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207136
January 30, 2003

VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20004-2134

ENTERED
Office of Proceedings

JAN 30 2003

Part of
Public Record



RE: Finance Docket No. 34310
*Keokuk Junction Railway Company--Alternative Rail Service--
Line of SF&L Railway, Inc.*

Dear Secretary Williams:

Enclosed herewith is an original and 10 copies of the Rebuttal of the Keokuk Junction Railway Company Supporting Its Petition for Alternative Rail Service, filed pursuant to 49 C.F.R. part 1146.1. A copy of this filing is also included on the enclosed diskette.

Please date stamp one copy of the filing and return the stamped copy to the messenger. If you have any questions about this matter, please contact me at your convenience.

Sincerely,

A handwritten signature in cursive script, appearing to read "William A. Mullins".

William A. Mullins

Enclosure

cc: All parties of record
Federal Railroad Administration

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34310

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**KEOKUK JUNCTION RAILWAY COMPANY
--ALTERNATIVE RAIL SERVICE--
LINE OF SF&L RAILWAY, INC.**

**REBUTTAL OF KEOKUK JUNCTION RAILWAY COMPANY SUPPORTING ITS
PETITION TO PROVIDE ALTERNATIVE RAIL SERVICE**

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**Attorneys for the Keokuk Junction Railway
Company**

January 30, 2003

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34310

**KEOKUK JUNCTION RAILWAY COMPANY
--ALTERNATIVE RAIL SERVICE--
LINE OF SF&L RAILWAY, INC.**

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**REBUTTAL OF KEOKUK JUNCTION RAILWAY COMPANY SUPPORTING ITS
PETITION TO PROVIDE ALTERNATIVE RAIL SERVICE**

Keokuk Junction Railway Company ("KJRY") hereby submits rebuttal in support of its January 21, 2003, Petition to Provide Alternative Rail Service ("KJRY's Petition") on a 71.5-mile rail line between Milepost 194.5 at La Harpe, Illinois and milepost 123.0 at Peoria, Illinois (the "La Harpe Line"). The line is currently owned by the SF&L Railway, Inc. ("SF&L"). SF&L filed the sole opposition to KJRY's petition. Toledo, Peoria & Western Railway Corporation ("TP&W") filed in partial support of KJRY's request.

I. SUMMARY OF ARGUMENT

Notwithstanding SF&L's empty protestations, the shippers and communities along the La Harpe Line need rail service that SF&L has shown that it is unwilling or unable to provide. Despite admitting that alternative service is appropriate "on an abandoned line pending its purchase . . . for restorative or alleviative purposes only," SF&L insists that "circumstances [on the La Harpe Line are] completely dissimilar from those." Reply of SF&L Railway, Inc. ("SF&L Reply") at 2. The facts, however, show just the opposite. Direct shipper evidence demonstrates the need for service on the LaHarpe Line, which SF&L has embargoed, tried to

abandon, and prevented others from using. Indeed, these are exactly the sort of circumstances that warrant issuing an alternative service order under 49 CFR part 1146.1.

Although TP&W partially supports KJRY's request, the conditions it proposes are unreasonable. TP&W asserts in its Response to Petition to Provide Alternative Rail Service ("TP&W Response") that KJRY's petition should be granted only for the western third of the line involved, and then only until SF&L conveys the line back to TP&W. TP&W also seeks compensation for the use of the line and underlying right of way and indemnification against liability arising from the operation.¹ However, KJRY's ability to serve shippers, whether local or overhead, should not be based on SF&L's and TP&W's willingness or ability to provide service over the entire line, especially given that overhead movements are contemplated and that KJRY is willing to serve the entire line. Moreover, KJRY recognizes that the owner of the railroad is entitled to compensation for use of its property, and is willing to do so on an economical basis. However, any money that KJRY expends to place or maintain the track in safe operating condition should be offset against such compensation, as the value of those improvements will ultimately accrue to the owner of the line.

II. DISCUSSION

The shippers' neglected need for service along the LaHarpe Line is exactly the situation that the Board's Ex Parte No. 628 rulemaking proceeding intended to address. Indeed, even SF&L admits that alternative rail service is justified when an abandoned line is being prepared

¹ TP&W also insists that KJRY not be allowed to operate east of Milepost 123.0. As clarification, KJRY's Petition did not ask the Board to allow KJRY east of Milepost 123.0. Assuming that TP&W lives up to its interchange obligations at Milepost 123.0, labeled SF&L Junction by TP&W's publication in *The Official Railway Guide*, KJRY would not need to operate east of Milepost 123.0. Therefore, this matter is not further addressed herein.

for sale and service is for restorative or alleviatory purposes. Accordingly, the Board should grant KJRY's Petition without the majority of limitations proposed by TP&W.

Under 49 U.S.C. § 11123, the Board may issue an order directing a rail carrier to provide alternative rail service when another rail carrier providing transportation subject to the jurisdiction of the Board... "cannot transport the traffic offered to it in a manner that properly serves the public." The Board has interpreted this statute to require that a railroad petitioning for such relief must (1) show substantial, measurable service deterioration or service inadequacy; (2) summarize discussions with the incumbent carrier and show why the incumbent is unlikely to restore adequate rail service within a reasonable period of time; (3) explain how the alternative carrier can meet current transportation needs, and show that this service can be provided safely without hurting service to existing customers of the alternative carrier and without unreasonably interfering with the incumbent's service; and (4) be served, by hand or overnight delivery, on the incumbent and the Federal Railroad Administration. See Denver Rock Island Railroad--Alternative Rail Service--Lines of Kansas Southwestern Railway, L.L.C., Finance Docket No. 33762 (STB served June 16, 1999). Accord, American Plant Food Corporation--Alternative Rail Service--Line of Texas Northeastern Railroad, Finance Docket No. 33795 (STB served Dec. 7, 1999). SF&L does not refute these standards, which KJRY clearly meets in its Petition.

A. Service Has Deteriorated Dramatically Since SF&L Purchased The Line And There is A Strong Public Need For Alternative Service By KJRY

There is a clear public need for the service KJRY proposes as there has been such a marked deterioration of rail service along the LaHarpe line since the time when SF&L formally acquired it in February 2001 to the point that none is currently provided at all. As the Board itself found, it is clear that SF&L employed several techniques from the very beginning that

virtually assured shippers would not be able to afford service. For example, it proposed block rates for commodities that were incapable of shipment in blocks and imposed a 36% rate increase for moving certain cars, whereas KJRY had not raised its rates in three years.

Notwithstanding SF&L's concerted effort to drive away traffic in order to justify abandoning the line, local communities and shippers still desperately need rail service, and in particular, the service that KJRY proposes to provide. Indeed, the City of Macomb and the County of MacDonough have continually expressed their desire for rail service along the LaHarpe Line, in their efforts to revoke SF&L's acquisition and continuance-in-control exemptions of the line and their protests of SF&L's abandonment of the line.² Likewise, despite SF&L's claim that shippers were "sympathetic to" and "none protested the proposed abandonment" (Reply at 3), the Farmer's Elevator Company filed a letter with the Board in September, 2002, expressing its interest in "continu[ing] to receive railroad service, and, if someone else were willing to try to operate the LaHarpe-to-Peoria railroad line, as for example, KJRY, [it] would hope the Board would act promptly and favorably on its application." Moreover, seven shippers recently wrote the Board expressing their desire to receive service along the line (the letters are contained in Exhibit A to KJRY's Petition). Three of those shippers are identified in SF&L's Reply as being "active shippers." These shippers' letters state, "[W]e will use the line" (see Elkem Carbon letter),³ "[W]e do not only want rail service - we need it" (see Farmers Elevator Company letter), and "United Paving . . . wants and needs this rail

² In stating that "no letters were attached to KJRY's Petition from the Mayor or other representatives from the City of Macomb," (SF&L Reply at 4, n.7) SF&L disingenuously implies that such letters do not exist. Indeed, KJRY did not attach such letters or filings since they are part of the public record pursuant to the Board's decision to revoke SF&L's acquisition and continuance-in-control exemptions of the line and SF&L's abandonment proceedings.

³ In light of this, TP&W's insinuation in Footnote 7 of its response that Elkem does not need service over the line is entitled to no weight.

service to continue. We will use this rail service if it is available.” See United Paving & Construction letter. These and other letters, as well as the considerable evidence compiled in the Related Proceedings, clearly establish a need for the service.

SF&L claims that it “cannot be said to have neglected to render adequate service in response to a reasonable request from a shipper” and thus the standards for imposition of relief under Ex Parte No. 628 have not been met. Setting aside the obvious fact that even today there are active shippers on the line who need service, have requested service, and cannot obtain service,⁴ SF&L is simply wrong in reciting the litany of alleged efforts it made to provide service. Without recounting SF&L’s numerous actions to drive away service, it is illuminating to point out just a few of the incorrect assertions made by SF&L in its most recent reply. For example, while it may be true that there have been only three active shippers on the line, there are several additional shippers that moved overhead traffic on the line prior to SF&L’s imposition of increased rates and reduced service. When these additional shippers were no longer able to move their traffic via SF&L, they had no other choice but to use alternative rail routings because the alternative carriers required them to make one-year volume commitments (nearly all being until January 2003).

In addition, SF&L’s incorrect and self-serving version of facts is evidenced through its claim that only 646 carloads of freight moved in the ten months from December 2001 through October 2002 (SF&L Reply at 3). SF&L conveniently omits information that during December

⁴ It is true that in the three months since SF&L embargoed the line, no shipper has requested service from SF&L. There are a myriad of logical reasons why a shipper requesting service from SF&L after announcement of an embargo would have been an exercise in futility: (1) SF&L was under an order to return the line to TP&W “immediately;” (2) requesting service over an embargoed line is a wasteful and fruitless action; and finally, (3) the shippers were in discussions with KJRY about KJRY filing a directed service order or similar request for KJRY to provide service.

2001 and January 2002, 227 loads of revenue overhead traffic continued to move, and does not include it in the carload account noted above. However, this traffic would have continued to move over this route had competitive rates been given. Additionally, several shippers requested rates from SF&L during this time period, but they were not used because the quoted rates were either too high, or were not received in a timely manner.

Moreover, SF&L misleadingly references Pschirrer Asphalt/United Paving & Construction, Inc., as "receiving a few test cars during September 2002" without providing any other information SF&L Reply at 3. Pschirrer/United, however, informed KJRY that only a few cars moved because after SF&L gave Pschirrer/United rates that were incorporated into bids that Pschirrer/United made and won for a state highway projects. Later, when Pschirrer/United went to use SF&L for deliveries won as part of the state highway project, SF&L inexplicably increased the rates by \$100/car and would not provide them with reliable service; actions that prevented Pschirrer/United from using SF&L. Nevertheless, as shown by Pschirrer/United's letter in Exhibit A to KJRY's Petition, Pschirrer/United looks forward to using KJRY's reliable service promptly when it becomes available. These are just a few examples of the actions that SF&L's took to purposely drive away traffic so that SF&L would not have to provide service, service that was needed and being requested by the shippers.

SF&L emphasizes that it lost money through its attempts to operate the railroad. Concededly, SF&L did continue to operate until it embargoed the line; however, service had deteriorated to once a week or less and rates had increased almost three fold, so that it was nearly impossible for shippers to use the line.⁵ Indeed, although SF&L complains that it was KJRY's

⁵ SF&L blames BNSF and TP&W for rerouting the intermodal train as the cause for its reduction in service. However, SF&L was aware that the intermodal train was being rerouted prior to its purchase of the line, but still guaranteed the KJRY no less than twice a week

acquisition of the line between LaHarpe and Lomax that caused rerouting of overhead traffic thereby dooming SF&L's operations, the truth is exactly the opposite. In fact, when the KJRY acquisition occurred in February 2002, KJRY had already lost over 2000 cars of line-haul traffic that used to be routed over the La Harpe to Peoria line as a result of TP&W's and SF&L's actions, traffic for which KJRY has yet to recover. Furthermore, contrary to SF&L's misperception, the traffic that KJRY moves over the La Harpe to Lomax segment is not traffic that was diverted from the La Harpe to Peoria line but rather is new traffic that KJRY moves over the line to Ft. Madison new traffic from Roquette, all to UP points, which are not competitive points, servicewise or ratewise, via SF&L's route.

The need for service is not limited to the west end of the line, as TP&W contends. While it may be true that the shippers are located toward the west end of the line, Elkem says it has customers that need it to ship over this line; Colusa Elevator says it needs to ship to the Illinois River, which runs through Peoria; LaHarpe Elevator and Blandinsville Elevator say that they need to be able to market grain at Peoria, and Roquette America says that it receives shipments from elevators located along the line. Moreover, to the extent that traffic which used to move as overhead traffic on this line can be routed efficiently over the line, the entire route is needed. While there may have been only three active shippers on the line recently, several additional shippers moved overhead traffic on the line prior to SF&L's increased rates and reduced service. Because SF&L's increased rates and lessened service prevented these shippers from moving their traffic effectively, most were forced to employ alternative rail routings which required them to volume commitments using those alternate routes. Many of those commitments expire this interchange service. SF&L service deteriorated to the point of often being less than once a week. If SF&L had maintained the promised service frequency, customers could have worked around the schedule. However, SF&L often simply failed to appear on days scheduled for interchange, without any advance notice.

month. In short, denying access to the entire line would perpetuate the inefficiency and unsatisfactory service forces upon these and other shippers during SF&L's reluctant tenure on the line. The Board should grant access for the entire line.

Regardless of whether the current embargo of the LaHarpe Line is compared to the time when TP&W operated twelve trains per week or when SF&L slashed service to two times per week, there has been a steady measurable deterioration of service along the LaHarpe Line. KJRY now seeks to rectify the extremely adverse impact such inadequacy has had on local communities and shippers located along the LaHarpe Line. Accordingly, the Board should grant its petition to provide alternative service relief.

B. Discussions with SF&L and TP&W Have Not Resulted In Service Being Restored and Neither SF&L Nor TP&W Are Likely To Restore Adequate Rail Service Within A Reasonable Period Of Time

While KJRY and SF&L did have discussions about methods by which service could be restored over the SF&L line, discussions which are mandated by the Part 1146 rules, SF&L's contract proposal to allow KJRY to operate the LaHarpe Line as SF&L's agent is meaningless and would not restore service to the shippers along the LaHarpe Line. The contract, attached to SF&L's Reply, would give SF&L, which the Board has found to never have intended to operate the La Harpe Line, control over operations, rates and other essential service matters. SF&L's Reply, Attachment C at 3-4. Furthermore, the contract proposes to compensate KJRY only for cars moved in interchange service. SF&L's Reply, Attachment C at 6. Apparently, local traffic, such as that projected by Roquette America in its letter appended to KJRY's Petition, is to be handled by KJRY at no cost. Moreover, the contract proposes to obligate KJRY to upgrade the line to Class II FRA standards, even though SF&L claims to have embargoed the line due to

unsafe track conditions.⁶ SF&L's Reply, Attachment C, Appendix A. The TP&W Response states that expenditures would be required even to bring the line to Class I FRA standards. TP&W Response at 4.

SF&L's proposed contract for KJRY to operate the line as SF&L's agent is patently unacceptable. For SF&L, which has sought for months and months to downgrade service in order to abandon and salvage the La Harpe Line, to assert continuing control over rates and service is simply untenable, to say nothing of attempting to require KJRY to restore the track in hopes that SF&L can then salvage it. Thus, KJRY has not reached an agreement with SF&L.

Yet, the incumbent carrier, SF&L, is unlikely to restore service over the line within a reasonable period of time. While bemoaning that no one contacted Mr. Van Wagenen, who apparently resides in Salt Lake City, Utah, about obtaining service on this Illinois rail line, SF&L does not show that it has any intent of providing service. Indeed, the Board's finding that SF&L never intended to serve the line, coupled with SF&L's abandonment exemption petition, would make any such contention incredible.

It is equally unlikely that TP&W currently, and perhaps for some time in the future, will be able to provide service on the La Harpe Line. TP&W's Response states that it is not currently able to serve the line because it does not own the line. TP&W Response at 5. Neither does TP&W seem eager to provide service, stating that it could restore service "while the abandonment petition was pending or while TP&W made other arrangements." TP&W Response at 5. TP&W's insistence that the line cannot be operated profitably, along with its request to substitute for SF&L as the abandonment exemption petitioner, likewise signals that TP&W does not want to operate this line. Moreover, so long as SF&L seeks, by action before

⁶ See SF&L's Reply at 3.

the Board or in court, to prevent reconveyance of the line to TP&W, this situation will continue and local communities and shippers will suffer. Accordingly, TP&W, because it is not the incumbent carrier, is not willing or able to attempt to restore service. Even if TP&W shortly reacquires the line, it could be months or even more before TP&W is in a position to restore service and operate over the line. Thus, at a very minimum, the Board should grant KJRY's petition to provide alternative service at least and until such time as the shippers no longer desire to use KJRY and instead express and desire to use TP&W and TP&W can provide such service.

C. KJRY Can Meet Current Transportation Needs Safely In A Manner That Does Not Interfere With SF&L's Or TP&W's Service Or Operations.

No one disputes that KJRY can meet the shipping needs on the line safely, without hurting KJRY's current customers or interfering with SF&L's service. KJRY is a part of an established rail family - Pioneer Railcorp - and has been in business for a number of years. Though much-needed, KJRY's service along the LaHarpe Line will not need to be so frequent or intense as to distract from KJRY's other operations, and, since SF&L is not operating on the line, KJRY's proposed operation has no potential to interfere with SF&L. Moreover, KJRY can operate the line safely, as evidenced by TP&W's admission that the Line could be operated at FRA Class I speeds, a conclusion it came to after it conducted a hi-rail inspection of the Line on November 12 and 13, 2002. TP&W Reply at 4.

Finally, the Board should not impose the conditions requested by TP&W, except to the extent that follows: (1) KJRY is willing to extend its current insurance coverage to apply to the La Harpe Line and to have TP&W named as an additional insured with respect to those operations; and (2) KJRY is willing to conduct a joint inspection of the line with TP&W and to thereafter maintain the line in that condition. These offers respond to TP&W's concerns about

protection in the event of a mishap in KJRY's proposed operations and TP&W's concern about being compensated for deterioration of the track. Otherwise, however, the Board should not order compensation to be paid to anyone other than the incumbent carrier, SF&L, with SF&L to be responsible to TP&W for any rental of the underlying right of way just as if SF&L were the operator. Otherwise, KJRY would be required to pay twice for that component of SF&L's cost of allowing this essential access to the La Harpe Line.

IV. CONCLUSION

As demonstrated by KJRY's Petition and by the lack of effective response thereto by SF&L, KJRY has met each of the Board's requirements pursuant to 49 U.S.C. § 11123 and 49 C.F.R. §1146.1. Rail service on the La Harpe Line is clearly needed, and will not be provided unless the Board grants KJRY's Petition. The Board should direct that KJRY be granted immediate access to the property upon establishing insurance coverage of its operations, and that KJRY and TP&W negotiate compensation for use of the underlying real estate, with compensation for use of the line to constitute KJRY's willingness to maintain the line at its current condition, at KJRY's expense. The Board should immediately order the requested relief as set forth in this petition and failing agreement on compensation and other issues, KJRY and SF&L or TP&W will present those issues to the Board. In no event, however, should the lack of agreement on these issues stand in the way of immediate alternative service relief to the shippers.

As to TP&W's requests, they should be denied except that KJRY should be directed to name TP&W as an additional insured under KJRY's insurance policy covering operation on the La Harpe Line, and that KJRY should be responsible to TP&W for deterioration in condition of

the track below the track condition shown by the parties' mutual inspection, assuming the Board enforces its order that SF&L reconvey the track to TP&W.

Respectfully submitted,



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Attorneys for the Keokuk Junction Railway
Company

January 30, 2003

VERIFICATION

I, Catherine Busch, KJRY's Vice President of Marketing, verify under penalty of perjury that I have read the foregoing Rebuttal and that the facts stated therein are true and correct.

Further, I certify that I am qualified and authorized to file this statement.

1/30/2003
Date

Catherine Busch
Catherine Busch

Subscribed and sworn before me
This 30th day of January, 2003

Shelia K. Wallace
Notary Public

My Commission Expires _____



State of Illinois

County of Peoria

CERTIFICATE OF SERVICE

This is to certify that on January 30, 2003, I caused the foregoing Rebuttal Of Keokuk Junction Railway Company Supporting Its Petition To Provide Alternative Rail Service to be served upon SF&L Railway, Inc. and its attorney, upon the Federal Railroad Administration, and upon other parties to this proceeding by hand or overnight delivery, pursuant to the Board's regulations at 49 C.F.R. §1146.1.

Elizabeth A. Martin
Elizabeth A. Martin
Attorney for Keokuk Junction Railway Co.