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SERVICE DATE - LATE RELEASE DECEMBER 26, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34143

KEOKUK JUNCTION RAILWAY COMPANY  
– ACQUISITION AND OPERATION EXEMPTION –  
WEST END OF TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION

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.

Decided: December 26, 2001

Petitioners' request to stay the effectiveness of the exemptions in these proceedings will be denied.

BACKGROUND

These proceedings have arisen out of proposals by the Toledo, Peoria and Western Railway Corporation (TP&W) to transfer, via sale or lease, its right to operate over track running between East Peoria, IL, in the east, and Fort Madison, IA, in the west. The western (La Harpe-Lomax-Fort Madison) segment of this track is at issue in STB Finance Docket No. 34143. The eastern (La Harpe-to-Peoria) segment of this track is at issue in STB Finance Docket No. 33995.

STB Finance Docket No. 34143. By notice filed on December 12, 2001, in STB Finance Docket No. 34143, the Keokuk Junction Railway Company (KJRY) invoked the class exemption at 49 CFR 1150.31 et seq. to acquire the right to operate over the western segment of the track over which TP&W is operating. In particular, KJRY seeks (a) to acquire 12.1 miles of track owned by TP&W, running between milepost 194.5 at La Harpe, IL (61450), and milepost 206.6

near Lomax, IL, and (b) to acquire 15.5 miles of operating rights, which KJRY describes as incidental trackage rights, over track owned by The Burlington Northern and Santa Fe Railway Company (BNSF). The trackage rights begin at milepost 218.5, near Lomax, run west to milepost 234.0 at Fort Madison, and proceed west from there over BNSF main line track to milepost 236.5. The trackage rights include track in BNSF's yard at Fort Madison. The exemption became effective on December 19, 2001.

STB Finance Docket Nos. 33995 and 33996. In STB Finance Docket No. 33995, the SF&L Railway Company (SF&L), a noncarrier, invoked the class exemption of 49 CFR 1150.31 et seq. to acquire an operating easement over, and the rail, ties, and improvements on, a 75.5-mile segment of TP&W's track running between milepost 194.5 at La Harpe, IL (61450), and milepost 123.0 at Peoria, IL (61607). This segment has been subject to a competing claim by KJRY in another proceeding. A related continuance-in-control exemption was filed in STB Finance Docket No. 33996.<sup>1</sup> By decision served on January 16, 2001, the Board denied a stay requested by Joseph C. Szabo, on behalf of the United Transportation Union-Illinois Legislative Board (UTU-IL). By decision served on June 5, 2001, however, the Board commenced an investigation of the merits of the issues raised in STB Finance Docket Nos. 33995 and 33996.

Stay Request. Late in the afternoon of December 18, 2001, and only hours before the midnight, December 19, 2001 effective date of the notice filed in STB Finance Docket No. 34143, a stay petition covering all three proceedings was filed by the County of McDonough, the City of Macomb, and UTU-IL (collectively, petitioners). Petitioners note that (in its earlier denial of a petition for stay in STB Finance Docket No. 33995, the Board found that employees would not be irreparably harmed because rail service would continue as before, with TP&W employees continuing to work on the line while the merits of the exemption were being determined. Petitioners argue that this rationale no longer applies because SF&L will no longer seek to retain TP&W as a contract operator. Petitioners also submit a statement from the Mayor of the City of Macomb alleging that the transaction will result in the discontinuance of service.

In support of their request for stay in STB Finance Docket No. 34143, petitioners argue that a stay is necessary in order to preserve the Board's ability to grant appropriate relief in STB Finance Docket No. 33995. Petitioners also maintain that the class exemption for acquisition and operation does not apply here because the trackage rights involved in STB Finance Docket No. 34143 are not properly "incidental" trackage rights. Moreover, petitioners maintain that the Board lacks jurisdiction over the yard tracks near Fort Madison on the grounds that those tracks are excepted under 49 U.S.C. 10906. Finally, petitioners assert that a stay is required in STB

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<sup>1</sup> This notice, filed under 49 CFR 1180.2(d), allows the owners to remain in control when SF&L becomes a rail carrier. The same owners also control three unconnected railroads.

Finance Docket No. 34143 because KJRY has failed to provide a copy of its purchase agreement with TP&W.<sup>2</sup>

On December 19, 2001, KJRY filed a reply in opposition to the petition for stay.

#### DISCUSSION AND CONCLUSIONS

The standards governing disposition of a petition for stay are: (1) that there is a strong likelihood that the movant 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). On a motion for stay, “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). The parties seeking a stay carry 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).

#### STB Finance Docket No. 34143

The criteria for stay are not met with respect to any of the stay criteria in STB Finance Docket No. 34143.

Likelihood of Prevailing on Merits. Petitioners have not shown that they are likely to prevail on their argument that jurisdiction over the transaction is lacking because the yard tracks near Fort Madison are excepted under 49 U.S.C. 10906. Whether track is excepted under section 10906 is a complex, fact bound issue. Petitioners have not come forward with sufficient evidence and argument necessary to convince the Board that they are likely to prevail in their argument that this transaction is beyond Board jurisdiction due to the nature of the track. Moreover, it is clear that at least a substantial, essential part of the track is main line track that is not excepted under section 10906.

Nor have petitioners shown that they are likely to prevail on their argument that the trackage rights involved in STB Finance Docket No. 34143 are not incidental trackage rights within the class exemption for acquisition and operations. They cite no precedents in support of this claim. When the class exemption was adopted, incidental trackage rights were defined as “a grant of trackage rights by the seller, or the assignment of trackage rights to operate over the line of a third party, that occurs at the time of the acquisition or operation.” Class Exemption – Acq.

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<sup>2</sup> Petitioners reiterate this argument in their supplemental petition filed on December 20, 2001. KJRY filed a reply to this document the same day.

And Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810, 816 (1985). Petitioners offer no argument as to why the proposed trackage rights fail to meet this standard. Nor do our regulations require those filing notices of exemption to provide copies of purchase agreements. Thus, the lack of such an agreement in KJRY's filing does not appear to be a fatal defect.

Irreparable Harm to Movants. Petitioners have not come forward with evidence that anyone will suffer irreparable harm if the stay is not granted. In the event that it were later to be found that the transaction were to be subject to statutory provisions governing trackage rights and that, consequently, affected employees were entitled to labor protective benefits granted under an appropriate implementing agreement, the compensation and benefits would relate back to any harm suffered by employees at the beginning of the improper transaction. Thus, it cannot be said that affected employees would suffer irreparable harm.

Harm to Other Interested Parties. On the other hand, if the Board were to issue a stay and the exemption were upheld on the merits, KJRY would permanently lose the business benefits of the transaction during the interim.

Public Interest. It is in the public interest to permit carriers to transact business among themselves absent a showing of harm to the public. No such showing has been made here.

STB Finance Docket Nos. 33995 and 33996

In its decision served on January 16, 2001, the Board refused to grant UTU-IL a stay of these same transactions. Petitioners have not come forward with new evidence that would justify a different result now.

Even if, as petitioners now assert, TP&W employees will not continue to provide service on the eastern segment of the line (as a contractor to SF&L, the owner of the operating rights), there is no indication in petitioners' submission that those employees will be irrevocably harmed if the transaction goes forward. If petitioners were to prevail on a petition to revoke the exemption, the affected employees would be made whole. Petitioners do not argue otherwise.

Petitioners also submit a statement from the Mayor of the City of Macomb alleging that the transaction will result in the discontinuance of service. In this document, the Mayor merely outlines his fear that service will be discontinued in the future because SF&L is the affiliate of a scrap enterprise. SF&L has held itself out to meet its common carrier obligation concerning the eastern segment, and the Board stands ready to ensure that it does. Service may not be discontinued without authority from the Board. Such authority has not been sought.

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

It is ordered:

1. The petition for stay is denied.
2. This decision is effective on its date of service.

By the Board, Linda J. Morgan, Chairman.

Vernon A. Williams  
Secretary