

SERVICE DATE - APRIL 13, 2001

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<sup>1</sup>

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

Dated: April 12, 2001

On January 10, 2001, Messrs. Kern W. Schumacher and Morris H. Kulmer (Applicants) filed a notice of exemption under 49 CFR 1180.2(d)(2) to allow them to continue in control of SF&L Railway, Inc. (SF&L), after it becomes a rail carrier. Kern W. Schumacher and Morris H. Kulmer–Continuance in Control Exemption–SF&L Railway, Inc., STB Finance Docket No. 33996 (STB served and published at 66 FR 9410 on Feb. 7, 2001). Also on January 10, 2001, SF&L filed a notice of exemption to acquire from Toledo, Peoria and Western Railway Corporation (TPW), an operating easement over, and the rail, ties, and improvements on, a 71.5-mile line extending between milepost 194.5 at La Harpe and milepost 123.0 at Peoria, IL. Under the terms of the transaction, TPW will retain the realty underlying the line, subject to a permanent and unconditional easement to permit SF&L to fulfill its obligations as a railroad common carrier, and SF&L will employ TPW as a contract operator but retain responsibility for providing service. 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 (STB served and published at 66 FR 9411 on Feb. 7, 2001).

Applicants filed a redacted version of their notice of exemption in STB Finance Docket No. 33996, which was placed in the public file, and a confidential version, which was filed under seal. The only difference between the two filings is that the confidential version contains a copy of a 2-page letter which confirmed agreements between SF&L and RailAmerica, Inc.

---

<sup>1</sup> These proceedings are not consolidated; they are being considered together for administrative convenience.

(RailAmerica). RailAmerica is the corporate parent of TPW, the owner of the line being transferred in STB Finance Docket No. 33995.<sup>2</sup>

On February 14, 2001, Mr. Joseph C. Szabo, representing the United Transportation Union-Illinois Legislative Board (UTU-IL), observed that Applicants had not filed a protective order in connection with the notice of exemption they filed in STB Finance Docket No. 33996. UTU-IL requested that a copy of the confidential version of the letter be released immediately.<sup>3</sup> Applicants responded on February 20, 2001, stating that they were willing to produce a redacted copy of the letter or would file a motion for a protective order if a redacted copy was not acceptable. On February 21, 2001, UTU-IL filed a reply reiterating its request for a copy of the letter, and on March 7, 2001, Applicants responded reiterating their offer to provide a redacted copy.

In a decision served on March 9, 2001, in STB Finance Docket No. 33996, Applicants were directed to submit a separate motion for a protective order under 49 CFR 1104.14(b) if they wished to keep the letter confidential. Applicants timely responded by filing a motion for a protective order on March 16, 2001. Applicants request that the entire letter be kept under seal, claiming that the letter's financial terms are commercially sensitive and highly confidential and that public disclosure would cause substantial business and competitive harm. UTU-IL replied on March 23, 2001, stating that Applicants had failed to justify the protective order.

On March 7, 2001, Keokuk Junction Railway (KJRY)<sup>4</sup> filed a petition to reopen and revoke the notices of exemption in both of these proceedings. KJRY also filed a motion for a protective order and a first set of interrogatories, requests to produce, and requests for

---

<sup>2</sup> The letter was submitted in compliance 49 CFR 1180.4(g)(i) and 1180.6(a)(7)(ii), which require applicants to submit a copy of any contract or written instrument entered into or proposed to be entered into.

<sup>3</sup> UTU-IL had previously filed a petition to stay the effectiveness of these exemptions pending the filing and disposition of petitions to revoke or reject. The stay was denied in a decision served in these proceedings on January 16, 2001.

<sup>4</sup> KJRY, a Class III rail carrier controlled by Pioneer Railcorp, see Pioneer Railcorp.—Acquisition of Control Exemption—Knreco, Inc. d/b/a Keokuk Junction Ry., Finance Docket No. 32877 (STB served Mar. 26, 1997), operates a 38-mile line of railroad between Keokuk, IA, and La Harpe and Warsaw, IL. KJRY states that it can interchange traffic with The Burlington Northern and Santa Fe Railway Company at Keokuk but that it connects with TPW at La Harpe and is dependent on that connection for access to other Class I railroads (Union Pacific Railroad Company, Canadian National Railway Company/Illinois Central Railroad Company, Canadian Pacific Railway Company/Soo Line Railroad Company, Norfolk Southern Railway Company, and CSX Transportation, Inc.) and nine shortline and regional railroads.

admissions. KJRY states that a protective order is needed to maintain the confidentiality of the commercially sensitive information that is likely to be produced which, if released, could cause irreparable harm to SF&L and Applicants. SF&L and Applicants filed a motion for a protective order in response to KJRY's discovery requests on March 20, 2001. KJRY replied to the motion on March 23, 2001. KJRY's reply includes a motion to compel discovery responses, which KJRY states were due on March 22, 2001.

Good cause exists to grant Applicants' motion for a protective order in STB Finance Docket No. 33996 and KJRY's motion for protective order in both of these proceedings.<sup>5</sup> The unrestricted disclosure of confidential, proprietary, or commercially sensitive material can cause serious competitive injury. Issuance of the requested protective orders will ensure that material submitted or otherwise produced in response to discovery requests will be used only in connection with these proceeding and not for any other purpose. The motions conform to the Board's rules governing requests for protective orders, 49 CFR 1104.14, and will be granted. The protective order and undertakings submitted by KJRY will be adopted as modified in the Appendix to this decision. UTU-IL may obtain access to Applicants' sealed submission by agreeing to the terms of the appended protective order and signing the relevant undertaking.

It is ordered:

1. KJRY's motion for a protective order is granted. The protective order and undertakings in the Appendix to this decision are adopted.
2. Applicants' motion for a protective order is granted. The confidential version of Applicants' notice of exemption in STB Finance Docket No. 33996 will be kept under seal and not be placed in the public docket or otherwise disclosed to the public.
3. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams  
Secretary

---

<sup>5</sup> SF&L's and Applicants' motion for a protective order in response to KJRY's discovery request, KJRY's reply and motion to compel discovery responses, and a separate motion to strike filed by SF&L and Applicants on March 20, 2001, are the subject of a separate decision that is being served today in these proceedings.

APPENDIX

PROTECTIVE ORDER

1. For purposes of this Protective Order:

(a) “Confidential Documents” means documents and other tangible materials containing or reflecting Confidential Information;

(b) “Confidential Information” means traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost work papers), the identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential terms of contracts with shippers and other parties, confidential financial and cost data, confidential terms of business transactions, and other confidential or proprietary business information;

(c) “Designated Material” means any documents designated or stamped as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in accordance with paragraph 5 or 6 of this Order, and any Confidential Information contained in such materials; and

(d) These “Proceedings” consist of STB Finance Docket Nos. 33995 and 33996.

2. Personnel of Keokuk Junction Railroad Company (“KJRY”) and its affiliates, including its parent corporation, Pioneer Railcorp (collectively “Petitioners”), and of SF&L Railway, Inc., and its affiliates, including Messrs. Kern W. Schumacher and Morris H. Kulmer (collectively “Respondents”), including outside consultants and attorneys for Petitioners and/or Respondents, may exchange Confidential Information for the purpose of participating in these Proceedings, but not for any other business, commercial, or other competitive purpose.

3. To the extent any meetings, conferences, exchanges of data, or other cooperative efforts between representatives of Petitioners and Respondents are held and carried out for purposes of these Proceedings, such meetings, conferences, exchanges of data, and other cooperative efforts will be deemed essential for the conduct and disposition of these Proceedings and will not be deemed a violation of 49 U.S.C. 11904 or any other provision of the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 (ICCTA).

4. If any party to these Proceedings determines that any part of a discovery request or response, transcript of a deposition or hearing, or pleading or other paper filed or served in these Proceedings contains Confidential Information or consists of Confidential Documents, then that party may designate and stamp such Confidential Information and Confidential Documents

“CONFIDENTIAL.” Any information or document designated or stamped “CONFIDENTIAL” shall be handled as provided for hereinafter.

5. Any party producing material in discovery or submitting material in pleadings or other documents filed or served may in good faith designate and stamp particular Confidential Information, such as material containing shipper-specific rate or cost data or other competitively sensitive or proprietary information “HIGHLY CONFIDENTIAL.” Any information or documents so designated or stamped shall be handled as provided hereinafter.

6. Information and documents designated or stamped “CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, to any person or entity, except to an employee, counsel, consultant, or agent of a party to these Proceedings, or to an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has been given and has read a copy of this Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit I to this Order.

7. Information and documents designated or stamped “HIGHLY CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, to any employee of a party to these Proceedings, or to any other person or entity, except outside counsel or any outside consultant to a party to these Proceedings, or to any employee of such outside counsel or outside consultant, who, before receiving access to such information or documents, has been given and has read a copy of this Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit 2 to this Order.

8. Any party to these Proceedings may challenge the designation by any other party of information or documents as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” by filing a motion with the Surface Transportation Board (Board), an administrative law judge (ALJ), or any other officer to whom authority has been lawfully delegated by the Board to adjudicate such challenge(s).

9. Designated Material may not be used in any other litigation or arbitration or for any purpose other than for participation in these Proceedings, including without limitation any business, commercial, strategic, or competitive purpose.

10. Any party who receives Designated Material in discovery shall destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the Board and retained by counsel for a party to these Proceedings) at the earlier of: (1) such time as the party receiving the materials withdraws from these Proceedings; or (2) the completion of these Proceedings, including any petitions for reconsideration, appeals, or remands.

11. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to the Board unless the pleading or other document is

submitted under seal in a package clearly marked on the outside as “Confidential Materials Subject to Protective Order.” See 49 CFR 1104.14. All pleadings and other documents so submitted shall be kept confidential by the Board and shall not be placed in the public docket in these Proceedings except by order of the Board, an ALJ, or any other officer in the exercise of authority lawfully delegated by the Board.

12. No party may include Designated Material in any pleading brief, discovery request, or response submitted in any judicial review proceedings arising from STB Finance Docket Nos. 33995 or 33996, unless:

(1) the pleading or other document is submitted under seal in accordance with a protective order that requires the pleading or other document to be kept confidential by that tribunal and not be placed in the public docket in the proceeding; or

(2) the pleading or other document is submitted in a sealed package clearly marked “Confidential Materials Subject to Request For Protective Order” and is accompanied by a motion to that tribunal requesting issuance of a protective order that would require the pleading or other document be kept confidential and not be placed in the public docket in the proceeding, and requesting that if the motion for a protective order is not issued by that tribunal, the pleading or other document be returned to the filing party.

13. No party may present or otherwise use any Designated Material at a Board hearing in these Proceedings unless that party has previously submitted, under seal, all proposed exhibits and other documents containing or reflecting such Designated Material to the Board, an ALJ, or any other officer to whom relevant authority has been lawfully delegated by the Board and has accompanied such submission with a written request that the Board, ALJ, or officer: (a) restrict attendance at the hearing during any discussion of such Designated Material; and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Order.

14. If any party intends to use any Designated Material in the course of any deposition in these Proceedings, that party shall so advise counsel for the party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any Designated Material is used or discussed shall be restricted to persons who may review that material under the terms of this Order. All portions of deposition transcripts or exhibits that consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and shall otherwise be handled as specified in paragraph 12 of this Order.

15. To the extent materials reflecting Confidential Information are produced by a party in these Proceedings and are held and/or used by the receiving person in compliance with

paragraphs 1, 2, 5, or 6 above, such production, disclosure, holding, and use of the materials and data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 10904 or any other provision of the ICCTA.

16. All parties must comply with all of the provisions of this Order unless the Board, an ALJ, or any other officer exercising authority lawfully delegated by the Board determine that good cause has been shown warranting suspension of any of the provisions herein.

17. Nothing in this Order restricts the right of any party to disclose voluntarily any Confidential Information originated by that party, or to disclose voluntarily any Confidential Documents originated by that party if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other party.

Exhibit I

UNDERTAKING—CONFIDENTIAL MATERIAL

I, \_\_\_\_\_, have read the Protective Order served on April 13, 2001, governing the production and use of Confidential Information and Confidential Documents in STB Finance Docket Nos. 33995 and 33996, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Finance Docket Nos. 33995 and 33996, and/or any judicial review proceedings in connection with STB Finance Docket Nos. 33995 and 33996. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped “CONFIDENTIAL,” other than file copies kept by counsel or pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Dated: \_\_\_\_\_ Signed: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Employer: \_\_\_\_\_

Exhibit 2

UNDERTAKING—HIGHLY CONFIDENTIAL MATERIAL

I am [counsel] [a consultant] for \_\_\_\_\_ for whom I am acting in this proceeding. I have read the Protective Order served on April 13, 2001, governing the production and use of Confidential Information and Confidential Documents in STB Finance Docket Nos. 33995 and 33996, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Finance Docket Nos. 33995 and 33996, or any judicial review proceedings in connection with STB Finance Docket Nos. 33995 and 33996. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof.

I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any information or documents designated or stamped “HIGHLY CONFIDENTIAL,” that I will take all necessary steps to assure that said information or documents be kept on a confidential basis by any counsel or outside consultants working with me, that under no circumstances will I permit access to said materials or information by employees of my client or its subsidiaries, affiliates, or owners (other than outside counsel), and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting information or documents designated or stamped “HIGHLY CONFIDENTIAL” other than file copies kept by counsel or pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Dated: \_\_\_\_\_ Signed: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Employer: \_\_\_\_\_