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UPS Next Day Air

Vernon L. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001
(202) 565-1519

November 15, 2002



Re: Finance Docket No. 33995 & 33996

Dear Mr. Williams:

✓ 206662 ✓ 206663

Please find enclosed the original and 25 copies of United Transportation Union's Motion to Imposition of Labor Protective Conditions for filing in the above-mentioned Finance Docket. Also, pursuant to prior Board orders, I have enclosed a disk in WordPerfect format.

Thank you for your cooperation.

Sincerely,

A handwritten signature in cursive script, appearing to read "Daniel R. Elliott, III".

Daniel R. Elliott, III
Associate General Counsel

cc: C. J. Miller, III, General Counsel

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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

ENTERED
Office of Proceedings

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Public Record

STB FINANCE DOCKET NO. 33996 -

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

**UNITED TRANSPORTATION UNION'S MOTION FOR
IMPOSITION OF LABOR PROTECTIVE CONDITIONS**

United Transportation Union ("UTU") respectfully moves the Surface Transportation Board ("STB" or "Board") to impose *Oregon Short Line* labor protective conditions in the above-captioned exemption proceeding from the date of effectiveness through the date the acquisition and control transactions were revoked. Since the facts established in this proceeding prove that these transactions were actually a *de facto* abandonment of a rail line, the corresponding labor protection for this type of transaction during this pertinent period is warranted.

**FACTS AND CONCLUSIONS ESTABLISHED
IN THIS PROCEEDING BY THE BOARD**

On January 10, 2001, SF&L Railway, Inc. ("SF&L"), a non carrier at the time, filed a notice of exemption under 49 C.F.R. § 1150.31 to acquire from Toledo, Peoria and Western Railway Corporation ("TP&W") an operating easement over, and the rails, ties, and certain improvements

on, a 71.5-mile segment of rail line in Illinois between milepost 194.5 at La Harpe and milepost 123.0 at Peoria (the "La Harpe Line" or "Line"). Also on that date, Messrs. Kern W. Schumacher and Morris H. Kulmer, the owners of SF&L, filed a notice of exemption under 49 C.F.R. § 1180.2(d)(2) to allow them to continue in control of SF&L after it became a rail carrier. They also owned A&K Materials, Inc. ("A&K"), which they refer to as "the Nation's leading supplier of new and used . . . rail, ties and other materials for use in railroad track applications."

When it was acquired by RailAmerica in 1999, TP&W owned 282.2 miles of rail line between Lomax, IL (milepost 206.6), and Logansport, IN, and operated 369 miles of rail line, which included trackage rights over Burlington Northern and Santa Fe Railway Company ("BNSF") between Fort Madison, IA, and Lomax and between Galesburg and Peoria, IL. La Harpe is located 12.1 miles to the east of Lomax. One of TP&W's major traffic movements at the time of the acquisition was a time-sensitive intermodal train that TP&W hauled for BNSF between Fort Madison and TP&W's intermodal ramps at East Peoria, IL, and Remington, IN. The train moved over the La Harpe Line, usually five or six days a week in each direction, and was used by TP&W to pick up and deliver local traffic interchanged with KJRY at La Harpe.

In January 2000, RailAmerica incurred substantial debt as a result of its acquisition of 17 additional shortline railroads. *See RailAmerica, Inc. – Control Exemption – RailTex, Inc.*, STB Finance Docket No. 33813 (STB served January 10, 2000). To reduce debt, it began disposing of properties. In this regard, Pioneer offered to purchase TP&W's entire West End, which connected with KJRY's line and would allow KJRY to reach Fort Madison and Peoria. While these negotiations progressed, RailAmerica and TP&W entered into an agreement with BNSF to shift BNSF's intermodal train from the Lomas interchanges and the La Harpe Line to the Galesburg

interchange.

By December 2000, Pioneer and RailAmerica had not reached an agreement for sale of TP&W's West End. On December 21, 2000, RailAmerica began negotiating to sell the West End to Messrs. Kulmer and Schumacher. Within 8 days, on December 29, 2000, RailAmerica entered into an agreement to sell the La Harpe Line to SF&L, an A&K-affiliated company, that, has bought and then liquidated rail properties in the past. A&K paid for the property on the same day, December 29, 2000, and received for security a note from SF&L.

Under the purchase agreement, SF&L acquired an operating easement over, and the rail, ties, and certain improvements on, the full 71.5-mile Line. TP&W retained the underlying real estate, subject to what TP&W describes as a permanent and unconditional easement permitting SF&L to fulfill the common carrier obligation for the Line. But the parties also agreed that TP&W would operate the Line for SF&L, and that they would execute additional documents and agreements as necessary to effect the sale and operation of the Line. Significantly, the sale to SF&L did not include the last mile of track by which TP&W had reached the KJRY line. TP&W remained the owner of that last mile and retained the corresponding common carrier responsibility on that piece of track. Thus, for through traffic to move between the KJRY line and the La Harpe Line, it would now need to go through an additional interchange for that 1-mile stretch, making such moves more costly.

After the line was sold, TP&W continued to operate it for many months, soliciting traffic for its own account. TP&W replaced BNSF's intermodal train with local train service (one train twice a week in each direction between Peoria and La Harpe) on February 18, 2001, and began hauling BNSF's intermodal train via Galesburg on February 19, 2001. In November 2001, the buyers

notified RailAmerica, Pioneer and others that SF&L would begin to operate the Line on its own. RailAmerica subsequently notified Pioneer in a letter dated December 12, 2001, that TP&W had "closed on the sale of its line . . . on December 10, 2001." The buyers claim that SF&L began operating the Line itself on December 12, 2001, that it operated one train twice a week in each direction between Peoria and La Harpe after that, and that, as of the time of its supplemental reply in this proceeding, it had received 172 carloads from, and delivered 58 carloads to, KJRY.

After considering the record in this proceeding, the Board decided to revoke the acquisition and control exemption. The Board noted that the class exemption process is intended to provide an expedited way for noncarriers to acquire rail lines so that rail service can be continued. The Board found here that the buyers abused the class exemption process by using the procedures to acquire lines for salvage rather than for any meaningful operations.

The finding by the Board that the buyers had abused the class exemption process in this case was based on a variety of indicia: the disjointed and incomplete structure of the sale; the buyers' obvious lack of interest in the operational aspects of the Line, as evidenced by their failure even to inspect the Line before the sale; the confusion as to whether certain essential components of the Line were even bought; the delay in consummation and the confusion over whether the buyer or the seller had the responsibility to quote rates; the understanding that TP&W and RailAmerica would support SF&L's future abandonment of the Line; and the unstructured financing of the Line.

In making this decision to revoke the exemption, the Board held as follows:

When we weigh all of the evidence we have just discussed, it is clear to us that revocation is warranted. To support the argument that they intended, at the time of the filing of the notices of exemption, to make a go of rail service, Respondents emphasize that SF&L did in fact operate this Line

beginning on December 12, 2001. Given the strong objections that have been voiced in this case, SF&L evidently concluded that it had no other choice. But the fact that SF&L operated a few trains a week is outweighed by overwhelming evidence that Respondents from the start evidently intended to raise rates and degrade service with the ultimate intent to abandon and salvage the Line. The most telling evidence includes: (1) Respondents' decision not to purchase enough of the West End of TP&W's line to procure interchange traffic from KJRY; (2) the hasty purchase of the Line with no analysis other than an assessment of the salvage value of the track; (3) the failure of Respondents to acquire essential components of the Line (bridges, trestles, and culverts); (4) the anticipation of abandonment and understanding that TP&W and RailAmerica would support the future abandonment of the Line; (5) the unstructured financing; and (6) the unexplained delay in consummating the transaction and related confusion that resulted. We are also mindful of the prior pattern of conduct of SF&L and other A&K affiliates in acquiring and promptly liquidating lines.

After weighing the evidence, we conclude that Respondents wrongly purchased the La Harpe Line for the purpose of abandoning and salvaging it. Our exemption process is designed to facilitate continued service to shippers and continued maintenance of the transportation network. The integrity of that process is undermined by, and must be protected from, tactics such as those employed by Respondents in these cases, which have been detrimental to the shippers on the Line. We will not allow our class exemption process to be abused by sales of active rail lines to persons whose intent is to degrade, abandon, and salvage those lines. Nor should the persons who engage in such abuses be allowed to profit from them. Accordingly, we revoke the exemptions in these cases.

(October 15, 2002 STB decision) (emphasis supplied). This revocation decision becomes effective on November 16, 2002.

ARGUMENT

Based upon the foregoing findings and conclusions by the STB, it is undisputed that the transaction was a *de facto* abandonment. 49 U.S.C. § 10903(b)(2) provides that "[t]he Board shall require as a condition of any abandonment or discontinuance under this section provisions to protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under 11326(a) and 24708(c) of this Title." The Board has found that the protections set forth in *Oregon Short Line R. Co. - Abandonment-Goshen*, 360 I.C.C. 91 (1979), satisfy this statutory requirement.

UTU is well aware that 49 U.S.C. § 10901 does not provide for labor protection in these types of transactions under normal circumstances. However, as the Board found, this transaction was not a typical § 10901 transaction, but was an abandonment under the guise of this acquisition and operation provision.

As the Board noted in its decision with respect to the revocation herein,

Our predecessor, the Interstate Commerce Commission (ICC), adopted the class exemption for the acquisition and operation of rail lines by noncarriers because the consideration of individual petitions for exemption from 49 U.S.C. 10901 had become a "burdensome and unnecessary expenditure of resources" on the agency and the individual petitioners. Class Exemption-Acq. & Oper. of R. Lines Under 49 U.S.C. § 10901, 1 I.C.C.2d 810,811 (1985), aff'd sub nom. Illinois Commerce Comm'n v. ICC, 817 F.2d 145 (D.C. Cir. 1987). The exemption was intended to facilitate the continued operation of marginal and failing rail lines by expediting and reducing the costs of entry into the rail industry and by eliminating uncertainty in negotiations with potential purchasers, especially those unfamiliar with the regulatory process. (*Id.*)

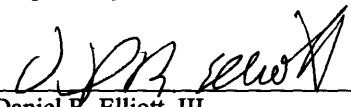
As a general matter, the exemption process has worked well; many marginal lines have been saved after being bought by lower-cost new operators. However, as the ICC cautioned in Lone Star Railroad, Inc. – Abandonment and Discontinuance of Trackage Rights ii in Wichita, Archer, Baylor, Knox, Haskell and Jones Counties, TX, Docket No. AB-425 et al. (ICC served June 9, 1995) (Lone Star), we cannot allow the process to be abused by salvage operators seeking to take over lines for their salvage rather than their operational value, and we will take remedial action (both with regard to the underlying line sale and any subsequent abandonment attempt) where the facts warrant it to maintain the integrity of our practices and procedures.

(October 15, 2002 Board decision herein). While UTU applauds the Board's revocation of this sham transaction, this situation requires further remedial action to protect the interests of the employees on the TPW. That remedial action should take the form of *Oregon Short Line* labor protection, as mentioned herein, since the transaction was a *de facto* abandonment. With this labor protection, any employee unjustly affected by this sham transaction would be made whole.

CONCLUSION

Based on the foregoing facts and argument, *Oregon Short Line* labor protective conditions should be imposed in this proceeding from the effective date of the exemption to the revocation date of November 16, 2002.

Respectfully submitted,


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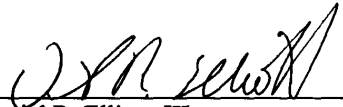
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing United Transportation Union's Motion for Imposition of Labor Protective Conditions has been served this 15th day of November 2002, via first-class, postage pre-paid mail upon the following:

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