obtaining our approval, which would be subject to appropriate conditions to assure that the Board could implement the terms of any order of the reviewing court.
4. This decision is effective on the date of service.

By the Board, Chairman Nober, Vice Chairman Burkes, and Commissioner Morgan.

Vernon A. Williams
Secretary

⁶ An embargo is a temporary, emergency cessation of rail service from a disability caused by, among other things, “physical conditions such as weather and flood damage.” GS Roofing Products Co. v. STB, 143 F.3d 387, 392 (8th Cir. 1998).