

810# 0102072002

BEFORE THE
SURFACE TRANSPORTATION BOARD

ORIGINAL

FEE RECEIVED

NOV 13 2002

**SURFACE
TRANSPORTATION BOARD**

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

ENTERED
Office of Proceedings

NOV 13 2002

Part of
Public Record

EXPEDITED ACTION RESPECTFULLY REQUESTED

PETITION TO REOPEN ADMINISTRATIVE ACTION,
FOR RECONSIDERATION, AND/OR
FOR CLARIFICATION OF DECISION
AND TO HOLD IN ABEYANCE ORDER TO RECONVEY

FILED

NOV 13 2002

**SURFACE
TRANSPORTATION BOARD**

Tracy C. Harman
Van Cott, Bagley, Cornwall &
McCarthy
P. O. Box 45340
Salt Lake City, UT 84145-0340
Tel.: (801) 532-3333

Fritz R. Kahn
Fritz R. Kahn, P.C.
1925 N Street, NW (8th fl)
Washington, DC
Tel.: (202) 263-4152

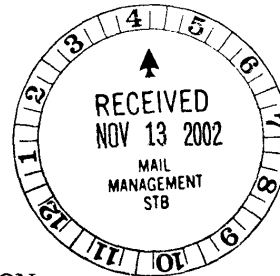
SF&L RAILWAY, INC.,
KERN W. SCHUMACHER
and MORRIS H. KULMER

Dated: November 13, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

EXPEDITED ACTION RESPECTFULLY REQUESTED

PETITION TO REOPEN ADMINISTRATIVE ACTION,
FOR RECONSIDERATION, AND/OR
FOR CLARIFICATION OF DECISION
AND TO HOLD IN ABEYANCE ORDER TO RECONVEY

Petitioners, SF&L Railway, Inc. ("SF&L"), Kern W. Schumacher, and Morris H. Kulmer, respectfully petition the Board, pursuant to 49 U.S.C. 10901(d)(2) and 49 C.F.R. §§ 1115.3, 1115.4 and 1117.1, to reopen the above-captioned administrative proceedings; to reconsider its Decision issued October 15, 2002 and served October 17, 2002; and/or to clarify its Decision and the application of its order to reconvey under the circumstances at hand. Petitioners further respectfully request that the Board hold in abeyance its order that Petitioners reconvey the subject property pending the Board's disposition of this petition.

1. The Board issued a Decision ("Decision") in the above-captioned administrative proceedings on October 15, 2002, a copy of which was served on SF&L on October 17, 2002. The Decision revokes the exemptions pursuant to which SF&L had obtained the Board's authorization to acquire the La Harpe-to-Peoria railroad line and to allow Messrs. Schumacher and Kulmer to continue in control of SF&L. The Decision further ordered that SF&L reconvey the La Harpe-to-Peoria line to Toledo, Peoria and Western Railway Corporation ("TP&W"), effective November 16, 2002. The Decision also provided that, in effecting the reconveyance, neither SF&L nor TP&W are to profit from the ordered reconveyance.

2. On November 7, 2002, RailAmerica, Inc. ("RailAmerica"), the owner of TP&W, transmitted to SF&L, via e-mail, documents drafted by RailAmerica to effect the reconveyance of the La Harpe-to-Peoria line by SF&L to TP&W. Pursuant to the terms of those documents and in accompanying correspondence,¹ RailAmerica has indicated that it will not pay one cent more for the La Harpe-to-Peoria railroad line than the \$2,179,878.00 that SF&L paid for it on December 29, 2000, regardless of the statutory "minimum constitutional value" of the subject property, and without any compensation to SF&L for the benefit to TP&W of its use of the \$2,179,878.00 in funds paid it by SF&L almost two years ago or reimbursement to SF&L for the corresponding opportunity cost associated with loss of the use of those funds by SF&L--or even the payment of interest to SF&L on the amount effectively "borrowed" by TP&W.

¹ See, letter from John T. White, Esq., to Michael Van Wagenen, Esq., dated November 5, 2002.

3. The effect of the reconveyance documents drafted by RailAmerica would be to allow TP&W and/or RailAmerica to profit substantially from a reconveyance by SF&L to TP&W of the La Harpe-to-Peoria railroad line.² Such an effect³ was not contemplated by the parties at the time the Decision was rendered and served, and further would contravene the express directive of the Board in the Decision that neither party should profit from the ordered reconveyance. The insistence by TP&W of such terms of any reconveyance, which was only recently communicated to SF&L, constitutes a change in circumstances that would materially affect the prior action in the above-captioned proceedings.

4. RailAmerica's transmission of its draft reconveyance documents to SL&F on November 7, 2002, rendered it impossible for SF&L to file a petition for reconsideration within the presumptive 20-day period for such filings specified in 49 C.F.R. § 1115.3(e), and further rendered it impossible for SF&L to file a stay request ten days in advance of the effective date of the Board's Decision, as contemplated by 49 C.F.R. § 1115.5. This petition is filed, however, within the additional 20-day period for the filing of a petition for reconsideration that may be authorized by the Board pursuant to 49 C.F.R. § 1115.3(e). Accordingly, SF&L respectfully requests the Board to extend the time for SF&L to file this petition as a petition for reconsideration pursuant to its authority set forth in 49 C.F.R. § 1115.3(e), so as to render this petition timely as a petition for reconsideration under the Board's rules.

2 As set forth in more detail below, TP&W seeks to profit from the reconveyance by insisting that it pay, in exchange for such reconveyance, only the identical amount it received from SF&L for the line in 2000, and simultaneously seeking to "step into the shoes" of SF&L in the petition filed by SF&L to abandon the line, in order to realize the true value of the line and associated property. See, Motion to Substitute the Toledo, Peoria and Western Railway Corporation for SF&L Railway, Inc., filed October 30, 2002, by TP&W in STB Docket No. AB-448 (Sub-No. 2X), SF&L Railway, Inc.-Abandonment Exemption-In Hancock, McDonough, Fulton and Peoria Counties, IL. ("Motion to Substitute").

3 Indeed, as set forth in more detail below, the prospect of a reconveyance of the subject property was not, itself, contemplated by the parties, as no party had requested an order of reconveyance, much less raised the issues implicated by such an order or a proposed method of dealing with them.

5. SF&L seeks reconsideration of the Decision pursuant to 29 C.F.R. § 1115.3(b) on the grounds that (1) the prior action involves material error, and (2) that the prior action will be affected materially because of changed circumstances.

6. Independent of its petition for reconsideration, SF&L seeks to reopen the above-captioned administrative proceeding under 29 C.F.R. § 1115.4 on the grounds that (1) the prior action involves material error, and (2) that the prior action will be affected materially because of changed circumstances.

7. Also independent of the foregoing requests for reconsideration and to reopen the proceedings, SF&L seeks clarification of the Decision and of the application of the order contained therein that SF&L reconvey the subject property to TP&W without "profit" to either party under the circumstances at hand.

8. In addition, given the serious disruption that would be caused by enforcement of the Board's order to reconvey by the specified date under the circumstances at hand, SF&L further respectfully requests that the Board refrain from enforcing, and to hold in abeyance, SF&L's obligation under the Decision to reconvey the line to TP&W pending final disposition by the Board of this petition and any related proceedings.⁴

9. The prior action will be affected materially because of changed circumstances in that RailAmerica has insisted that the property be reconveyed to TP&W on terms not contemplated by the Decision and the order contained therein that SF&L reconvey the line and associated property in such a manner that neither SL&F nor TP&W profit from the transaction. In particular, RailAmerica insists that the line and associated property be reconveyed to TP&W in exchange for payment to SL&F of the \$2,179,878.00 received by it from SL&F in December 2000, without regard to the subject property's net

⁴ See The Land Conservancy of Seattle & King County—Acq'n & Op. Exemption—The Burlington Northern & Santa Fe R. Co., STP Finance Docket No. 33389, 1997 WL 651658 (I.C.C.).

liquidation value, exclusive of realty, of at least \$5.6 million, both in December 2000 and at present; the value of any improvements made by SL&F to the subject line and/or of the losses incurred by SL&F in its operation of the line from at least December 2001 to the present; or the value of TP&W's use, for almost two years, of the \$2,179,878.00 it received from SL&F--and the corresponding lost opportunity cost to SL&F of such use by TP&W of those monies.

10. Independent of the change in circumstances, the prior action involves material error in at least the following respects:

a. The Board revoked the exemptions previously granted to SL&F on grounds not authorized by law. In the matter at hand, the Board based its decision to revoke the exemptions on the ground that revocation of the exemptions was necessary to ensure the integrity of the Board's processes. The governing statute, however, permits the Board to revoke an exemption only "when it finds that Application in whole or in part of a provision of this part . . . is necessary to carry out the transportation policy of section 10101 of this title." 49 U.S.C. § 10502(d). In interpreting the predecessor to section 10502(d) (previously numbered as 49 U.S.C. § 10505(d)) the Board concluded, based on the legislative history of the statute and a canvassing of prior Board decisions, that "the appropriate analysis in determining whether a revocation is proper should be the same as the analysis for determining whether exemption is proper at the outset of a proceeding. This analysis focuses on the sections of the [Rail Transportation Policy] related to the underlying statutory section from which an exemption is sought." Minnesota Comm'l R. Inc.—Trackage Rights Exemption—Burlington Northern R. Co., STB Finance Docket No. 31603, 8 I.C.C.2d 31, 35-36, 1991 WL 171624 at *36 (I.C.C.) (effective Aug. 30, 1991) (citing, *inter alia*, Village of Palestine v. ICC, 936 F.2d 1335 (D.C. Cir. 1991)). As further explained by the Board in Minnesota, the Board "retain[s] the right to review the transaction to protect the integrity of our

processes. To the extent, however, that revocation of an exemption is sought to undo the underlying transaction, and RTP analysis is thus implicated, only those sections of the RTP related to the underlying section of the statute are required to be addressed." 8 I.C.C.2d at 37, 1991 WL 171624 at *4 (emphasis added).⁵

In its Decision in the proceeding at hand, the Board failed to consider the specific sections of the provisions of the rail transportation policy related to the statutory section from which the exemption was sought by SF&L in connection with its acquisition of the La Harpe-to-Peoria railroad line, as, for example, 49 U.S.C. 10101(1), (2), (3) and (5). Instead, the Board focused almost exclusively on a single enumerated policy statement, 49 U.S.C. § 10101(7), which is not directly related to the underlying statutory section from which the subject exemptions were granted. Furthermore, 49 U.S.C. § 10901(a)(4) permits a person other than a rail carrier, such as SF&L, merely to "acquire a railroad line" if found by the Board to be consistent with the public convenience and necessity. SF&L was denied the opportunity to make that requisite showing. In addition, the Board did not enable SF&L to overcome the alleged deficiency in its exemption filing by permitting it to file an application, pursuant to 49 U.S.C. 10901(a).

b. The Board's decision to revoke the subject exemptions on the "evidence" before it is contrary to Board precedent. The Board based its decision to revoke the subject exemptions exclusively on a "determination" that "Respondents from the start evidently intended to raise rates and degrade service with the ultimate intent to abandon and salvage the Line." Decision at 14.

⁵ See also Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, Ex Parte No. 392 (Sub-No. 1) (STB 1985) (hereinafter "Class Exemption Decision"). In addition to consideration of the specific sections of the RTP related to the underlying statutory section from which an exemption is sought, an exemption is properly revoked upon a finding that the notice of exemption "contains false or misleading information." 49 C.F.R. § 1150.32(c). In the proceeding at hand, however, there was no contention, much less a "finding," that the notice(s) of exemption filed by SL&F contained "false or misleading information."

The Board based its determination upon “a variety of indicia” that SF&L never seriously intended to operate the subject line, but purchased it solely with an eye toward abandoning and salvaging it. Decision at 9. The Board arrived at that conclusion notwithstanding the undisputed fact that SF&L actually, and directly, operated the line for approximately one year, Decision at 14, and that it had done so for just short of 9 months, at a loss, before seeking to abandon the line.⁶ The Board further considered “SF&L’s affiliation with A&K,” an affiliated business entity that deals in scrap rail materials,” in arriving at its determination of Respondents’ “evident intent” not to operate the line. Decision at 13. In the only published Decision that counsel for SF&L has been able to locate to date that involves facts similar to those in the matter at hand, but much more supportive of an inference of a lack of serious intent to operate the rail line at issue, the Board determined that revocation of an exemption was inappropriate. See Track Tech, Inc. –Abandonment Exemption– in Adair and Union Counties, IA, STB Docket No. AB-493 (Sub-No. 7X) , served November 1, 1999.

More fundamentally, however, the Board’s determination in the matter at hand appears to be based, at least in significant part, on what has subsequently been revealed to be an inaccurate assumption that “the La Harpe Line was not inherently unprofitable[,] and the shippers wanted to continue to use the Line.” Decision at 13. As subsequently made clear in TP&W’s Motion to Substitute in the abandonment proceeding seeking Board authorization for the abandonment of the line, TP&W “agrees with the analysis made by SF&L that the traffic currently on the Line does not warrant TP&W’s continued operation or maintenance of the Line;” that “TP&W’s operations over the Line prior to its sale to SF&L showed steadily declining traffic;” Motion to Substitute at 6-7

⁶ SF&L filed its Verified Petition for Exemption seeking permission to abandon the line on September 3, 2002, as amended September 10, 17, and 19.

(emphasis added); that TP&W had considered abandoning the line “[p]rior to agreeing to sell the Line to SF&L;” and that TP&W had approached SF&L to take over operation of the line, and that, given the troubled economic picture of the line, had provided SF&L with a number of inducements to get SF&L to take over operation of the line, including such things as an agreement not to oppose an abandonment “if SF&L’s venture failed[.]” Motion to Substitute at 4 n.3. TP&W’s motion further confirms that at least one shipper has “agreed that ‘SF&L should be allowed to abandon the line,’” Motion to Substitute at 6, and that “no shippers on the Line oppose the abandonment.” Motion to Substitute at 9. Accordingly, the Board’s determination that the exemptions granted to Respondents in the case at hand should be revoked is both against Board precedent, and is based on certain fundamental assumptions that subsequently have been shown to be inaccurate.

c. An order issued by the Board requiring SF&L to reconvey the subject property to TP&W, on the terms presented by RailAmerica and TP&W, would result in the imposition of a monetary penalty that the Board is not authorized to impose. Although the Board is statutorily empowered to initiate, on its own behalf or with the assistance of the Attorney General, civil actions to enforce various requirements of the Act, 49 U.S.C. §§ 11701 – 11703, and may seek the imposition of various civil and criminal monetary penalties in such actions, 49 U.S.C. §§ 11901 – 11908, it is not authorized, as a general proposition, to impose direct monetary penalties on individuals or entities subject to regulation under the Act.

The La Harpe-to-Peoria railroad line, purchased by SF&L on December 29, 2000, was, and is, valued at at least \$5.6 million, exclusive of the underlying realty.⁷ TP&W concedes that the

⁷ See, the offers of Pioneer Railcorp, dated November 21, 2000, and December 1, 2000, produced by Keokuk Junction Railway Co.

subject railroad line is worth at least \$5.6 million in net liquidation value,⁸ exclusive of realty. An appraisal of the property's net liquidation value currently being conducted at the request of SF&L very well may indicate that the railroad line has a net liquidation value *in excess of* \$5.6 million. Thus, any imposition by the Board of an order requiring SL&F to reconvey the subject property to TP&W on the terms proposed by TP&W would subject SF&L to substantial monetary losses, and would amount to the imposition of an immediate and substantial monetary penalty on SF&L, which the Board is not authorized to impose.

d. Any interpretation of the order issued by the Board in its Decision requiring SF&L to reconvey the subject property to TP&W, on the terms presented by RailAmerica and TP&W, would result in a violation of the terms of the order itself, which expressly provides that neither SF&L nor TP&W may "profit" from the ordered reconveyance. As set forth above, the net liquidation value of the subject property, excluding realty, is in excess of \$5.6 million, a fact acknowledged by TP&W. In addition, while TP&W received the immediate benefit of the initial transaction, in the form of a payment of monies by SF&L to it in the amount of \$2,179,878.00 and the resultant benefit accruing to TP&W by virtue of the elimination of a significant portion of its cash-flow difficulties, and the use of those monies over an approximately two-year period, SL&F has incurred operating losses of over \$200,000.00 in running the line since December 12, 2001, as well as the lost opportunity cost associated with its payment of the \$2,179,878.00 to TP&W. Under the terms of reconveyance insisted on by RailAmerica, however, RailAmerica and/or TP&W seek a windfall from the Decision. Specifically, RailAmerica insists that it should pocket the difference between the \$2,179,878.00 it proposes to repay SF&L and the \$5.6 million,

⁸ See, Motion to Substitute filed October 30, 2002, by TP&W in STB Docket No. AB-448 (Sub-No. 2X), SF&L Railway, Inc.-Abandonment Exemption-In Hancock, McDonough, Fulton and Peoria Counties, IL.

exclusive of the realty, that it acknowledges as the net liquidation value of the property to be reconveyed, and which SF&L had hoped to realize from the abandonment of the line (and which TP&W now similarly hopes to realize from an abandonment of the line).⁹ RailAmerica seeks to even profit further by its insistence that it be allowed to have the benefit of the use of \$2,179,878.00 in funds paid it by SF&L without reimbursement or compensation to SF&L for the value to TP&W of the use of those funds or for the lost opportunity cost to SF&L associated with its payment of those funds to RailAmerica in December 2000. Such a windfall to TP&W hardly squares with the repeated directives of the Board in the Decision that neither RailAmerica, Inc./TP&W nor SF&L should profit from the revocation of the exemptions and the ordered reconveyance.

In contrast, SF&L would not be gaining anything more than it bargained for if it were to receive the \$5.6 million acknowledged by both parties to be the net liquidation value of the property to be reconveyed by SF&L to TP&W (less the \$2,179,878.00 already paid by it). That was the true value of the property when SF&L bought it on December 29, 2000, and is, at minimum, its true value today. Thus, to require SF&L to reconvey the property to SF&W for anything less than the actual market value of the property that it purchased through arms-length bargaining with RailAmerica, Inc., would be tantamount to a taking of its property without just compensation, in violation of the due process clause of the United States Constitution. Other sections of the statute, 49 U.S.C. 10904(f)(1)(B) and 10907(b)(2), are explicit that a railroad's property cannot be taken from it for less than the "constitutional minimum," namely, the greater of the property's net liquidation value or going-concern value. In addition to, but independent of the

⁹ See, Motion to Substitute filed October 30, 2002, by TP&W in Docket No. AB-448 (Sub-No. 2X), SF&L Railway, Inc.—Abandonment Exemption—In Hancock, McDonough, Fulton and Peoria Counties, IL.

“takings” issue, any requirement imposed by the Board on SF&L that it accept less than the “constitutional minimum” for the property at issue would impose an extraordinary penalty on SF&L. Any such penalty would be unlawful, however, because the Board is without statutory authority directly to impose financial penalties—even for allegedly proscribed conduct.

11. The Board in its Decision may have found that SF&L improperly used the class exemption of 49 C.F.R. 1150.21, et seq., to obtain the Board’s authorization to acquire the La Harpe-to-Peoria railroad line; the Board did not find, and it could not have found, however, that SF&L had not purchased the property properly, subject to the Board’s approval, by application pursuant to 49 U.S.C. 10901 and 49 C.F.R. 1150.1, et seq., instead of the class exemption.

12. Only if the Board were to set the amount to be paid by RailAmerica, Inc. to SF&L for the subject property at \$5.6 would SF&L agree to forego the 10.2% interest¹⁰ on the \$2,179,878.00 it paid for the La Harpe-to-Peoria railroad line and the more than \$200,000.00 of operating losses it incurred in operating the line since December 12, 2001. That RailAmerica, Inc., proposes not even to pay interest on the sum it received from SF&L and used to its advantage in the interim and the amount it saved in not operating the property is completely contrary to the spirit and letter of the Board’s Decision, and should not be endorsed by the Board.

WHEREFORE, Petitioners, SF&L Railway, Inc., Kern W. Schumacher and Morris H. Kulmer, respectfully ask (a) that the Board to determine that its prior action will be adversely affected by changed circumstances and that it involved material error; (b) that the Board reconsider its Decision in this matter; (c) that the Board re-open the administrative proceedings in these matters; (d) that the Board clarify that its Decision requires RailAmerica, Inc., and/or Toledo, Peoria and Western Railway, Inc., pay the greater of the net liquidation value or on-going concern value of the property for the reconveyance of the La Harpe-

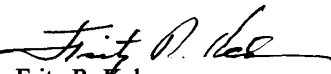
to-Peoria railroad line; and (e) that the Board stay the effective date of its Decision (or otherwise hold in abeyance its Decision) until ten days after the date of service of the Board's determination of this Petition.

Respectfully submitted,

SF&L RAILWAY, INC.,
KERN W. SCHUMACHER
and MORRIS H. KULMER

By their attorneys,

Tracy C. Harman
Van Cott, Bagley, Cornwall &
McCarthy
P. O. Box 45340
Salt Lake City, UT 84145-0340
Tel.: (801) 532-3333


Fritz R. Kahn
Fritz R. Kahn, P.C.
1925 N Street, NW (8th fl.)
Washington, DC
Tel.: (202) 263-4152

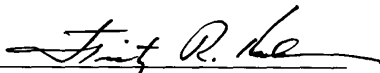
Dated: November 13, 2002

¹⁰ See, STB Ex Parte No. 558 (Sub-No. 5), Railroad Cost of Capital – 2001, served June 20, 2002.

CERTIFICATE OF SERVICE

I certify that I this day served copies of the foregoing Petition upon each of the parties
by facsimile transmitting copies thereof to their counsel.

Dated at Washington, DC, this 13th day of November 2002.


Fritz R. Kahn