

ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD



✓ Finance Docket No. 33995

206971

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

Finance Docket No. 33996

206972

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

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REPLY TO PETITION TO REOPEN, ETC.

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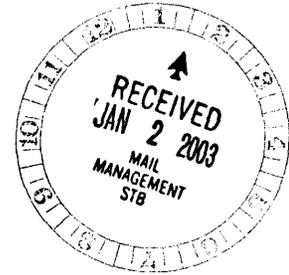
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Due Date: January 2, 2003

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Preliminary Statement

McDonough County, City of Macomb, and Joseph C. Szabo,^{1/}
(Joint Petitioners) submit this reply to the petition by SF&L
Railway, Inc. (SF&L), Kern H. Schumacher, and Morris H. Kul-
mer,^{2/} filed December 13, 2002, as corrected December 16, 2002,
which seeks to reopen the proceeding for reconsideration and/or
for clarification of decision, and to hold in abeyance order to
reconvey.

The decision sought to be reconsidered or clarified, and
stayed (in part), was issued October 17, 2002 by the Surface

^{1/} Illinois Legislative Director for United Transportation Union,
with offices at 8 So. Michigan Avenue, Chicago, IL 60603

^{2/} Messrs. Schumacher and Kulmer control SF&L, but otherwise did not
participate in Finance Docket No. 33995.

Transportation Board (Board). (Decision, 10/17/02). The October 17 order, which became effective November 16, 2002, directs that SF&L immediately reconvey to Toledo, Peoria and Western Railway Corporation (TP&W), the operating easement over, and the rail, ties, and certain improvements on, the 71.5-mile segment between La Harpe and Peoria, IL. (Decision, 10/17/02, 19). The Board in its decision also ruled that it would soon issue a decision dismissing, as moot, SF&L's petition for an exemption to abandon the very line it was directed to reconvey. SF&L-Abandonment.^{3/} (Decision, 10/17/02, 3-4).

Interest of these Petitioners

The Board should deny the SF&L "petition for reconsideration," filed December 13, 2002. The Board's October 17, 2002 mandate for reconveyance should go forward, along with dismissal of SF&L Abandonment. If TP&W desires to abandon the line after it resumes operation, it should file its own abandonment application or invoke exemption procedures.

These petitioners take no position as to the financial terms for reconveyance of the line to TP&W. However, we do not believe the Board should revise its October 17, 2002 decision to assist the financial process, if to do so would permit substitution of TP&W for SF&L in SF&L Abandonment, or would allow TP&W to seek abandonment without filing a new and separate abandonment application or exemption procedure.

^{3/} The SF&L abandonment request is Docket No. AB-448 (Sub-No. 2X), SF&L Railway, Inc.-Abandonment Exemption-in Hancock, McDonough, Fulton and Peoria Counties, IL.

We deem it scandalous that SF&L seeks reconsideration, and stay of the reconveyance directive, while at the same time SF&L has embargoed service on the line. (Appendix 1).

The interest of the joint petitioners lies in the prompt and adequate TP&W resumption of service for this area of Illinois. The promise of TP&W service was found necessary to preserve the competitive balance between carriers, shippers, and communities, when the former ICC and present Board approved the recent BNSF and UP/SP merger applications. Burlington Northern Et Al.--Merger-- Santa Fe Pacific Et Al., 10 I.C.C.2d 661, 682-85, 730-31,763-68, 778-79, 811, 813 (1995); Union Pacific/Southern Pacific Merger, 1 S.T.B.233, 279-81, 467 (1996).^{4/}

Background

The Joint Petitioners^{5/} on May 18, 2001, as supplemented January 7, 2002, filed their separate petition to revoke the notices of exemption in Finance Docket Nos. 33995-96, seeking to restore ownership (and later operation) of the TP&W line between La Harpe and Peoria, IL, from SF&L back to TP&W. The Board in its October 17, 2002 decision, dismissed the joint petition as moot, in light of the fact the Board was granting the similar petition

^{4/} We repeat our request, frequently mentioned, here and in SF&L Abandonment, that the Board on its own motion, should reopen Finance Docket No. 34143, Keokuk Junction Railway Co.-Acquisition and Operation Exemption-West End of Toledo, Peoria and Western Railway Corporation, which involves the 12.1-mile line between La Harpe and Lomax, IL, with incidental trackage rights into Fort Madison, IA.

^{5/} The term "Joint Petitioners" was used by the Board in its earlier decisions, for example Decision, 12/21/01, 3; Decision, 12/26/01, 2. In the most recent decision, they are termed "UTU-IL parties," Decision, 10/17/02, 2).

to revoke which had been filed by Keokuk Junction Railway Company (KJRY). (Decision, 10/17/02, 20).

The first reaction to the October 17, 2002 decision, mandating reconveyance to TP&W, was TP&W's motion, filed October 30, 2002, that TP&W be substituted for SF&L in the very SF&L Abandonment proceeding the Board had announced would soon be dismissed. TP&W argued that its substitution should be in lieu of the SF&L Abandonment dismissal announced by the Board in its October 17, 2002 decision.

Then SF&L, on November 13, 2002, filed a petition to reopen the October 17, 2002 decision, which was similar in many (but not all) respects to its instant petition to reopen, etc., filed later on December 13, 2002. These petitioners on November 14, 2002, made a brief reply to SF&L's November 13, 2002 petition to reopen; however, on the following day, November 15, 2002, SF&L withdrew its November 13, 2002 petition to reopen.

TP&W on November 20, 2002, followed with notices of exemption purporting to transfer the very non-real estate assets between La Harpe and Peoria, as are embraced in the instant Finance Docket No. 33995, and as embraced in SF&L Abandonment, to a newly-created non-carrier affiliate, Western Illinois Railway Company.^{6/}

SF&L's subsequent December 13, 2002 petition to reopen, etc. has been labeled a "petition for reconsideration" by the Board in its December 20 and December 26, 2002 decisions in SF&L Abandon-

^{6/} Finance Docket No. 34282, Western Illinois Railway Company-Acquisition Exemption-Toledo, Peoria & Western Railway Corporation (served December 20, 2002), 67 Fed. Reg. 78040-41 (Dec. 20, 2002); Finance Docket No. 34283, RailAmerica, Inc. et al-Corporate Family Reorganization Exemption-Western Illinois Railway Company (served December 20, 2002), 67 Fed. Reg. 78039 (Dec. 20, 2002).

ment. (Decision, 12/20/02, 2-3; 7/ SF&L Abandonment, 12/26/02, 2).

The Board in its December 20, 2002 decision found it would be premature to dismiss SF&L Abandonment, or to rule on TP&W's motion to substitute for SF&L in SF&L Abandonment, while the Board is considering SF&L's December 13, 2002 petition for reconsideration of the Board's October 17, 2002 decision directing reconveyance. The Board said action in SF&L Abandonment would be deferred until January 21, 2003, to permit reconsideration of the October 17, 2002 decision, and that the time for filing an Offer of Financial Assistance (OFA) in SF&L Abandonment is tolled until further notice. (SF&L Abandonment, 12/20/02, 2-3; SF&L Abandonment, 12/26/02, 2).

I. THE SF&L'S DECEMBER 13 PETITION IS TO REOPEN, RATHER THAN FOR RECONSIDERATION.

The SF&L's petition is labeled as to reopen for reconsideration, and the Board has labeled it as a petition for reconsideration. However, the Board should apply the standards for a petition to reopen, pursuant to 49 CFR 1115.4, rather than the standards for a petition for reconsideration, otherwise cognizable pursuant to 49 CFR 1115.3.

A petition for reconsideration must be filed within 20 days from service of the decision, or within any further period (not to exceed 20 days) as the Board may authorize. 49 CFR §1115.3(e). SF&L did not seek time beyond the initial 20 days for filing either its original November 13 (voluntarily dismissed) petition,

7/ The December 20, 2002 decision in SF&L Abandonment, also embraces Finance Docket Nos. 33995-96.

or for its December 13, 2002 petition.^{g/} Petitions for reconsideration of the October 17, 2002 decision were due November 5, 2002. SF&L asks that its time to seek reconsideration be extended, retroactively by 38 days, based upon an "informal extension of the effective date." (SF&L Petition, 12/13/02, 3-4). Such a claim for an extension is absurd, and borders upon attempted fraud.

Accordingly, the SF&L December 13, 2002 petition should be treated as a petition to reopen pursuant to 49 CFR §1115.4. The petition must state the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances, and the petition must state in detail the nature of and reasons for the relief requested. 49 CFR §1115.3(c)(d); 49 CFR §1115.4.

II. THE ACTIONS OF SEVERAL PARTIES, WITH THE APPARENT ACQUIESCENCE OF BOARD STAFF, HAVE SERVED TO VIOLATE THE BOARD'S DIRECTIVE AND TO HARM THE PUBLIC IN THE INVOLVED AREA.

The Board's October 17, 2002 decision required immediate reconveyance of the line to TP&W, with the Board's order becoming effective November 16, 2002. (Decision, 10/17/02, 19-20).

A. Embargo. SF&L took immediate action upon issuance of the Board's October 17 decision, but it was to place an embargo on the entire line, which these joint petitioners appended to their

^{g/} SF&L contends that its early (and withdrawn) November 13 petition was filed within the additional 20-day period that may be authorized by the Board. (SF&L Petition, 12/13/02, 3). This does not meet the rule requirement. SF&L did not request an extension, and none was granted.

November 14, 2002 filing. This embargo is still in effect--nothing moves on the La Harpe-Peoria line. (Appendix 1). This action is an outrage--continuing outrage--against the public.

B. Stay of Effective Date. SF&L claims it secured an "informal" stay of the November 16, 2002 effective date for compliance with the October 17, 2002 decision. (SF&L Petition, 12/13/02, 3-4):

Immediately thereafter, TP&W informed SF&L, that it had obtained an informal extension of the effective date of the Decision, and that it desired to negotiate with SF&L to reach a mutually agreeable and equitable resolution of the matter...Based upon, and in reliance upon, TP&W's statement that it had obtained an extension of the effective date of the Decision.....

The joint petitioners were not advised of any request--formal or otherwise--for a stay of the effective date. Such action by SF&L, TP&W, and perhaps Board Staff, warrant immediate action by the Board, perhaps employing outside investigators.

There is no basis for the Board to accord SF&L a retroactive extension of the effective date (SF&L Petition, 12/13/02, 1, 2-3, 13), particularly where SF&L slapped an embargo on the line, beginning October 18, 2002, and continuing to present.

The Board's rules provide an orderly method for requesting the extension for the effective date of a Board order, with notice to the parties. 49 CFR 1115.5. SF&L, perhaps together with TP&W and Board Staff, have simply taken the law into their own hands--and opted to deny railroad service over a 71.5-mile line of railroad. The Board should deny nunc pro tunc extension of time for seeking reconsideration, for extension of the November 16,

2002 effective date for reconveyance, or the period for complying with the Board's October 17, 2002 order.

SF&L's alternative request that the Board hold in abeyance (stay) the October 17, 2002 order directing reconveyance, or decline to enforce the immediate conveyance specified in the order of October 17, 2002 (SF&L Petition, 12/13/02, 1, 4-5, 13-14), is patently absurd.

III. THERE HAS BEEN NO MATERIAL ERROR, NEW EVIDENCE OR SUBSTANTIALLY CHANGED CIRCUMSTANCES.

SF&L's December 13, 2002 petition fails to demonstrate material error, new evidence, or substantially changed circumstances. 49 CFR §1115.4.

A. Material Error. SF&L's claim that the Board erred in its statutory findings under the rail transportation policy, 49 U.S.C. 10101, is baseless. (SF&L Petition, 12/13/02, 6-8). The Board is not required to go beyond certain criteria that bear upon the statutory provisions in the absence of exemption, but the Board certainly is permitted to do so. Village of Palestine v. ICC, 936 F.2d 1355, 1342-46 (Silberman, J.) (D.C. Cir. 1991), cert. den. 502 U.S. 1030.^{9/} Here, the Board met all of its obligations in revoking the exemption.

The SF&L contention the Board in its October 17, 2002 order erred in not permitting SF&L to file an application pursuant to 49 U.S.C. 10901, totally lacks merit. (SF&L Petition, 12/13/02, 8). First, the Board did not "approve" SF&L's acquisition of the line by publishing SF&L's notice of exemption on February 7, 2001. (66

^{9/} See also our November 14, 2002 Reply at 3.

Fed. Reg. 9410-11), so that there was no change in Board rulings. The only "approval" is the original class exemption established in 1985.^{10/} Specific instances of exercise of the class exemption are never approved. An exercise of the exemption can be challenged "at any time." 49 CFR 1150.34.

Exercise of the exemption is permitted seven days after the filing of notice. The exemption is self-executing. Railway Labor Executives Ass'n v. Galveston, Tex., 849 F.2d 145, 147 (5th Cir. 1988), vac. and rem. other grds., 492 U.S. 901 (1989):

In 1985, pursuant to this authority, the ICC in Ex Parte 392 (fn. omitted) had adopted a class exemption for substantially all Section 10901 acquisitions and operations. Under the class exemption, such transactions automatically become effective seven days after notice is filed with the Commission unless a petition to revoke the exemption has been filed and granted or the Commission stays the transaction.

The self-executing nature of the class exemption was also noted by another Circuit. There is no specific "approval," "grant," or "exemption" action taken by the agency after the notice is filed. Black v. ICC, 837 F.2d 1175, 1176-77 (D>C> Cir. 1988):

The Class exemption requires that, to qualify for an exemption, the 'applicant must file a verified notice providing details about the transaction, and a brief caption summary.' 49 CFR 1150.32(a) (1986). The exemption is effective seven days after the notice is filed. Id. 1150.32(a). Under 49 U.S.C. 10505(d), the Commission may revoke any exemption upon finding that application of a statutory provision is necessary to carry out the transportation policy set forth in 49 U.S.C. 10101.

^{10/} Class Exemption-Acq. & Oper. of R. Lines Under 49 U.S.C. 10901;
49 CFR 1150.31.

Second, the October 17, 2002 decision does not preclude SF&L from entering into an agreement with TP&W, or any other carrier, for acquisition of the line pursuant to an application under 49 U.S.C. 10901.

B. New Evidence. SF&L asserts as "new evidence" the TP&W claim that traffic on the line segment does not warrant TP&W's continued operation of the line. SF&L contrasts the TP&W motion to substitute, filed October 30, 2002 in SF&L Abandonment, with the Board's finding that the La Harpe line was not inherently unprofitable. (SF&L Petition, 12/13/02, 8-9).

Such conjecture by TP&W is not "new evidence" for SF&L's case. The validity of TP&W's claim can be decided in any TP&W proceeding. Moreover, a reopening of the La Harpe-Lomax-Fort Madison proceeding (Finance Docket No. 34143), with evaluation of the entire Peoria-Fort Madison line, may warrant a different view of TP&W operation and line viability, from that recently expressed by TP&W.

C. Substantially Changed Circumstances. The primary changed circumstances urged by SF&L is its disagreement with TP&W as to financial terms for reconveyance.^{11/} These joint petitioners take no position on the financial terms. However, the SF&L embargo should be lifted, with prompt resumption of operations by TP&W. The Board should defer resolution of compensation terms, if necessary, and not permit such terms to be a bargaining weapon in the timing of reconveyance and TP&W service to the public.

^{11/} We do not consider the form of reconveyance to be significant. Finance Docket No. 34282. (SF&L Petition, 12/13/02, 5-6).

CONCLUSION

The SF&L's December 13, 2002 petition should be denied in all respects, including denial of its request for an extension of time to file for reconsideration, to postpone the effective date of the Board's order, to comply with the Board's order, and to postpone enforcement of the Board's order.

Respectfully submitted,

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January 2, 2003

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Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage-prepaid.

Washington DC

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Association of American Railroads
Embargo Notices for: 10/18/2002
Consecutive Sheet: 136

Roadmark:	SFLR
Railroad:	SF & L RAILWAY INC
Embargo Number:	1-2002
Amendment Number:	
Status:	Effective
Embargo Effective Date:	10/18/2002
Commodity:	All Traffic
Destination Gateway or Territory:	To, From or Via all stations from SF&L Junction, IL (FSAC 1124) to and including LaHarpe, IL (FSAC 1196). Intermediate stations include Blandinsville(1189), Bushnell (1171), Canton (1140), Cuba (1149), Good Hope (1180), New Philadelphia (1166), Rawalts (1137), Sciota (1183), Seville (1158) and Smithfield (1155).
Consigned or Reconsigned To, or Intended For:	
Cause:	Track Conditions
Amend:	
Exception:	None
Note:	

[\[Back\]](#)



All embargoes sorted by: [Issue Date](#)
 Currently effective embargoes sorted by [Railroad](#)
[Issue Embargo](#)

All Embargoes (sorted by Railroad and Embargo Number -711 embargoes are available.)

Page: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 [Next]

Road	Embargo No	Embargo Status	Sheet No.	Issue Date
RSR	1-01 Amendment 1	Expired	55	03/21/2001
RSR	1-01	Expired	47	03/09/2001
RVPR	1-2002 Cancellation	Cancelled	104	09/24/2002
RVPR	1-2002 Cancellation	Cancelled	102	09/24/2002
SCXY	1-2002	Effective	74	07/18/2002
SCXY	2-2001 Cancellation	Cancelled	163	06/18/2001
SCXY	2-2001 Cancellation	Cancelled	164	06/18/2001
SDIY	1-00 Cancellation	Cancelled	127	07/28/2000
SDIY	1-00 Cancellation	Cancelled	120	07/10/2000
SEKR	1-01	Expired	186	07/13/2001
SEKR	1-2002	Effective	136	10/18/2002
SJVR	3-01	Expired	190	07/19/2001
SJVR	2-01	Expired	189	07/19/2001
SJVR	1-2001 Cancellation	Cancelled	67	03/29/2001
SJVR	1-2001 Cancellation	Cancelled	36	02/26/2001
SJVR	1-2001 Cancellation	Cancelled	22	02/09/2001
SJVR	1-2001 Cancellation	Cancelled	21	02/07/2001
SJVR	3-00	Expired	121	07/13/2000
SJVR	2-00	Expired	117	06/26/2000
SJVR	1-00	Expired	89	06/12/2000
SJVR	2-99	Expired	88	07/15/1999
SJVR	1-99	Expired	81	06/25/1999
SKOL	1-01	Expired	185	07/13/2001
SRY	2-02 Cancellation	Cancelled	95	09/09/2002
SRY	1-02 Cancellation	Cancelled	92	09/05/2002

Page: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 [Next]

APPENDIX 1
 Page 2 of 2