

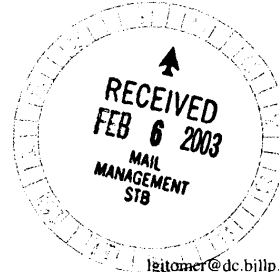
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February 6, 2003

ENTERED
Office of Proceedings

FEB 06 2003

Part of
Public Record

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

207175
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*
207176
Finance Docket No. 33996, *Kern W. Schumacher and Morris H. Kulmer—Continuance in Control—SF&L Railway, Inc.*
207177
Docket No. AB-448 (Sub-No. 2X), *SF&L Railway, Inc.—Abandonment Exemption—in Hancock, McDonough, Fulton and Peoria Counties, IL*

Dear Secretary Williams:

Enclosed for filing are the original and ten copies of the Response to Petition for Stay Pending 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.

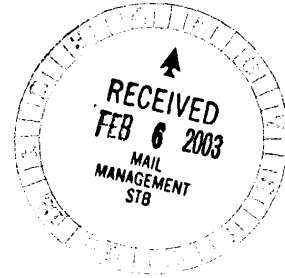
Respectfully submitted,

Louis E. Gitomer

Enclosures

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.

STB Docket No. AB-448 (Sub-No. 2X)

SF&L RAILWAY, INC.—ABANDONMENT EXEMPTION—IN HANCOCK,
MCDONOUGH, FULTON AND PEORIA COUNTIES, IL

TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION RESPONSE TO
PETITION FOR STAY PENDING REVIEW

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Dated: February 6, 2003

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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

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—CONTINUANCE IN CONTROL EXEMPTION—SF&L RAILWAY, INC.

STB Docket No. AB-448 (Sub-No. 2X)

SF&L RAILWAY, INC.-ABANDONMENT EXEMPTION-IN HANCOCK,
MCDONOUGH, FULTON AND PEORIA COUNTIES, IL

TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION RESPONSE TO
PETITION FOR STAY PENDING REVIEW

The Toledo, Peoria and Western Railway Corporation (“TP&W”), a wholly-owned indirect subsidiary of RailAmerica, Inc. (“RailAmerica”) opposes the Petition for Stay Pending Review filed by SF&L Railway, Inc. (“SF&L”), Kern W, Schumacher, and Morris H. Kulmer (the “Petitioners”) on February 5, 2003 (the “Petition”). Petitioners seek a stay of the decision by the Surface Transportation Board (the “Board”) that they reconvey by February 10, 2003 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”). *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 January 31, 2003) (the "*Second Decision*"). Previously, the Board had ordered Petitioners to reconvey the Line to TP&W by November 18, 2002. *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 "*First Decision*").

Petitioners expected to acquire the Line from TP&W for \$2,179,878.00, drive the traffic off the Line, abandon the Line, and sell it for a net liquidation value of \$5.7 million.¹ Petitioners assumed a risk, as did TP&W. Petitioners did not succeed. They now seek to point the finger for their failure everywhere but at themselves, the parties who actually caused their venture to fail.

A STAY IS NOT WARRANTED

1. THE STAY CRITERIA.

The Board has said that:

The standards governing disposition of a petition for stay are: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant 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 of 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). On a motion for stay, "it 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). The parties seeking a stay carry 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).

¹ There is no evidence in the record in these proceedings that the net liquidation value of the track and material in the Line is \$5.7 million. Petitioners merely have cited to a study they commissioned, but have not introduced that study or other evidence into the record.

Comrail International Railroad, Inc.-Operation Exemption-Chicago Heights Railcar, Inc., STB Finance Docket No. 34291 (STB served December 10, 2002).

2. PETITIONERS HAVE NOT SHOWN THAT THEY ARE LIKELY TO PREVAIL ON THE MERITS BEFORE THE COURT OF APPEALS

Petitioners are not likely to prevail on the merits. Petitioners contend that they are entitled to file an application under 49 U.S.C. § 10901 to seek a determination that the public convenience and necessity permit acquisition of the Line, but not necessarily the operation of the Line, and that the Board has prevented them from making this filing. Petitioners are wrong on two counts.

First, once the *First Decision* was served, Petitioners could have filed an application in conformity with the requirements of 49 U.S.C. § 10901 and the implementing regulations at 49 C.F.R. § 1150. Instead, Petitioners filed two petitions to reopen (one of which they withdrew) with the Board and a petition for review with the Tenth Circuit Court of Appeals. However, they did not file an application. Petitioners could have filed an application and attempted to make their case. It is obvious that Petitioners realize that they cannot in good conscious argue that they intend to continue to fulfill the common carrier obligation, will not meet the public convenience and necessity test, and will not be able to prevail in the application process. Therefore, Petitioners raise the bogus argument that the Board prevented them from filing an application when it was the Petitioners themselves who chose not to file an application.

Second, despite Petitioners expertise in the acquisition of railroads, Petitioners make the remarkable argument that they should be permitted to file an application to merely acquire the assets of the Line but not the common carrier obligation to serve

shippers. They ignore the underlying premise of the statute that Congress intended and that the Board has consistently followed that when rail assets are transferred the common carrier obligation to serve shippers must be maintained. Under Petitioners' theory, they should be allowed to buy the assets of any railroad with no one obliged to carry out the common carrier obligation. Petitioners have decided that the regimen developed by Congress over 80 years ago governing the abandonment of the common carrier obligation (49 U.S.C. § 10903) is not necessary under their theory and that they can buy the assets of any railroad but not provide for the common carrier obligation. Petitioners are wrong. Whether it is Petitioners or another party, when an active line of railroad is transferred, a party must step forward and agree to continue to provide common carrier service.

Petitioners misrepresent the Board's precedent. In those instances where one entity has acquired the assets of a rail line and another has acquired the common carrier obligation the termination of the common carrier obligation and will not be permitted until authority is received from the Board. *See Maine, DOT - Acq. Exemption, Me. Central R. Co.*, 8 I.C.C.2d 835 (1991).

Petitioners' theories are an incorrect reading of the law and will not prevail to overturn either the *First Decision* or the *Second Decision*.

3. PETITIONERS WILL NOT SUFFER IRREPARABLE HARM IN THE ABSENCE OF A STAY.

Petitioners will not suffer irreparable harm in the absence of a stay. Petitioners are actually only arguing about receiving monetary damages. However, monetary damages are not an acceptable basis for a stay, and such economic loss does not, by itself, constitute irreparable injury. *Union Pacific RR Co. -Aban.- Fremont & Teton Counties*,

ID, 6 I.C.C.2d 641, 648 (1990), citing *Wisconsin Gas Co. v. FERC*, 758 F. 2d 669, 674 (D.C. Cir. 1985).

Putting aside Petitioners' own recognition that injuries in terms of money are not irreparable harm (Petition at 2), Petitioners build an elaborate, but misleading maze in trying to convince the Board that they will suffer monetary harm and that the harm they contend they will suffer is irreparable.

Petitioners claim a right to their projected \$3.5 million difference between what they paid TP&W for the Line and what they believe, but have not proven, the net liquidation of the Line to be. There is no evidence that Petitioners are correct in the net liquidation value they claim for the Line. Nor is there any evidence that Petitioners could sell the Line for the net liquidation value they claim, or any value. Before Petitioners could liquidate the Line, the Board would have to approve the abandonment of the Line.² However, there is no indication anywhere in the record that the Board would approve such abandonment.

Petitioners also claim that once the Line is reconveyed to TP&W that TP&W will immediately turn around and sell the Line to KJRY for the net liquidation value predicted without evidence by Petitioners. If Petitioners' fantasy world were fact, then KJRY would have offered TP&W \$5.7 million for the Line in December 2000 and TP&W would not have sold the Line to Petitioners for \$2,179,878.00. Petitioners have proffered

² The Board should dismiss out of hand the ridiculous claim by Petitioners that they offered the Line to the Keokuk Junction Railway Company and that KJRY's acquisition is being blocked by the Board's requirement that Petitioners' reconvey the Line to TP&W. Petitioners conveniently forget to mention that they do not have an agreement with KJRY. Moreover, Petitioners suffer amnesia in failing to mention that their offer to make the Line available to KJRY for operation was rebuffed by KJRY.

no evidence of an agreement or deal with KJRY, much less an agreement to acquire the Line for \$5.7 million or anything approaching net liquidation value. TP&W expects to discuss the sale of all or part of the Line to KJRY once Petitioners finally reconvey it to TP&W. However, TP&W is not as sanguine about KJRY's purchase of the Line as are Petitioners. TP&W sees difficult negotiations with an uncertain outcome, which includes the distinct possibility of no sale to KJRY. Petitioners' claim of a quick sale followed by an expedited regulatory acquisition is fantasy at best.

Petitioners then claim that because TP&W is a subsidiary of RailAmerica, Inc. ("RailAmerica") that RailAmerica will leave TP&W cashless and unable to pay the certain judgment that Petitioners claim they will win against TP&W. Were it not for Petitioners' scandalous, unfounded and untrue claims about RailAmerica's financial condition in December 2000 (Petition at 5-6), this argument would not even be worthy of response. RailAmerica was not in "desperate straits" (Petition at 5) at the time it sold the Line to Petitioners. RailAmerica was merely attempting to improve its balance sheet for 2000 through a series of year-end transactions, of which this was one. However, RailAmerica never booked the gain from the sale to Petitioners. Petitioners purposely misstate the purpose of cash sweeps. A cash sweep is to amass as much cash as possible from subsidies to assure that the cash is invested at the highest possible return at the lowest possible cost for all of RailAmerica's subsidiaries. It is beyond doubt that smaller cash investments by RailAmerica's 37 railroad subsidiaries would earn less of a return and generate more in fees than the consolidated cash sweep procedure used by RailAmerica. Such an economically efficient process does not make TP&W unable to pay any just debts or judgments. Were TP&W liable, it would make arrangements to pay

its liabilities, whether it involved financing from outside sources or its parent, sale of assets, or some other means. Petitioners would not have to seize TP&W's property to assure payment. Petitioners have created another windmill that they can successfully tilt at with here, but the windmill bears no relation to reality.

Petitioners next claim that they are entitled to the \$456,917 they lost in operating the Line.³ Petitioners are knowledgeable and experienced businessmen. They should recognize that in the United States of America private investments are not guaranteed. Why, among other reasons, do they think TP&W was willing to sell the Line to them for \$2,179,878.00? TP&W knew, and if they had performed due diligence, Petitioners should have known, that the Line was a marginal investment at best and could easily become unprofitable. Petitioners accepted a risk, as they have before in other rail transactions. This time the reward did not offset the risk. TP&W never guaranteed Petitioners that they would earn any return on the purchase of the Line. The losses arose through Petitioners' actions and Petitioners should take responsibility and face the consequences. Moreover, without the Line, SF&L is not a railroad and its financial condition is no longer of concern to the Board.

Petitioners have not demonstrated any irreparable harm. The only potential harm they have established is monetary, but they have not even justified that there will be any harm or the level of potential harm.

4. TP&W WILL BE SUBSTANTIALLY HARMED BY A STAY.

³ Petitioners have not justified this loss as they would be required to do in an abandonment proceeding. Indeed, the Profit/Loss statement they filed with the Board on January 28, 2003 contains questionable costs for Professional Services of \$176,442,

TP&W is again attempting to marshal forces and plan for the reconveyance of the Line. TP&W went through this exercise in October and November and is again engaged in this process. TP&W has limited manpower and is involved in operating a line of railroad between west of Peoria, IL, and Logansport, IN. It cannot afford to engage in an on-again-off-again effort to prepare for the reconveyance of the Line and the operation of the Line.

Petitioners are wrong when they state that TP&W "wants to back out of the deal and the Board is perfectly willing to go along." (Petition at 6). Again, Petitioners have it backwards. Unlike Petitioners, TP&W is merely attempting to comply with the Board's *First Decision* and *Second Decision*. TP&W will incur a burden by repaying the purchase price plus interest to Petitioners, but TP&W is not driving this process. Further, TP&W is not sure that it will reap the "windfall" that Petitioners predict. No one has offered TP&W what it believes to be the net liquidation value of the Line, much less the \$5.7 million net liquidation value put forth by Petitioners. Moreover, Petitioners ignore the requirement in the contract between TP&W and SF&L that government approval must be obtained for the sale of the Line from TP&W to SF&L. The Board has revoked the approval and therefore, under the terms of the contract, SF&L and TP&W have no choice but to return the Line and purchase price of the Line, plus interest, to each other.

5. THE PUBLIC INTEREST DOES NOT FAVOR A STAY.

Petitioners are not interested in operating the Line. SF&L issued an embargo on October 18, 2002, even though TP&W believes that on that date the Line could have

Locomotives of \$162,275, and Track & Signal Maintenance of \$86,073. None of these costs have been justified or tested.

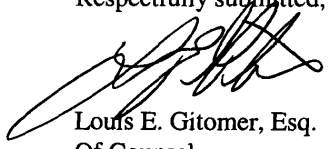
continued to be operated without extensive repairs. A stay would only continue this failure of service.

Allowing the Board's decision to take effect and the Line to be reconveyed to TP&W for the purchase price plus interest will allow TP&W to begin the process of reinstituting service or making other arrangements for service. In addition, TP&W will be able to inspect the Line, contact potential shippers (since the Line was embargoed by SF&L there are technically no shippers on the Line), and make arrangements for the future of the Line.

CONCLUSION

TP&W respectfully requests that the Board deny the Petition and not stay the *Second Decision*.

Respectfully submitted,



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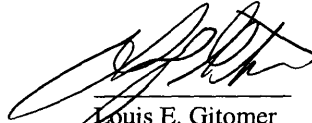
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Attorneys for TOLEDO, PEORIA AND
WESTERN RAILWAY CORPORATION

Dated: February 6, 2003

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 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
February 6, 2003