

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.

Decided: December 21, 2001

On January 10, 2001, SF&L Railway, Inc. (SF&L), a noncarrier, filed a notice of exemption to acquire from Toledo, Peoria and Western Railway Corporation (TP&W)<sup>2</sup> an operating easement over, and the rail, ties, and improvements of, a 71.5-mile rail line extending between milepost 194.5 at La Harpe and milepost 123.0 at Peoria, IL (the La Harpe Line or Line). TP&W retained the underlying real estate, subject to a permanent, unconditional easement to ensure that SF&L can fulfill its common carrier obligations with respect to the Line. TP&W is to operate the Line for SF&L as a contract operator, and SF&L is to retain responsibility for providing rail 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).

Also 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 when it becomes a rail carrier. Kern W. Schumacher and Morris H. Kulmer—

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

<sup>2</sup> TP&W, a railroad controlled by RailAmerica, Inc., a noncarrier holding company, operates approximately 300 miles of rail line between Logansport, IN, and Lomax, IL, with trackage rights over The Burlington Northern and Santa Fe Railway Company (BNSF) between Lomax and Fort Madison, IA, and between Peoria and Galesburg, IL. See RailAmerica, Inc.—Control Exemption—Florida Rail Lines, Inc., Toledo, Peoria and Western Railroad Corporation, Marksman Corporation, and Toledo, Peoria and Western Railway Corporation, STB Finance Docket No. 33777 (STB served Sept. 17, 1999).

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).

On March 7, 2001, Keokuk Junction Railway Company (KJRY)<sup>3</sup> filed a petition to revoke the two notices of exemption.<sup>4</sup> KJRY simultaneously filed a motion for a protective order and undertakings and a number of interrogatories and requests for production and admissions. SF&L and Applicants, on March 20, 2001, filed motions requesting that a protective order be issued in response to the discovery requests and that material be stricken from the petition to revoke. KJRY filed a reply, including a motion to compel discovery, on March 23, 2001.<sup>5</sup> In a decision served on April 13, 2001, SF&L's and Applicants' motions were denied. They were directed to respond to KJRY's discovery requests within 15 days of the decision's service date,

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<sup>3</sup> KJRY, a Class III shortline railroad controlled by Pioneer Railcorp, operates a 38-mile line of railroad between Keokuk, IA, and La Harpe and Warsaw, IL. See Pioneer Railcorp—Acquisition of Control Exemption—KNRECO, Inc., d/b/a Keokuk Junction Railway, Finance Docket No. 32877 (STB served Mar. 26, 1996). KJRY states that it interchanges traffic with BNSF at Keokuk but that it depends on its connection with TP&W at La Harpe to interchange with other Class I railroads (Union Pacific Railroad Company (UP), 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.

On December 12, 2001, KJRY filed a notice of exemption under 49 CFR 1150.41 to acquire: (1) TP&W's railroad assets, including rail, ties, other track materials, real estate interests, and operating rights for its 12.1-mile line between milepost 194.5 at La Harpe and milepost 206.6 near Lomax; (2) 15.5 route miles of TP&W trackage rights over BNSF between Lomax, milepost 218.5, and Fort Madison, milepost 234.0; and (3) other TP&W trackage rights in BNSF's Fort Madison Yard. See Keokuk Junction Railway Co.—Acquisition and Operation Exemption—West End of Toledo, Peoria and Western Railway Corporation, STB Finance Docket No. 34143.

<sup>4</sup> KJRY claims that SF&L acquired the La Harpe Line with the immediate intent to downgrade service and impose unreasonable charges and with the ultimate intent to abandon service and conduct salvage through its affiliate, A&K Railroad Materials, Inc. KJRY argues that the use of the class exemption, 49 CFR 1150.31, for these purposes is improper and contrary to the rail transportation policy, 49 U.S.C. 10101, that the exemption should be revoked, and that SF&L should be required to file an application under 49 U.S.C. 10901 to ensure that a complete record is developed on the merits of the proposed transaction.

<sup>5</sup> SF&L and Applicants filed a reply to the merits of the petition to revoke on March 26, 2001.

and KJRY was granted a 15-day extension, to May 13, 2001, to supplement its petition to revoke.<sup>6</sup>

On May 18, 2001, Mr. Joseph C. Szabo, on behalf of the United Transportation Union-Illinois Legislative Board (UTU-IL), the county of McDonough, and the city of Macomb (together referred to as Joint Petitioners) filed a joint petition to reject and/or revoke the notices of exemption, and they filed discovery requests.<sup>7</sup> In a decision served on June 5, 2001, a proceeding was instituted under 49 U.S.C. 10502(b), and KJRY was granted a 15-day extension from the date discovery is completed in connection with the joint petition to supplement its petition to revoke.

Motions to Compel. SF&L and Applicants, on August 16, 2001, filed a motion to compel responses to two multiple-part interrogatories propounded in a set of six interrogatories submitted to KJRY on July 20, 2001. On September 4, 2001, SF&L and Applicants filed a second motion to compel responses to 31 individual interrogatories submitted to KJRY on August 16, 2001. KJRY filed a reply to the second motion to compel on September 12, 2001, and a motion for leave to late-file a reply and a reply to the first motion to compel on September 14, 2001. In its motion for leave, KJRY states that it prepared but inadvertently failed to file a reply to the first motion to compel and that SF&L and Applicants do not object to the late filing. KJRY's motion for leave to late-file is not opposed and will be granted.

The two interrogatories that are the subject of the first motion to compel seek 3½ years of information on: (1) KJRY's operating revenues and expenses; (2) the carloads and tonnages of revenue traffic that KJRY originated and terminated; (3) the carloads of revenue traffic that KJRY interchanged with TP&W at La Harpe and with BNSF at Keokuk; (4) each of KJRY's consignors and consignees; (5) the number of carloads, types of commodities, tonnages, and revenues on traffic tendered by consignors or delivered to consignees; (6) whether consignors ordinarily designate routings; and (7) which shipments, and the percent of total shipments that, are interchanged at La Harpe and Keokuk and whether these shipments could be routed via either interchange.

The 31 individual interrogatories that are the subject of the second motion to compel seek information on: (1) whether a KJRY/TP&W Switching and Haulage Agreement that was entered into in 1988 still exists in its original or in a modified form, and, if so, how much revenue freight

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<sup>6</sup> KJRY filed the supplement to its March 7, 2001 petition to revoke on December 12, 2001.

<sup>7</sup> UTU-IL separately filed a "petition to reject" the notices of exemption on April 18, 2001, and a petition for reconsideration of the assessment of a \$300 filing fee in connection with the petition to reject on May 10, 2001. These petitions will be the subject of a subsequent decision.

was tendered under it in 1998, 1999, 2000, and the first 6 months of 2001; (2) whether KJRY has discussed entering into, or would be willing to enter into, a new haulage agreement or other working relationship with SF&L and TP&W; and (3) the purchase option that KJRY claims to have exercised to acquire the La Harpe line. See Keokuk Junction Railway Co.–Acquisition and Operation Exemption–West End of Toledo, Peoria and Western Railway Corporation, STB Finance Docket No. 34085 (STB served and published at 66 FR 45892 on Aug. 30, 2001) (KJRY Acquisition).<sup>8</sup>

SF&L and Applicants state that they would not have acquired the La Harpe Line and that SF&L would not have used the class exemption from 49 U.S.C. 10901 if the Line's traffic volumes and revenues were not sufficient to permit continued rail operations. They claim that their first set of interrogatories seeks information on how much traffic and revenue KJRY can be expected to contribute to the operation of the La Harpe Line to enable them to establish that the Line's revenues are sufficient to permit continued profitable operations.

KJRY contends that its petition to revoke is predicated on only one issue, whether SF&L and Applicants actually intend to operate the La Harpe Line. See supra note 4. KJRY argues that data on the amount of traffic it has historically tendered say nothing about SF&L's and Applicants' intent and, for this reason, the discovery served on them only sought information probative of their intentions toward the ownership and operation of the Line. KJRY also contends that the purchase option at issue in its filings in KJRY Acquisition is irrelevant to the issues in this proceeding.

In view of the limited scope of the petition to revoke, there is no merit to SF&L's and Applicants' motions to compel. The information they seek is of a most confidential nature and is not relevant to the issue in contention. KJRY chose not to rely on historic traffic volumes and revenues to establish SF&L's and Applicants' intentions with respect to the La Harpe Line, and it now has the burden to prove their intentions without this type of evidence. Similarly, while the purchase option that KJRY claims to have exercised in KJRY Acquisition concerns the same line at issue here, it is not apparent how the option is relevant to establishing SF&L's and Applicants' intent. In any event, the exemption in KJRY Acquisition was revoked. See supra note 8.

SF&L and Applicants submitted their first discovery request more than 4 months after KJRY filed its petition to revoke. While SF&L and Applicants cite Board precedent and offer

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<sup>8</sup> KJRY filed a notice of exemption on August 12, 2001, to acquire and operate approximately 98 miles of TP&W line between milepost 108.0 near East Peoria, IL, and milepost 206.0L, near Lomax, and trackage rights over (1) UP between Hollis, milepost 119.28, and Iowa Junction, milepost 113.9, and (2) Peoria and Pekin Union Railway Company between Iowa Junction, milepost 113.9, and milepost 109.49. That exemption was subsequently revoked at KJRY's request in a decision served on October 15, 2001.

various interpretations of 49 CFR 1121.2 to support their right to obtain discovery, they do not offer a satisfactory explanation for their delayed submissions.

Petitions for Extension of Time. On December 12, 2001, KJRY filed its supplemental petition. SF&L and Applicants filed a petition on December 17, 2001, requesting that their due date to file a reply be extended until 15 days from the date when action is taken on their August 16 and September 4, 2001 motions to compel or KJRY responds to the interrogatories that are the subject of those motions. KJRY filed a reply to the December 17, 2001 petition on December 19, 2001. Joint Petitioners also filed a petition for extension on December 17, 2001. Citing 49 CFR 1121.2, Joint Petitioners request that they be permitted to file a supplemental petition within 15 days after discovery is concluded. They contend that they have been waiting for KJRY to complete discovery before filing their supplemental petition, but that KJRY unexpectedly had terminated discovery and filed its supplemental petition.

This decision terminates discovery. The supplemental petition of Joint Petitioners will be due 15 days from the date of service of this decision. SF&L's and Applicants' reply to Joint Petitioner's supplemental petition is due 15 days after it is filed. In order to permit SF&L and Applicants to file a single reply, their reply to KJRY's supplemental petition will also be due the same day.

It is ordered:

1. KJRY's petition for leave to late-file a reply to SF&L's and Applicants' first motion to compel is granted.
2. SF&L's and Applicants' motions to compel are denied.
3. Joint Petitioners' supplemental petition will be due 15 days from the service date of this decision (January 7, 2002). SF&L and Applicants may file a reply 30 days from the service date of this decision (January 22, 2002).
4. SF&L's and Applicants' reply to KJRY's supplemental petition will be due 30 days from the service date of this decision (January 22, 2002).
5. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams  
Secretary