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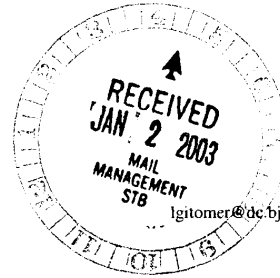
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January 2, 2003

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Washington, DC 20423

RE: Finance Docket No. 33995, *SF&L Railway, Inc.—Acquisition and Operation Exemption—Toledo, Peoria and Western Railway Corporation between La Harpe and Peoria, IL*
Finance Docket No. 33996, *Kern W. Schumacher and Morris H. Kulmer—Continuance in Control—SF&L Railway, Inc.*

206973

206974

Dear Secretary Williams:

Enclosed for filing are the original and ten copies of the Response to Petition to Reopen Administrative Action, for Reconsideration, and/or for Clarification of Decision and to Hold in Abeyance Order to Reconvey filed by SF&L Railway, Inc., Kern W. Schumacher and Morris H. Kulmer on December 13, 2002 by the Toledo, Peoria and Western Railway Corporation, and three diskettes with the file Response.doc.

Please time and date stamp the extra copy of this letter and the Response and return it with our messenger. If you have any questions, please contact me.

Respectfully submitted,

Louis E. Gitomer

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Office of Proceedings

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Enclosures

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Public Record

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33995

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

Finance Docket No. 33996

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

TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION RESPONSE TO
PETITION TO REOPEN ADMINISTRATIVE ACTION, FOR RECONSIDERATION,
AND/OR FOR CLARIFICATION OF DECISION AND TO HOLD IN ABEYANCE
ORDER TO RECONVEY OF SF&L RAILWAY, INC., KERN W. SCHUMACHER
AND MORRIS H. KULMER

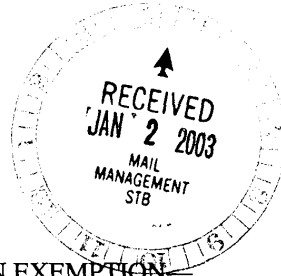
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Attorneys for TOLEDO, PEORIA AND
WESTERN RAILWAY CORPORATION

Dated: January 2, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD



Finance Docket No. 33995

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

Finance Docket No. 33996

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

TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION RESPONSE TO
PETITION TO REOPEN ADMINISTRATIVE ACTION, FOR RECONSIDERATION,
AND/OR FOR CLARIFICATION OF DECISION AND TO HOLD IN ABEYANCE
ORDER TO RECONVEY OF SF&L RAILWAY, INC., KERN W. SCHUMACHER
AND MORRIS H. KULMER

The Toledo, Peoria and Western Railway Corporation ("TP&W"), a wholly-owned indirect subsidiary of RailAmerica, Inc. ("RailAmerica") opposes the specific relief sought in the Petition to Reopen Administrative Action, for Reconsideration, and/or for Clarification of Decision and to Hold in Abeyance Order to Reconvey filed by SF&L Railway, Inc. ("SF&L"), Kern W. Schumacher and Morris H. Kulmer (collectively the "Petitioners") on December 13, 2002, as corrected on December 16, 2002 (the "Petition").

TP&W opposes Petitioners request that TP&W be required to "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." Petition at 13. Petitioners are requesting the Surface Transportation Board (the "Board") to require TP&W to pay \$5.7 million to

SF&L to reacquire certain rail assets that the Board ordered SF&L to reconvey to TP&W. TP&W sold these assets to SF&L in December 2000 for \$2,179,878.00, a TP&W repurchase from SF&L at \$5.7 million would result in a profit to SF&L of \$3,520,122. TP&W urges the Board to deny the relief requested by Petitioners, and instead uphold its statement that “no party to the sale should be allowed to profit.”¹ TP&W urges the Board to determine that the price to be paid by TP&W to SF&L for the reconveyance of the Line is equal to the price paid by SF&L to TP&W of \$2,179,878.00 plus interest calculated pursuant to 49 C.F.R. § 1141. It is TP&W’s position that neither SF&L nor TP&W will profit from the transaction if the Board determines that SF&L is entitled to the price it paid TP&W plus reasonable interest.

TP&W believes that the remaining argument and purported facts in the Petition are intended to divert the Board’s attention from Petitioners’ shortcomings and cast doubt on TP&W’s motives.

TP&W is, and has been since November 18, 2002, ready, willing and able to comply with the decision of the Board that revoked “the exemptions in these proceedings” and ordered that without profit to either SF&L or TP&W, “SF&L shall immediately reconvey to TP&W the operating easement over, and the rail, ties, and certain improvements on, the 71.5-mile segment of rail line in Illinois between milepost 194.5 at La Harpe and milepost 123.0 at Peoria” (the “Line”). *Decision*, at 19.

BACKGROUND

¹ *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 October 17, 2002) (the “*Decision*”), at 19.

The Board and parties are aware of the events that led to the issuance of the *Decision*. Since the issuance of the *Decision*, there have been two separate but related matters that have not been resolved – the implementation of the reconveyance and the proposed abandonment of the Line.

1. Implementation of the Reconveyance.

The *Decision* was served on October 17, 2002 by the entire Board, to become effective on November 16, 2002 (a Saturday). But according to the Board's rules (49 C.F.R. § 1104.7(a)), the *Decision* would not become effective until November 18, 2002. SF&L issued embargo number 1-2002 on October 18, 2002, effective immediately, to embargo service over the Line.

In order to be able to take any necessary steps to be in a position to comply with the *Decision*, TP&W filed a letter with the Board on October 22, 2002, requesting clarification whether further regulatory authorization was required to reacquire the Line or whether the *Decision* provided the necessary authorization. The Board responded on October 29, 2002, stating that "the Board negated the transaction" which "returned the ... Line to the preexisting status quo." The Board also said that "the Board's order authorizes TP&W to take back SF&L's interest in the ... Line. No other authority is needed for TP&W to comply with the Board's order." The Board served the letter on all parties to these proceedings.

Negotiations between SF&L and TP&W began no later than October 30, 2002, when SF&L made a proposal to TP&W. However, progress was slow. In light of the impending reconveyance date, TP&W prepared and forwarded to SF&L on November 5, 2002 a letter, attached as Exhibit 1 (the "November 5th Letter"), which precipitated

further negotiations. In November 5th Letter, which SF&L received on November 5, 2002, TP&W offered to reacquire the Line for \$2,179,878.00, and stated that it would prepare and forward to SF&L the appropriate documents, which it did on November 7, 2002. Hence, SF&L knew TP&W's position on November 5, in sufficient time to file a petition for reconsideration and/or a petition for stay on November 6.²

Negotiations continued, but on November 13, 2002, Petitioners filed a Petition to Reopen Administrative Action, for Reconsideration, and/or for Clarification of Decision and to Hold in Abeyance Order to Reconvey (the "November 13th Petition"). TP&W did not reply because SF&L and TP&W believed they had negotiated a settlement on November 14, 2002. Petitioners withdrew the November 13th Petition on November 15, 2002.

On the same date, the United Transportation Union filed a Motion for Imposition of Labor Protective Conditions on employees of the TP&W. SF&L responded in opposition on December 4, 2002.

In order to further the proposed settlement with SF&L, on November 20, 2002, as clarified on December 3, 2002, TP&W filed a notice of exemption to immediately transfer the assets it was reacquiring from SF&L to a new entity in order to avoid their entanglement with TP&W's existing credit agreement. *Western Illinois Railway Company—Acquisition Exemption—Toledo, Peoria & Western Railway Corporation*, Finance Docket No. 34282 (the "*Acquisition Exemption*").³ TP&W would transfer to

² Since the *Decision* actually did not become effective until November 18, 2002, SF&L had until November 8, 2002 to file a stay request. See 49 C.F.R. § 1115.5(a).

³ RailAmerica and its wholly owned subsidiary Palm Beach Rail Holdings, Inc. ("Palm Beach") filed a notice of exemption to continue in control of Western Illinois Railway

WIRC the assets reconveyed by SF&L, but retain the obligation to perform the common carrier obligation and the authority to sell the assets on behalf of WIRC if the Line were abandoned and a party filed an OFA to acquire all or part of the Line. WIRC, RailAmerica, and Palm Beach filed a Petition to Dismiss the *Acquisition Exemption* and the *Control Exemption* on November 26, 2002 on the ground that TP&W retained the common carrier obligation and that WIRC was merely the owner of the assets reconveyed from SF&L, without any common carrier obligation or the ability to fulfill that obligation. The Keokuk Junction Railway Co. ("KJRY") filed a notice of intent to participate in the *Acquisition Exemption* and the *Control Exemption* on December 13, 2002.⁴

Petitioners filed the Petition on December 13, 2002, as corrected December 16, 2002.⁵

2. The Proposed Abandonment of the Line

SF&L filed a petition for exemption to abandon the Line on September 3, 2002 in *SF&L Railway, Inc.—Abandonment Exemption—in Hancock, McDonough, Fulton and Peoria Counties, IL*, Docket No. AB-448 (Sub-No. 2X) (the "*Abandonment Proceeding*"). The Board ordered the dismissal of the *Abandonment Proceeding* in the *Decision*. TP&W filed a Motion to Substitute (the "Motion") itself for SF&L in the

Company ("WIRC"). *RailAmerica, Inc., et al.—Corporate Family Reorganization—Western Illinois Railway Company*, Finance Docket No. 34283 (the "*Control Exemption*").

⁴ The Board issued notices of exemption in *Western Illinois Railway Company—Acquisition Exemption—Toledo, Peoria & Western Railway Corporation*, STB Finance Docket No. 34282 (STB served December 20, 2002) and *RailAmerica, Inc., et al.—Corporate Family Reorganization—Western Illinois Railway Company*, STB Finance Docket No. 34283 (STB served December 20, 2002).

⁵ Petitioners also filed a Petition for Review of the *Decision* with the Tenth Circuit Court of Appeals on December 13, 2002.

Abandonment Proceeding on October 30, 2002. TP&W believed that substituting for SF&L in the *Abandonment Proceeding* would more expeditiously preserve for TP&W the options of abandoning the Line, operating the Line⁶, or selling the Line once the Line was reconveyed. Even if it were to obtain abandonment authority, TP&W would review the market to determine whether it made sense to continue to operate all or part of the Line. In addition, TP&W believed that it might be easier to sell all or part of the Line through the offer of financial assistance process under 49 U.S.C. § 10904.

On November 7, 2002 an Environmental Assessment (the "EA") was served by the Board's Section of Environmental Analysis. Also on November 7, 2002 a reply in opposition to the Motion was filed by McDonough County, the City of Macomb, and Joseph C. Szabo, Illinois Director for the United Transportation Union (the "Abandonment Parties").

SF&L filed a letter on November 11, 2002 indicating that it intended to file a reply, which it did on November 19, 2002, not objecting to the Motion.

The Abandonment Parties asked the Board to take official notice of the *Acquisition Exemption* and the *Control Exemption* in the *Abandonment Proceeding* on November 26, 2002. The Abandonment Parties filed comments on the EA on December 6, 2002.

⁶ TP&W recognized that even if abandonment authority were granted by the Board that TP&W was not required to exercise that authority, but could exercise it in whole or in part.

On December 17, 2002 KJRY sought information concerning the net liquidation value of the Line from SF&L and TP&W and asked the Board to clarify the status of the *Abandonment Proceeding*.⁷

The Board held in abeyance the dismissal of the *Abandonment Proceeding* and action on the Motion to Substitute in the *Abandonment Proceeding* while it considered the Petition. *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 December 20, 2002).

On December 23, 2002, KJRY filed a Petition to Toll Deadline for Filing Keokuk Junction Railway Company's Offer of Financial Assistance. In response, the Board tolled the time for filing an OFA for all or part of the Line. *SF&L Railway, Inc.—Abandonment Exemption—in Hancock, McDonough, Fulton and Peoria Counties, IL*, STB Docket No. AB-448 (Sub-No. 2X) (STB served December 26, 2002).

ARGUMENT IN RESPONSE TO PETITIONERS

1. SF&L should be required to reconvey the Line to TP&W for \$2,179,878.00 plus reasonably calculated interest.

Petitioners demand TP&W pay SF&L \$5.7 million for the reconveyed Line on the false premise that SF&L must be compensated for its expected earnings of \$5.7 million from selling the Line.⁸

⁷ Mr. Szabo responded to a procedural point by letter dated December 19, 2002.

⁸ Petitioners contend that an appraisal of the Line that they commissioned from R.L Banks & Associates, Inc. (which has not been submitted for the record) and TP&W's statement that it believes the net liquidation value (the "NLV") of the Line is \$5.7 million conclusively demonstrate that the NLV is \$5.7 million. Petitioners are wrong. The Banks appraisal is not of record and therefore should not be given any weight. TP&W's statement was its estimate of the NLV. However, there is no evidence of record of the

SF&L did not say that it expected to earn \$5.7 million from operating the Line. Instead, SF&L claims that the net liquidation value ("NLV") of the Line is \$5.7 million. In order to expect to earn \$5.7 million in NLV, SF&L must have planned to abandon the Line and liquidate the assets. Petitioners to the contrary "insist, however, that they acquired the Line 'to make a go of operating it profitably, to see if the shippers ... will tender sufficient revenue freight and be prepared to pay remunerative rates so that the line will be self-sustaining.' Respondents' Reply, V.S. of Messrs. Schumacher and Kulmer at 14." *Decision* at 10. It seems to TP&W that Petitioners have made strikingly inconsistent arguments before the Board for their own benefit. Petitioners make the contradictory statements that they both acquired the Line to either operate it and to abandon it.

If SF&L acquired the Line to operate it, then SF&L could not have any logical expectation of earning the NLV of the Line within one year of purchase. On the other hand, if SF&L acquired the Line solely for the purpose of abandoning it, and had been forthright with the Board in filing its notice of exemption, it is unlikely that the Board would have allowed the notice to become effective, particularly in light of the opposition from KJRY and the Abandonment Parties. In any event, based on the *Decision* Petitioners' claim is wrong that they are entitled to be paid \$5.7 million, which includes their expected profit of over \$3.5 million. Either Petitioners did not expect to earn \$5.7 million within one year, or they misled the Board.

NLV. Moreover, under the Board's "no profit" standard, the NLV is not the relevant measure.

Moreover, the economic principles of capitalism practiced in the United States do not guarantee a profit to a party to a transaction regardless of risk. Any transaction carries an element of risk. SF&L assumed at least three risks: (1) that it would receive Board approval to acquire the Line; (2) that it would receive Board approval to abandon the Line; and (3) that it would receive the NLV it sought after abandonment. Based on the record, the Board concluded that SF&L should not be permitted to acquire the Line, and that SF&L should not profit from its aborted acquisition effort.

In making their argument, Petitioners attempt to portray themselves as innocent, naïve buyers. Petitioners ignore the facts and timing involved in this proceeding.

SF&L paid TP&W on December 29, 2000. It took SF&L and TP&W until December 10, 2001 to negotiate and execute an agreement, at which time SF&L acquired the Line and began operations. Although the notices filed by SF&L and the other Petitioners took effect on January 17, 2001, they were not immediately consummated. Between the effective date of the notices and the acquisition of the Line by SF&L (nearly 11 months), the Petitioners must have realized that they faced fierce opposition to the acquisition and that the Board could revoke the exemption.⁹

Petitioners claim that TP&W will “profit substantially from a reconveyance.” Petition at 2. TP&W does not have the same sanguine view as Petitioners. Upon reconveyance, TP&W plans to operate over the Line, and not embargo it like SF&L. TP&W will continue to operate the Line until it sells the Line or determines that the market will not allow it to profitably operate the Line, at which time it will seek

abandonment authority from the Board, although TP&W is not certain, unlike Petitioners, that the Board will permit abandonment. TP&W is not guaranteed a profit for reacquiring the Line at the price it paid (plus reasonable interest). TP&W believes that in reacquiring the Line that it is incurring risk – the risk of operations and the risk of the value of the Line increasing or decreasing if TP&W is granted abandonment authority.

TP&W certainly realized the risk involved in the proposed transactions as opposition mounted. In adopting the notice of exemption procedures the Interstate Commerce Commission put all potential users of the procedure on notice of potential divestiture. “Transactions under this class exemption involve the transfer of discrete, defined property that would not be ‘lost’ in the property of the acquirer. Thus, any transaction could be reversed in whole or in part, and we specifically reserve the right to require divestiture to avoid abuses of market power resulting from the transaction, or to regulate in accord with the provisions of the rail transportation policy.” *Class Exemption—Acq. & Oper. Of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810, 812 (1985) (the “*Class Exemption*”). Hence, if Petitioners did not contemplate the revocation and reconveyance as a possibility in the Board’s *Decision*, they have only their lack of diligence to blame. The *Class Exemption* put Petitioners on notice that there was a risk in their proposal.

Petitioners claim that they and TP&W did not contemplate divestiture and reconveyance at the time the agreements were negotiated. Petition at 2-3. Petitioners are wrong. TP&W was very concerned about the result of denial of SF&L’s acquisition at

⁹ As the Board noted in the *Decision*, Petitioners had been involved in many transactions involving the acquisition of a line of railroad and had at times faced opposition and the

the time leading up to the execution of the Agreement for Sale of Certain Assets, Rights and Obligations, and other agreements. Petitioners seem to ignore the passage of time before the agreements were executed. Petitioners filed their notices of exemption on January 10, 2001. The agreements were not executed until December 10, 2001. During the interim KJRY and the Abandonment Parties had petitioned to revoke the notices and sought discovery. TP&W was very concerned about unwinding the transaction if the Board was to revoke the exemption and require divestiture, but Petitioners refused to agree to any divestiture provision. Petitioners did not agree to address reconveyance in the agreements, but it was an issue of great concern to TP&W.

TP&W and Petitioners have been negotiating the reconveyance of the Line to TP&W since the Board issued the *Decision*. TP&W believed that it only had to return the money that was paid to it by SF&L based on its interpretation of the Board's statement that "Neither the buyers nor the sellers should be allowed to profit from their actions here." *Decision*, at 11. To that end, TP&W offered to wire transfer to SF&L \$2,179,878 upon SF&L reconveying the Line to TP&W on November 18, 2002. TP&W and Petitioners continued to negotiate, and TP&W thought an agreement was imminent until it received the Petition. Based on the language regarding neither party profiting from the transaction in the *Decision*, TP&W believes that it should repay Petitioners the principal amount of \$2,179,878 (the "Principal") paid by SF&L to TP&W and a reasonable rate of interest.

SF&L seeks interest at the railroad cost of capital. But SF&L was not a railroad when it acquired the Line and will not be a railroad after it reconveys the Line to TP&W.

prospect of revocation.

Moreover, SF&L has not revealed or placed in the record the interest it is paying on the financing made available by its parent, A&K Materials, Inc. TP&W has not earned the railroad cost of capital since its purchase by RailAmerica and booked no gain on the sale to SF&L due to the timing of the transfer and the risk of the transaction.

TP&W believes that the interest that it should pay SF&L on the Principal should be calculated in accordance with 49 C.F.R. § 1141.1, "the coupon equivalent yield ... of marketable securities of the United States Government having a duration of 91 days." For the 690 days from December 31, 2000 to November 18, 2002 the rate of 5.10% is based on the US Treasury Bill rate available to TP&W. For that period, TP&W calculates that interest to be \$209,998.52.

TP&W does not believe it is appropriate for it to pay the railroad industry cost of capital because it did not earn the cost of capital on the Principal. By paying the interest rate it did earn, TP&W is returning any profit it may have earned as a result of the transaction. TP&W did not earn the cost of capital as requested by Petitioners, and Petitioners have not demonstrated the cost of capital for SF&L, a non-carrier before it acquired the Line. With no evidence to the contrary it is logical to conclude that the maximum interest rate in securities of the same grade as US Treasury Bills that SF&L would have earned would have been 5.10%. Any interest payment by TP&W to Petitioners in excess of that amount would permit Petitioners to profit from this transaction.

Petitioners also request that TP&W make SF&L whole for \$200,000 in losses incurred by SF&L in the operation of the Line. TP&W respectfully requests the Board to deny this request. Until December 10, 2001, TP&W operated the Line. On December

10, 2001, SF&L acquired the Line and commenced operations on December 12, 2001.

The basis for Petitioners' claim that TP&W should reimburse them for losses incurred in operating the Line is that if SF&L had not operated the Line, TP&W would have incurred those losses. TP&W disagrees.

If Petitioners had not agreed to acquire the Line in December 2000, SF&L would not have operated the Line beginning December 12, 2001. In addition, TP&W would have taken other steps beginning in December 2000 to reduce or eliminate losses. TP&W could have sought to abandon the Line, sold the Line to another buyer, found a lessee to operate the Line, adjusted its rates, obtained governmental or shipper subsidies, or taken advantage of any number of other options. However, the steps that TP&W would have taken in December 2000 will never be known because SF&L agreed to acquire the Line, assume the risk of operations, and began operating over the Line on December 12, 2001. At that point, as SF&L told the Board "they acquired the Line 'to make a go of operating it profitably, to see if the shippers . . . will tender sufficient revenue freight and be prepared to pay remunerative rates so that the line will be self-sustaining.'" *Decision*, at 10. Essentially, SF&L told the Board that it assumed the risk of operating profitably, which is the positive way of saying that SF&L assumed the risk of loss. The agreements between TP&W and SF&L do not indemnify SF&L for any losses incurred as a result of SF&L's own operation of the Line.

TP&W did not profit from SF&L's operation of the Line. Petitioners should not profit from their business decision because SF&L could not profitably operate the Line. Petitioners assumed several risks when they acquired the Line and more risk when SF&L began to operate the Line in its own name. The Board has eliminated one of the risks by

requiring TP&W to return SF&L's investment in the Line. TP&W has eliminated another risk by agreeing to pay SF&L interest at the maximum rate it could have earned in the safest security available. Petitioners are experienced in the railroad industry, *Decision* at 17, knew that there was a risk of loss if they acquired and operated the Line, and should be required to accept that loss. TP&W urges the Board not to make it the insurer of SF&L's profits and to hold it responsible for the losses incurred by SF&L's operation of the Line. SF&L accepted the risk when it commenced operations in its own name and should be required to accept the losses it incurred.

TP&W urges the Board to clarify that its statement that neither party to this transaction should profit requires TP&W to return the Principal to SF&L along with reasonable interest.

2. 49 U.S.C. § 10901(d)(2) is not relevant to this proceeding.

Petitioners are wrong in claiming that 49 U.S.C. § 10901(d)(2) has any relevance to the *Decision*. Section 10901(d)(2) gives the Board jurisdiction to determine operating and compensation terms when one railroad is ordered to permit a second railroad to construct a line across one of its rail lines as part of a construction project approved or exempted by the Board under 49 U.S.C. § 10901(d)(1). There is no construction project involved in these proceedings. TP&W sold the Line of railroad (excluding the real estate) to SF&L. SF&L sought to acquire and operate the Line under 49 U.S.C. § 10901(a)(4) under the Board's exemption process at 49 C.F.R. § 1150.31.

3. Petitioners were on notice of TP&W's requirements in time to file a petition for reconsideration or a petition for stay.

Petitioners next claim that the documents transmitted to them by TP&W on November 7, 2002 are the basis for a number of procedural failures by Petitioners and create a windfall for TP&W. Petitioners' position is outrageous.¹⁰

Negotiations between SF&L and TP&W to affect the reconveyance ordered by the Board began no later than October 30, 2002. On that date SF&L made an offer to reconvey the Line to TP&W for \$5.7 million. TP&W responded in the letter dated November 5 that was sent to SF&L and received by SF&L on that date. Not hearing from SF&L to the contrary, TP&W forwarded documents to SF&L on November 7, 2002 that would effectuate the expeditious reconveyance of the Line from SF&L to TP&W in order to comply with the *Decision*. TP&W intended and even Petitioners recognize that the letter and documents were part of the negotiations. However, Petitioners believe that they can use the November 7th transmission of proposed closing documents as the basis for painting TP&W and RailAmerica as obstructionists taking advantage of naïve Petitioners.¹¹ Petitioners are wrong and TP&W is confident that the Board will agree that Petitioners have put themselves in an uncomfortable procedural position. The

¹⁰ TP&W believes that it is improper to reveal negotiations in litigation. Petitioners have unfortunately taken this approach in the apparent hope of generating sympathy from the Board. TP&W reluctantly must recount its version of negotiations to present a balanced picture to the Board. However, TP&W will limit its use of this information to merely respond to Petitioners.

¹¹ Petitioners did not include the November 5th Letter in the Petition. Instead, they purposely mislead the Board by claiming that TP&W stated that it would pay the original price it received "regardless of the statutory 'minimum constitutional value' of the subject property." Petition at 2. A review of Exhibit 1 finds no language. Indeed, Petitioners contradict themselves in the Petition when they discuss "TP&W's initial interpretation of the Board's Decision" (Petition at 4) and state "Although the parties have moved beyond TP&W's initial position" (Petition at 11).

November 5th Letter explained all of the terms and documents to SF&L. SF&L received the November 5th letter on November 5, 2002.

Petitioners' argue that by transmitting draft documents on November 7, 2002, TP&W created materially changed circumstances and made it impossible for Petitioners to file either a timely petition for reconsideration or a petition for stay. This is the most ridiculous claim made by Petitioners. It shows that it is necessary for them to ignore such basic concepts as the Board's rules and calendars to make their case.

Under 49 C.F.R. 1115.3(e) "petitions must be filed within 20 days after the service of the action." The *Decision* was served on October 17, 2002. Thus, according to 49 CFR 1115.3(e), which Petitioners rely on, a petition must be filed by November 6, 2002 (the last 14 days of October 18-31 and the first six days of November). Hence, Petitioners' petition for reconsideration was due under the Board's rules on November 6, 2002, the day after Petitioners received the November 5th Letter. Petitioners make the same argument to justify their failure to file a petition for stay. Under the Board's rules at 49 CFR 1115.5, cited by Petitioners, a "petition must be filed not less than 10 days prior to the date the terms of the decision take effect." Even though the *Decision* specified November 16, 2002 as the effective date, it actually did not become effective until November 18, 2002 under the Board's rules. 49 C.F.R. § 1104.7(a). Ten days before November 18 is November 8th, the day after Petitioners received the documents that they claim caused them, for reasons unexplained, not to file a petition for stay.

Petitioners have failed to explain why the November 5th Letter did not cause Petitioners to file a petition for reconsideration or petition for stay on November 6th.

Petitioners argue that their November 13th filing of a petition caused TP&W to negotiate.¹² TP&W contends that Petitioners are again misrepresenting history to the Board. Negotiations between TP&W and Petitioners were ongoing from at least October 30th. TP&W and Petitioners believed they had reached an agreement on November 14th, which required Petitioners to withdraw the November 13th petition.

4. Transfer of the Line to WIRC complies with the *Decision*.

Petitioners raise another red herring when they question whether TP&W's transfer of the assets to be reconveyed by SF&L to WIRC complies with the *Decision*. TP&W developed the structure using WIRC to meet Petitioners' demands in the negotiation process. TP&W has retained the permanent right to operate over the Assets, the common carrier obligation, and the right to maintain and renew the rail line. If there is not a settlement between TP&W and SF&L, then it may be unnecessary to use the WIRC structure. However, TP&W believes that its use of the WIRC structure does comply with the *Decision*.

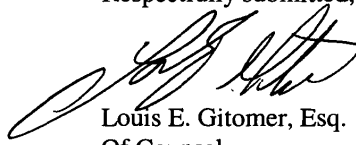
CONCLUSION

TP&W believes that the proper interpretation of the Board's requirement that neither TP&W nor SF&L profit from this transaction requires TP&W to repay to SF&L the Principal along with reasonable interest at the rate required by 49 C.F.R. § 1141(a) and calculated in the manner set forth in 49 C.F.R. § 1141(b). TP&W urges the Board

¹² Petitioners also claim that TP&W obtained an informal extension of the effective date of the *Decision* from the Board. TP&W's counsel contacted the Board to determine whether the effective date in the *Decision* of November 16, which fell on a Saturday, was indeed the effective date, or whether it was the preceding business day, Friday the 15th or the subsequent business day of Monday November 18, 2002 as contemplated by 49

not to require it to insure the risk assumed by SF&L that resulted in undocumented losses of \$200,000. Moreover, TP&W requests the Board not to require it to pay \$5.7 million to SF&L, which would in essence guarantee SF&L's profits contrary to the *Decision*.

Respectfully submitted,



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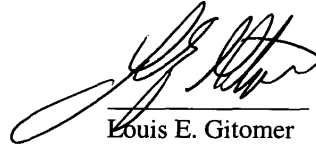
Attorneys for TOLEDO, PEORIA AND
WESTERN RAILWAY CORPORATION

Dated: January 2, 2003

C.F.R. 1104.7(a). Counsel was informed that November 18 would be the effective date. Petitioners are wrong in calling such interpretation of the Board's rules an extension.

CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2003, I have caused this Response to be served upon counsel for all known parties of record by first class mail, postage pre-paid, or by more expeditious means.



Louis E. Gitomer
January 2, 2003

EXHIBIT 1



RailAmerica, Inc.

Corporate Headquarters
5300 Broken Sound Blvd., NW
Boca Raton, Florida 33487
Tel: 561/994-6015
Fax: 561/994-4629

November 5, 2002

Via Facsimile: (801) 977-9387
and Regular Mail

Mr. Michael J. VanWagenen
Vice President
SF&L Railway, Inc.
P.O. Box 26421
Salt Lake City, Utah 84126

Re: STB Finance Docket No. 33995 -- SF&L Railway, Inc.
-- Acquisition and Operation Exemption -- Toledo, Peoria and Western Railway
Corporation between LaHarpe and Peoria, IL

Dear Mike:

RailAmerica, Inc. and the Toledo, Peoria and Western Railway Corporation ("TP&W") acknowledge and reject the proposals you submitted to them concerning the re-conveyance by the SF&L Railway, Inc. ("SF&L") to TP&W of the rail line from MP 123.0, near Peoria, IL to MP 194.5 near LaHarpe, IL (the "Rail Line"). These include your request that in the course of the abandonment proceedings, if an acceptable offer of financial assistance ("OFA") is made, the proceeds of the track material be remitted to SF&L, or if the line is abandoned, that the track material be re-conveyed to SF&L.

On October 17, 2002, the Surface Transportation Board (the "STB") ordered that "SF&L shall immediately re-convey to TP&W the operating easement over, and the rail, ties and certain improvements on, the 71.5-mile segment of rail line...". In compliance with the specific language and the spirit of the STB's decision, TP&W hereby offers to tender to SF&L the full purchase price of \$2,179,878 by wire transfer in exchange for the following documents executed by SF&L to effectuate the re-conveyance from SF&L to TP&W ordered by the STB: 1) Bill of Sale, 2) assignment of contracts by means of an Assignment, Assumption and Indemnification Agreement (which will include indemnification for any liability arising from SF&L's embargo of the Rail Line); 3) a quitclaim deed from SF&L to release the easement for filing in each of the four counties in which the Rail Line is located; and 4) release of the Notice of Real Property and Attached Personal Property Interest for filing in each of the four counties in which the Rail Line is located.



RailAmerica, Inc. _____

Mr. Michael J. VanWagenen

November 5, 2002

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TP&W proposes using the same document forms for the Bill of Sale and the Assignment as were used in the original conveyance to SF&L. TP&W will also prepare the quitclaim and release. These documents will be promptly forwarded to you for review.

If SF&L has placed any encumbrances on the Rail Line, let us know immediately so that appropriate release documents can be drafted.

As you know, this transaction must be completed by November 16, 2002 in compliance with the STB's order.

Once both parties have reviewed the documents, we will arrange for an express mail closing, with the documents to be held in escrow by RailAmerica until the wire transfer has been effected.

Sincerely yours,

John T. White

Vice President and General Counsel

cc: Surface Transportation Board
Attn: Vernon A. Williams, Secretary
Via facsimile: (202) 565-1651

✓ Lou Gitomer, Esquire
Via facsimile: (202) 783-6947

RailAmerica, Inc.

Mr. Gary O. Marino

Mr. Gary Spiegel

Mr. Donald D. Redfearn

Gary Laakso, Esquire

Scott G. Williams, Esquire