

32273
EB

SERVICE DATE – MARCH 15, 2002

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. 33996¹

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

Decided: March 14, 2002

By petition filed on September 19, 2001, SF&L Railway, Inc. (SF&L Railway), Kern W. Schumacher, and Morris H. Kulmer (collectively, petitioners) request that the Board impose sanctions on attorneys William A. Mullins and Thomas J. Healey, and their law firm, Troutman Sanders, LLP (Troutman Sanders) (collectively, respondents), for allegedly violating a Board protective order. Respondents and Keokuk Junction Railway Co. (KJRY) separately filed in opposition to the petition.² For the reasons discussed below, we will deny the petition.

BACKGROUND

On January 10, 2001, SF&L Railway filed a notice of exemption to acquire from Toledo, Peoria and Western Railway Corporation (TP&W), an operating easement over, and the rail, ties, and certain improvements on, a 71.5-mile rail line between La Harpe and Peoria, IL (La Harpe Line). See SF&L Railway, Inc.–Acquisition and Operation Exemption–Toledo, Peoria and Western Railway Corporation Between La Harpe and Peoria, IL, STB Finance Docket No. 33995. Also on January 10, 2001, Messrs. Schumacher and Kulmer filed a notice of exemption under 49 CFR 1180.2(d)(2) to allow them to continue in control of SF&L Railway after it

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

² Attached to the respondents' opposition are verified statements from Messrs. Healy and Mullins and from David C. Reeves, another attorney in the law firm. The verified statement of Jonathan L. Kazense, General Counsel of KJRY, is attached to KJRY's opposition.

became a rail carrier.³ See Kern W. Schumacher and Morris H. Kulmer—Continuance in Control Exemption—SF&L Railway, Inc., STB Finance Docket No. 33996. The notices were served and published at 66 FR 9410-11 on February 7, 2001.

On March 7, 2001, KJRY, through its counsel Troutman Sanders, filed a petition to reopen and revoke the exemptions,⁴ along with requests for discovery. To facilitate discovery, KJRY also filed a motion for a protective order. On March 16, 2001, petitioners filed their own request for a protective order. On April 13, 2001, the Board granted a protective order that restricted the disclosure of information designated as “Highly Confidential.” On June 5, 2001, the Board instituted a proceeding to consider the issues raised in the petitions to reopen and revoke.

On July 20, 2001, petitioners submitted a first set of interrogatories to KJRY. On August 16, 2001, petitioners filed a motion to compel responses to two of the interrogatories and, on September 14, 2001, Troutman Sanders, on behalf of KJRY, filed a reply to the motion to compel. Troutman Sanders attached to this reply, as an exhibit, a letter dated May 10, 2001, from petitioner’s counsel, Fritz Kahn, to Mr. Healey of Troutman Sanders. The letter revealed the purchase price that SF&L Railway had paid on December 29, 2000, for the La Harpe Line and recited that this information was “Highly Confidential.” Although Troutman Sanders, in the filing, described the attached letter as “redacted,” it attached the letter in unredacted form.

Also, on September 14, 2001, Troutman Sanders sent by facsimile a copy of the reply and letter to the Board and to five persons, including KJRY’s General Counsel,⁵ who was ineligible to review “Highly Confidential” material and who had not signed the undertaking in the Board’s protective order. On September 17, 2001, the reply and letter became available at the Board for inspection and copying by the public.

³ At the time, Messrs. Schumacher and Kulmer already controlled three regulated railroads—Tulare Valley Railroad Company, Kern Valley Railroad Company, and V and S Railway, Inc.

⁴ On May 18, 2001, Joseph C. Szabo on behalf of the United Transportation Union-Illinois Legislative Board (UTU-IL), McDonough County, IL, and the City of Macomb, IL, also filed a petition to reopen and revoke the exemptions.

⁵ The other four recipients are: Fritz R. Kahn, counsel for SF&L Railway; Louis E. Gitomer, outside counsel for TP&W; Gary A. Laakso, inside counsel for TP&W; and Gordon P. McDougall, outside counsel for McDonough County, the City of Macomb, and Joseph C. Szabo of UTU-IL.

The petition for sanctions was filed on September 19, 2001, to which respondents and KJRY filed their responses on September 28, 2001. On October 3, 2001, petitioners requested leave to file a rebuttal to respondents' reply, accompanied by the rebuttal. On October 4, 2001, respondents filed a reply opposing petitioners' motion for leave to file a rebuttal or, in the alternative, a request for leave to file a response to the rebuttal, accompanied by the response.⁶ Also on October 3, 2001, KJRY filed a motion to dismiss the petition for sanctions, to which petitioners filed a reply in opposition on October 5, 2001.

DISCUSSION AND CONCLUSIONS

The motion to dismiss the petition for sanctions will be denied. Respondents have offered no reason why we should not accept and consider the petition. As next discussed, however, the petition for sanctions will also be denied on its merits.

Courts have upheld the authority of agencies to enact disciplinary rules for professionals who practice before them, despite a lack of express statutory authority, as necessary to protect the integrity of the agencies' processes. See Touche Ross & Co. v. SEC, 609 F.2d 570, 581-82 (2d Cir. 1979). Therefore, under appropriate circumstances, the Board may impose sanctions to enforce its orders and ensure an efficient process for those under its jurisdiction. As pertinent here, under 49 CFR 1103.5(a):

A member of the Board's bar may be subject to suspension, disbarment, or other disciplinary action if it is shown that the practitioner: . . . (2) Violated any of the Board's rules . . . or (3) Engaged in conduct unbecoming a member of the bar of the Board.

The agency retains sole authority to determine whether a breach has occurred, and, if so, the appropriate action to be taken.

The Board has not addressed the issue of which, if any, of the various available sanctions is appropriate for breaching a protective order. However, the U. S. International Trade Commission (Commission), in a notice published in the Federal Register, stated that:

In determining the appropriate response (to a breach of a protective order), the Commission generally considers mitigating factors such as the unintentional nature of the breach, the lack of prior breaches committed by the breaching party, the corrective measures taken by the breaching party, and the promptness with which the breaching party reported the violation to the Commission. The Commission

⁶ The rebuttal and the response are accepted into the record.

also considers aggravating circumstances, especially whether persons not under the [protective order] actually read the [confidential information].

Summary of Commission Practice Relating to Administrative Protective Orders, 65 FR 30434, 30436 (May 11, 2000).

In another notice, the Commission issued a private letter of reprimand to an attorney whose breach was inadvertent, who had no prior breaches, and who took prompt action to remedy the breach, yet whose disclosure may have been read by unauthorized persons. Summary of Commission Practice Relating to Administrative Protective Orders, 66 FR 27685, 27687 (May 18, 2001). On still another occasion, the agency issued a warning letter instead of sanctions to an attorney whose breach was inadvertent, who had no prior breaches, who took prompt action to remedy the breach, and whose distributed material was not read by unauthorized persons. Id. at 27688.

The circumstances in this case closely resemble the latter situation before the Commission. First, the record indicates that the breach here was inadvertent. Respondents clearly intended to attach a redacted copy of Mr. Kahn's letter, but mistakenly attached an unredacted version. Second, there is no evidence before us of a prior breach of any protective orders by the respondents. Third, the record indicates that, as soon as the problem was discovered, respondents took prompt remedial action to avert disclosure to KJRY and to the public. This was accomplished by immediately retrieving the confidential material from the persons to whom it was sent and by requesting that it be removed from the public docket. Fourth, there is no evidence on the record that any person not authorized to see the highly confidential information under the terms of the protective order actually read the material. The record indicates that Mr. Kazense, who was not authorized to see the material, never read it.⁸

Moreover, the record shows that the objected-to material, i.e., the purchase price of the La Harpe Line, was already in the public domain at the time of the breach.⁹ A January 4, 2001 news

⁸ It appears that Mr. Laakso, although inside counsel for TP&W, already had access and entitlement to the material.

⁹ SF&L Railway does not contest the assertion that the information was previously available to the public. Instead, it maintains that because the information is classified as "Highly Confidential," whether it was available to the public is irrelevant to the existence of respondents' breach.

release of RailAmerica, Inc. (RailAmerica)¹⁰ listed the combined amount for which RailAmerica sold two of its lines – its South Central Tennessee Railroad and the La Harpe Line. Additionally, a January 5, 2001 article in the Nashville Business Journal listed the amount for which RailAmerica sold its South Central Tennessee Railroad. From the figures listed in these two publications, one could deduce the approximate amount for which Rail America sold its La Harpe Line to petitioners. Therefore, it is highly unlikely that petitioners suffered any real harm as a consequence of the breach.

Thus, we conclude that the petition for sanctions should be denied.¹¹ However, a breach did occur here that violated the terms of the Board’s protective order and that could have potentially harmed petitioners. Respondents are cautioned to take greater care in the future to ensure full compliance with the terms of the protective order issued in this proceeding and with the terms of any other Board protective orders.

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

It is ordered:

1. Petitioners’ request for leave to file a rebuttal to respondents’ reply is granted.
2. Respondents’ request for leave to file a response to petitioners’ rebuttal is granted.
3. KJRY’s motion to dismiss the petition for sanctions is denied.
4. The petition for sanctions is denied on its merits.

¹⁰ RailAmerica is a noncarrier holding company that controls TP&W, the carrier from whom SF&L acquired the La Harpe Line.

¹¹ We also note that the petitioners initially requested that Messrs. Mullins and Healey be suspended from practicing before the Board for 60 days and that Troutman Sanders be required to reimburse SF&L Railway for damages, preliminarily estimated at \$1 million. Petition p. 5. These requests were apparently based on petitioners’ initial belief that the breach had been intentional and had injured them. Subsequently, however, petitioners’ counsel withdrew his prior criticism of respondents’ professional conduct, retracted his prior claim that KJRY had reviewed confidential material, and agreed with respondents that the breach had been unintentional and that respondents had taken prompt, appropriate corrective action. Finally, it appears that counsel for petitioners made no attempt to contact counsel for respondents prior to filing the motion for sanctions. As a general rule, we encourage parties to attempt to resolve disputes regarding potential violations of protective orders before filing motions with the Board.

5. This decision is effective March 25, 2002.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary