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January 2, 2003

VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

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RE: STB Finance Docket No. 33995-206980
*SF&L Railway, Inc.--Acquisition And Operation Exemption--Toledo, Peoria And
Western Railway Corporation--Between La Harpe And Peoria, IL; and*
STB Finance Docket No. 33996-206981
*Kern W. Schumacher And Morris H. Kulmer--Continuance In Control Exemption--
SF&L Railway, Inc.*

Dear Secretary Williams:

I am enclosing an original and 11 copies of the Reply of Keokuk Junction Railway Company to the December 13, 2002, Petition of SF&L Railway, Inc., Et Al., Seeking Reopening and Other Relief. Keokuk Junction Railway Company opposes said petition. A copy of the filing on a disk in WordPerfect format is also enclosed.

Please acknowledge receipt and filing of the enclosed reply by receipting the 11th copy of the filing, which is enclosed for that purpose, and returning that copy to the person delivering the filing, for return to me. As can be seen from the certificate of service, copies of this filing have been served on all parties of record.

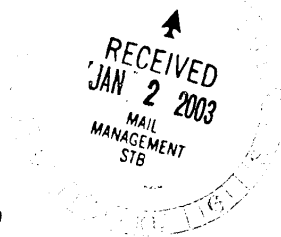
Sincerely,



William A. Mullins

cc: All Parties of Record
Keokuk Junction Railway Company

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.



Finance Docket No. 33995 - 206980

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

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Finance Docket No. 33996 - 206981 JAN 03 2003

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

Part of
Public Record

REPLY OF KEOKUK JUNCTION RAILWAY COMPANY TO DECEMBER 13, 2002,
PETITION OF SF&L RAILWAY, INC., ET AL., SEEKING REOPENING AND OTHER
RELIEF

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Attorneys for Keokuk Junction
Railway Company

Dated: January 2, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

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.

REPLY OF KEOKUK JUNCTION RAILWAY COMPANY TO DECEMBER 13, 2002,
PETITION OF SF&L RAILWAY, INC., ET AL., SEEKING REOPENING AND OTHER
RELIEF

Keokuk Junction Railway Co. ("KJRY") herewith replies to the December 13, 2002,
Petition to Reopen Administrative Action, For Reconsideration And/Or Clarification of Decision
And To Hold In Abeyance Order to Reconvey of SF&L Railway, Inc., Kern W. Schumacher and
Morris H. Kulmer ("SF&L's Petition"). KJRY opposes SF&L's Petition.

Summary

SF&L's Petition is without merit. SF&L has failed to show material error, new evidence or
changed circumstances sufficient to justify reopening.

When the Board addresses SF&L's Petition, the petition should be denied. SF&L
essentially claims that the Board should reopen the October 17 Decision because SF&L did not

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expect that its exemption could be revoked and because SF&L would be deprived of profits SF&L expected from scrapping the line. These claims do not meet any of the tests for reopening this proceeding. Exemption petitions are, by statute and by regulation, subject to revocation. The Board's revocation of SF&L's exemption for abuse of the Board's processes is consistent with the statute and regulations and with past practice. SF&L's profit motive is not new evidence or a changed circumstance as the Board clearly recognized that SF&L intended to profit from scrapping the line. Neither does the fact that TP&W might sell the line for a higher price than SF&L paid TP&W constitute new evidence or a changed circumstance, as SF&L has stated that the line has substantially the same net liquidation value as when SF&L acquired it. Because the Board's decision was not in error, the Board should not hold the effect of its order in abeyance.

If the Board does desire to reopen its decision for further consideration, it should not do so without the approval of the U.S. Court of Appeals for the Tenth Circuit, where SF&L has filed a petition to review the Board's October 17 Decision. SF&L's filing vests the Court with jurisdiction in this matter. *See* 28 U.S.C. § 2349 (2000).

Background

Having issued a dozen notices and decisions in these proceedings and several more in related proceedings, the Board is quite familiar with the background of this matter. Therefore, very briefly, this case involves SF&L's spur of the moment acquisition of Toledo, Peoria and Western Railroad Corporation's ("TP&W's") rail line between La Harpe and Peoria, IL (the "La Harpe Line"). KJRY and rail labor each separately sought revocation of the exemption. While the revocation proceedings progressed at the Board, SF&L bypassed opportunities that might have

supported continued operation of the line. SF&L then filed an exemption petition, seeking authority to abandon the line.¹

The Board, however, intervened, and by decision served October 17, 2002 (the "October 17 Decision"), revoked SF&L's exemption to acquire the line. The Board directed SF&L to return the line to TP&W, with neither side to profit from the transaction.

No petition for reconsideration was filed within 20 days of the issuance of the Board's order. On November 13, SF&L filed an untimely petition for reconsideration of the Board's decision, but two days later withdrew that petition, allowing the Board's order to take effect as scheduled on November 16.

Subsequently, on December 13, SF&L petitioned the Board to reconsider, reopen and/or hold in abeyance the October 17 Decision. On the next business day, SF&L petitioned the Tenth Circuit to review the October 17 Decision.² By orders issued December 20 and 26, the Board deferred action on SF&L's abandonment exemption petition, pending the outcome of the Board's consideration of SF&L's Petition.

¹ *SF&L Railway, Inc.—Abandonment Exemption—In Hancock, McDonough, Fulton and Peoria Counties, IL*, STB Docket No. AB-448 (Sub-No. 2X) (filed Sept. 3, 2002).

² *SF&L Railway, Inc., Kern W. Schumacher And Morris H. Kulmer v. Surface Transportation Board and United States of America*, No. 02-9591 (10th Cir. filed Dec. 16, 2002).

Discussion

I. SF&L's Petition Should Be Denied For Failure to Show Material Error, New Evidence or Changed Circumstances

A. Standards of Decision

SF&L's Petition, whether characterized as a petition for reconsideration or as a petition to reopen,³ must show material error, new evidence or changed circumstances to warrant affirmative action by the Board. 49 C.F.R. §§ 1115.3(b) and 1115.4 (2002).

B. SF&L's Petition Should Be Denied

The essence of SF&L's Petition is that SF&L wants to have its cake and eat it, too; that is, to obtain a profit of greater than 100% from being forced to sell a rail line back to its original owner even though SF&L abused the STB's processes and procedures when it purchased the line and thus should not have been allowed to acquire the line in the first place. Because the Board correctly found that SF&L abused the exemption process by acquiring a line to abandon and scrap it, rather than operate it in accordance with the goals and policies of the ICC Termination Act of 1995, the Board's decision does not involve material error. Neither does SF&L's argument show new evidence or a changed circumstance warranting reopening.

(1) *That SF&L Ignored the Possibility of Revocation of Its Exemption Is Not Grounds for Reopening*

There is no merit to SF&L's contention that "the prospect of a reconveyance of the subject property was not, itself, contemplated by the parties." SF&L's Petition, at 3 n. 2. This position ignores the exemption statute, the exemption regulations, and the specific language of the Board's

³ Because SF&L filed no petition within 20 days of the Board's October 17 Decision, and did not timely seek extension of that deadline, the petition can only be viewed as a petition to reopen. See generally 49 C.F.R. § 1115.3(e)(2002) and *Fritsch v. Interstate Commerce Commission*, 59 F.3d 248, 251 (D.C. Cir. 1995), cert. denied 516 U.S. 1171 (1996).

exemption notices in these proceedings. Accordingly, the Board's decision did not involve material error, new evidence or changed circumstances in this regard.

The risk of revocation is inherent in all Board exemptions. The statute specifically authorizes the Board to revoke exemptions if it finds that regulation of a transaction is necessary to carry out the National Rail Transportation Policy ("NRTP"). 49 U.S.C. § 10502(d) (2000). The Board's regulations specifically provide procedures for revocation of exemptions. *See* 49 C.F.R. Part 1115 (2002). The notices served by the Board in these proceedings on February 7, 2001, each said, "If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time." (Emphasis added.) Thus, SF&L had ample notice that its exemption to acquire the line could be revoked at any time.

SF&L further knew that its acquisition exemption was in jeopardy throughout the more than eighteen months that KJRY's and rail labor's petitions to revoke the exemption were pending before the Board. KJRY filed its petition to revoke SF&L's exemption on March 6, 2001. Rail labor filed its separate revocation request on May 18, 2001. SF&L did not close on the purchase until months later. Thus, SF&L was on notice that its exemption was in danger of revocation for over nine months before SF&L even closed on the purchase. Clearly the purchase agreements could have contemplated the possibility of revocation of the exemption.

If SF&L's exemption to acquire the line was to be revoked, SF&L would have no other option but to return the line to TP&W. The exemptions in these matters were the only legal means for SF&L to acquire the La Harpe Line from TP&W. Without those exemptions, SF&L's acquisition and Messrs. Schumacher's and Kulmer's control of SF&L as an operating railroad were illegal. Therefore, SF&L's assertion that reconveyance of the line was not contemplated by the

parties is either disingenuous or incredibly naive, as the requested revocation clearly would deprive SF&L of the legal right to own the line. While SF&L also might have secured permission for this acquisition by other means, it cannot credibly claim that it had no idea that it could lose the right to own the line if its exemption was revoked. Indeed, SF&L's Petition, at 5 n.3, acknowledges that the Board has previously ordered lines acquired by exemption to be reconveyed to their former owners. *See The Land Conservancy Of Seattle And King County--Acquisition and Operation Exemption--The Burlington Northern and Santa Fe Railway Company*, STB Finance Docket No. 33389 (served Sept. 26, 1997).⁴ This potential for revocation of SF&L's exemption is not new or changed circumstance, and does not show that the Board's decision involved material error.

(2) *SF&L's Speculative Claims About Potential Lost Profits Do Not Warrant Reopening*

The central issue in SF&L's Petition is SF&L's attempt to profit - more than doubling its money - from acquiring TP&W's line. Because SF&L should never have acquired the line via the exemption process in the first place, as the Board correctly found in the October 17 Decision, these assertions do not warrant reopening.

SF&L's Petition seemingly concedes the Board's conclusion that SF&L never intended to operate the La Harpe Line but, rather, acquired the line to scrap it. If it did contest that finding, SF&L would not have waited until after the deadline for filing a reconsideration petition to ask the Board to take a second look at the October 17 Decision. SF&L's Petition states that SF&L's receipt of RailAmerica's draft reconveyance documents after the deadline for petitioning to reconsider "rendered it impossible for SF&L to file a [timely] petition for reconsideration." SF&L Petition at

⁴ The Board has revoked other types of exemptions as well. *E.g., Riverview Trenton Railroad Company-Acquisition and Operation Exemption-Crown Enterprises, Inc., et al.*, STB Finance Docket Nos. 33980 and 34040, 2002 STB LEXIS 108 (served Feb. 15, 2002).

3. This statement could only be correct if SF&L was solely concerned with how much money it would be paid for the line. Otherwise, SF&L could have timely challenged the Board's findings that SF&L acquired the line intending to liquidate it. Accordingly, SF&L has as much as conceded that it did acquire the La Harpe Line to abandon and salvage it.

Because SF&L acquired the line for an improper purpose, revocation of the exemptions in these matters was fully justified. The Board's October 17 Decision examined in painstaking detail the series of events leading up to and following SF&L's acquisition of the La Harpe Line. The facts considered included SF&L examining only the salvage value of the line, not its traffic base, before agreeing to the purchase; SF&L not knowing whether it acquired the bridges necessary to make the line a continuous rail property; SF&L not acquiring the additional mile of track necessary to connect directly with KJRY and to eliminate a third party from a KJRY-SF&L move; the agreement between SF&L and TP&W that TP&W would not oppose SF&L's abandonment of the line; and nearly one year's delay in consummating the purchase. These facts, and others, led the Board to conclude that SF&L "wrongly purchased the La Harpe Line for the purpose of abandoning and salvaging it." Board Decision, 2002 STB LEXIS 602 at *40.

SF&L's Petition argues that SF&L's intent to liquidate, rather than operate, the La Harpe Line is not an adequate reason for revoking these exemptions. The Board's decision, SF&L asserts, relied exclusively on the element of the NRTP calling for reduced regulatory barriers to entry and exit from the industry to justify the Board's action. *See* SF&L Petition at 7.

Clearly, SF&L overlooked important parts of the Board's order. The Board also stated, "[T]he main purpose of the entry provisions of the statute is to promote the availability of rail service." Board Decision, 2002 STB LEXIS 602 at *20. *See also id.* at 21 ("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.”), and *The Land Conservancy Of Seattle And King County--Acquisition and Operation Exemption--The Burlington Northern and Santa Fe Railway Company*, STB Finance Docket No. 33389 (served Sept. 26, 1997) (“The policy underlying the governing acquisition exemption procedures is to support the continued operation of rail lines in lieu of abandoning them.”). Whether or not this is specifically labeled as a goal of the NRTP, the Board clearly relied on the NRTP goal of making adequate rail service available, 49 U.S.C. § 10101(4) (2000), as an element of its decision. Moreover, the provisions of the NRTP cited by SF&L - dealing with carriers’ revenue adequacy - while perhaps relevant to SF&L’s desire to abandon the line, are irrelevant to whether SF&L should have been permitted to acquire the line in the first place. The carrier’s reasonable pre-acquisition due diligence inquiries, not the Board’s class exemption procedures, should address whether the carrier can operate a line as a financially viable entity. Of course, SF&L did not make such inquiries, and chose not to acquire the one-mile connection to KJRY which could have improved the viability of the line. In short, the Board considered the relevant elements of the NRTP - developing a sound rail transportation system to meet the service needs of shippers - in concluding that SF&L’s exemption petition should be revoked.⁵

The Board and the ICC have previously stated that exemptions could be revoked where they resulted in an abuse of the Board’s processes. *The Land Conservancy Of Seattle And King County--Acquisition and Operation Exemption--The Burlington Northern and Santa Fe Railway Company*,

⁵ SF&L has not been “denied the opportunity to make the requisite showing” that its acquisition of the line is consistent with the public convenience and necessity, as contended in SF&L’s Petition at 8. SF&L still could attempt to make such a showing. However, in light of the Board’s conclusion that SF&L acquired the line to salvage it, and SF&L’s exemption petition to abandon the line, such an attempt seems unlikely to succeed.

STB Finance Docket No. 33389 (served Sept. 26, 1997); *Minnesota Commercial Railway, Inc. - Trackage Rights Exemption-Burlington Northern Railroad Company*, 8 I.C.C.2d 31, 1991 ICC LEXIS 199 at *11-12 (1991). Here, the Board was obviously justified in concluding that the allowing SF&L to acquire an active rail line in order to scrap it disserved the NRTP and the exemption procedures which were designed to make continued operation of rail lines easier. Thus, the Board's decision does not involve material error.

SF&L's arguments about the profit that it potentially could lose if forced to convey the line back to TP&W is irrelevant to Section 10505(d) and does not constitute new evidence or a changed circumstance warranting reopening. In concluding that SF&L acquired the La Harpe Line to abandon and scrap it, the Board obviously considered that SF&L or A&K hoped to profit from that action. That SF&L might lose such a profit through revocation of the exemption is therefore not new. Moreover, SF&L's statements that the value of the line is substantially similar now to what it was when SF&L acquired it, *see* SF&L's Petition at 5 and 12, show that the value issue is not new or a changed circumstance, and could have been raised previously by SF&L. Aside from being irrelevant to whether the SF&L's exemption should be revoked because preservation of rail service, not scrapping active rail lines, is a goal of the NRTP, SF&L's arguments about potential lost profit are not new evidence or a changed circumstance.

SF&L also contends that its effort to abandon the line, and TP&W's cooperation with that attempt, is new evidence or a changed circumstance that warrants reopening. The contrary is true. SF&L's effort to abandon the line after a mere nine months of operation simply confirms the Board's conclusion that abandonment is what SF&L intended all along; indeed, SF&L had petitioned for an exemption to abandon the line before the Board issued its October 17 Decision. That TP&W agrees with SF&L's effort is not surprising inasmuch as the Board found that TP&W

and SF&L agreed that TP&W would support, or at least not oppose, SF&L's abandonment of the line. Board Decision, 2002 STB LEXIS 602 at *33.

Moreover, it is far from certain that an operator who actually wanted to operate this line could not do so profitably. The Board's decision details the steps that SF&L took to deliberately downgrade service. An operator that actually intended to provide service would act differently and, consequently, would have different financial results than SF&L. Accordingly, the fact that SF&L seeks to abandon the line or that TP&W agrees with SF&L's desire does not show that the line is inherently unprofitable, that the Board's decision involved material error, or that new evidence or changed circumstances warrant reopening and changing the Board's decision.

SF&L's request that the Board reopen these proceedings so that SF&L can profit from its improper acquisition of the line is completely meritless. The Board correctly found that SF&L acquired the La Harpe Line to abandon it, contrary to the purpose of Section 10901 and the NRTP to assure that adequate rail service exists to meet public needs. Clearly the Board's order directing that SF&L reconvey the line to TP&W is well-tailored to serve these provisions and to prevent abuses of the Board's procedures which seek to undermine those provisions. SF&L's Petition should be denied.

(3) *SF&L's Request to Hold the October 17 Decision in Abeyance Should Also Be Denied*

SF&L's request to hold the Board's decision in abeyance is effectively a request for a stay. The standards governing disposition of SF&L's request that the Board hold the October 17 Decision in abeyance therefore should be that SF&L show: (1) that there is a strong likelihood that SF&L will prevail on the merits; (2) that SF&L will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public

interest supports the granting the stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). "[I]t is the movant's obligation to justify the . . . exercise of such an extraordinary remedy." *Cuomo v. United States Nuclear Regulatory Comm.*, 772 F.2d 972, 978 (D.C. Cir. 1985). SF&L bears the burden of persuasion on all of the elements required for such extraordinary relief. *Canal Authority of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

As shown above, the Board's decision was not in error. Indeed, SF&L's Petition reaffirms the conclusion that SF&L is really only concerned with liquidating the La Harpe Line. The Board's conclusion that allowing SF&L to acquire the La Harpe Line to scrap it would violate NRTP principles of fostering continued rail service is amply supported. Therefore, SF&L has no prospect of prevailing on appeal. Accordingly, the Board's October 17 Decision should not be held in abeyance.

SF&L also has not shown that it would be irreparably harmed or that the public's interest in continued rail service would not be harmed by holding the decision in abeyance to allow SF&L to retain the line. Because of this failure of proof by SF&L, the request to hold the Board's October 17 Decision in abeyance should also be denied.

II. If the Board Reopens Its Decision, Which It Should Not, It Should, At A Minimum,
Defer Action Pending Approval of the Tenth Circuit

The Tenth Circuit currently has jurisdiction over this matter. Because SF&L's Petition was filed more than 20 days after service of the Board's decision, SF&L's Petition is not properly characterized as a petition for reconsideration under 49 C.F.R. § 1115.3. *See Fritsch v. Interstate Commerce Commission*, 59 F.3d 248, 251 (D.C. Cir. 1995), *cert. denied* 516 U.S. 1171 (1996). If a

party files a timely "petition for reconsideration" before the Board within twenty days of the Board's decision, as provided for in 49 C.F.R. 1115.3,⁶ the Board's decision becomes "nonfinal" for purposes of the Hobbs Act.⁷

SF&L did not file its petition within 20 days of October 17, nor did it request an extension of that deadline. Therefore, the Board's October 17 Decision is administratively final. SF&L's request that the Board treat its December 13 petition as a petition for reconsideration of the October 17 Decision is without precedent, and contradicts both the Board's regulations and the concept of administrative finality that is a prerequisite to SF&L's filing its petition for review with the U.S. Court of Appeals for the Tenth Circuit.

SF&L's petition for review vests the Tenth Circuit with jurisdiction to review the October 17 Decision. 28 U.S.C. § 2349(a) (2000). *See Ozark Mountain Railroad v. Interstate Commerce Commission*, No. 95-1107, unpublished D.C. Cir. order filed Aug. 14, 1995; *Greater Boston Television Corp. v. Federal Communications Commission*, 463 F.2d 268, 283 (D.C. Cir. 1971). Precedent indicates that the Board should seek the Tenth Circuit's agreement before proceeding with the reopening petition. *See Benmar Transport & Leasing Corp. v. Interstate Commerce Commission*, 444 U.S. 4, 5 (1979) (reopening is allowed when all parties agree to reopening and to

⁶ A Section 1115.3 petition for reconsideration is a discretionary appeal that a party may make as a matter of right within twenty days of the Board's initial decision. 49 C.F.R. § 1115.3(a and e) (2002).

⁷ *See Schneider National, Incorporated v. ICC*, 948 F.2d 338 (7th Cir. 1991) ("When an ICC order is timely appealed to the agency, the order becomes nonfinal. If, however, it is not timely appealed, the order becomes administratively final effective on the date of service."). *See also United Transportation Union v. ICC*, 871 F.2d 1114 (D.C. Cir. 1989); *ICG Concerned Workers Ass'n v. United States*, 888 F.2d 1455, 1456-1458 (D.C. Cir. 1989); *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 133-134 (D.C. Cir. 1989); *West Penn Power Co. v. EPA*, 860 F.2d 581 (3d Cir. 1988); *Winter v. ICC*, 851 F.2d 1056 (8th Cir. 1988).

the court's holding the matter in abeyance) and *B.J. Alan Company v. Interstate Commerce Commission*, 897 F.2d 561, 563 (D.C. Cir. 1990).

Conclusion

The Board should defer action on SF&L's Petition pending agreement from the Tenth Circuit to the Board's further action in this matter. When the Board addresses the merits of SF&L's Petition, it should deny the petition. There is no error in the Board's conclusion that allowing its exemption procedures to be used to acquire a line for scrapping does not serve the NRTP. Neither do the issues raised by SF&L constitute new evidence or changed circumstances relevant to whether the exemption should have been granted in the first place, had SF&L's true plans been known. Accordingly, SF&L has failed to carry its burden to justify reopening of the Board's October 17 Decision. SF&L also has not justified staying the effect of the Board's decision. SF&L's Petition should therefore be denied.

Respectfully submitted,



William A. Mullins

David C. Reeves

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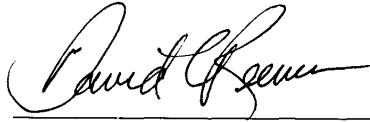
Washington, DC 20004-2134

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January 2, 2003

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "Reply of Keokuk Junction Railway Company To December 13, 2002, Petition Of SF&L Railway, Inc., et al., Seeking Reopening And Other Relief" has been served on January 2, 2003, by first class mail, postage prepaid upon all parties of record by first class mail, postage prepaid, or by more expedited service.

A handwritten signature in cursive script, appearing to read "David C. Reeves", written over a horizontal line.

David C. Reeves

Attorney for Keokuk Junction Railway Co.