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LOUIS E. GITOMER
OF COUNSEL
(202) 466-6532

BALL JANIK LLP

A T T O R N E Y S

1455 F STREET, NW, SUITE 225
WASHINGTON, D.C. 20005

TELEPHONE 202-638-3307
FACSIMILE 202-783-6947

lgitomer@bjllp.com

May 13, 2002



Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Suite 700
Washington, DC 20423

RE: Finance Docket No. 34191, *Petition for Declaratory Order of Charles M. Sotelo*

Dear Secretary Williams:

Enclosed are the original and 10 copies of the Response of the SWKR Operating Co. and San Pedro Trails, Inc. to the petition filed in above-entitled proceeding. Also enclosed are three floppy discs with the pleading Repsonse.doc. Please time and date stamp the extra copy of this letter and pleading and return it with our messenger.

If you have any questions, please contact me.

Sincerely yours,

Louis E. Gitomer
Attorney for SWKR Operating Co. and
San Pedro Trails, Inc.

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ORIGINAL

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BEFORE THE

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34191



PETITION FOR DECLARATORY ORDER OF CHARLES M. SOTELO

RESPONSE OF SWKR OPERATING CO. AND SAN PEDRO TRAILS, INC.

Gary A. Laakso, Esq.
Vice President Regulatory Counsel
SWKR Operating Co. and San Pedro Trails, Inc.
5300 Broken Sound Boulevard N.W.
Second Floor
Boca Raton, FL 33487
(561) 994-6015

Louis E. Gitomer, Esq.
Of Counsel
BALL JANIK LLP
1455 F Street, N.W., Suite 225
Washington, D.C. 20005
(202) 638-3307

Attorneys for: SWKR Operating Co. and San Pedro
Trails, Inc.

Dated: May 13, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34191



PETITION FOR DECLARATORY ORDER OF CHARLES M. SOTELO

RESPONSE OF SWKR OPERATING CO. AND SAN PEDRO TRAILS, INC.

SWKR Operating Co. ("SWKR") and San Pedro Trails, Inc. ("SP Trails") (collectively "Respondents") respond in opposition to the request for Declaratory Order filed by Charles M. Sotelo ("Petitioner").¹ Respondents contend that there is no need for the Surface Transportation Board (the "Board") to institute a declaratory proceeding because the issues presented are well settled.

BACKGROUND

In October 2001, Petitioner presented Respondents with his plan to reopen cross-border rail service between Naco, AZ and Naco, Sonora, Mexico, using Respondents' rail line. Due to the pending acquisition of Respondents by RailAmerica, Inc. ("RailAmerica"),² a response to Petitioner was delayed. Having now reviewed the proposal from Petitioner, Respondents at this time are not interested in participating in the project with Petitioner on the terms proposed by

¹ Respondents note that the pleading filed by Petitioner *pro se* is nearly a verbatim repetition of a Petition for Declaratory Order filed on August 27, 1999 by SWKR, and dismissed by the Board at SWKR's request. *SWKR Operating Co., Inc.—Petition for Declaratory Order—Line Relocation in Cochise County, AZ*, STB Finance Docket No. 33793 (STB served November 30, 1999).

² RailAmerica acquired control of Respondents pursuant to *RailAmerica, Inc.—Control Exemption—StatesRail Acquisition Corp. and StatesRail, Inc.*, STB Finance Docket No. 34129 (STB served December 28, 2001).

Petitioner.

FACTUAL BACKGROUND

SWKR's abandonment of its 41.5-mile rail line between milepost 1055.8 near Charleston and milepost 1097.3, the end of the line, near Paul Spur, in Cochise County, AZ (the "Line") was exempted by the Board in a Decision and Notice of Interim Trail Use or Abandonment.³

Encompassed in this abandonment was SWKR's service to Naco, AZ.

Chemical Line Company ("CLC") filed an offer of financial assistance to subsidize and acquire the Line and the Board Postponed the effective date of the February 14, 1997 decision.⁴ Failing to reach an agreement with SWKR, CLC asked the Board to set the terms and conditions for the subsidy and acquisition of the Line, which the Board did.⁵ CLC then rejected the terms set by the Board, and the Board then vacated its April 4, 1997 decision and made the abandonment effective on December 2, 1997.⁶

On April 13, 1998, SP Trails filed a request for issuance of a notice of interim trail use, which was granted by the Board.⁷ The Board stated that "The parties may negotiate a trail use agreement during the 180-day period prescribed below."⁸ If the parties reach a mutually acceptable final agreement, further Board approval will not be necessary." *Id.*, at 2-3. The

³ *SWKR Operating Co.—Abandonment Exemption—in Cochise County, AZ*, STB Docket No. AB-441 (Sub-No. 2X) (STB served February 14, 1997).

⁴ *SWKR Operating Co.—Abandonment Exemption—in Cochise County, AZ*, STB Docket No. AB-441 (Sub-No. 2X) (STB served April 4, 1997).

⁵ *SWKR Operating Co.—Abandonment Exemption—in Cochise County, AZ*, STB Docket No. AB-441 (Sub-No. 2X) (STB served November 12, 1997).

⁶ *SWKR Operating Co.—Abandonment Exemption—in Cochise County, AZ*, STB Docket No. AB-441 (Sub-No. 2X) (STB served December 2, 1997).

⁷ *SWKR Operating Co.—Abandonment Exemption—in Cochise County, AZ*, STB Docket No. AB-441 (Sub-No. 2X) (STB served July 7, 1998).

⁸ Should the parties reach an agreement for trail use, the corridor will be rail banked. As such, should a need for rail service develop in the future, rail service can be restored over the right-of-way.

Board ordered "If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented." *Id.*, at 3.

SWKR and SP Trails entered an agreement for interim trail use and rail banking. SP Trails has the interest of an interim trail user in the Line. SWKR still retains the common carrier obligation. Petitioner does not possess any legal interest in the Line.

Petitioner has now come to the Board seeking a ruling to the effect that without regulatory approval or exemption, that Petitioner should be able to build a new line of railroad one mile east of where a line connected railroads in the United States and Mexico. Petitioner wants to build its 1,775-foot line about one mile east of the old line connecting the United States and Mexico, beginning at milepost 53.0 on the Line.⁹

ARGUMENT

Respondents respectfully urge the Board not to commence a declaratory order proceeding and, based on the facts, conclude that Petitioner is not proposing a relocation, but the construction of a line of railroad requiring advance Board approval or exemption after a complete environmental review.

Respondents contend that this is not a relocation project because Respondents are not proposing to construct the line, but, instead, Petitioner is proposing to construct its new line by itself, not in conjunction with Respondents. Finally, it is clear that as a new independent railroad that has never provided service before, that Respondent would be invading a new territory by constructing the line it proposes to build.

1. Petitioner's proposed construction is not a relocation.

Petitioner proposes to construct a new line of railroad about one-mile east of the

⁹ As described in the February 14, 1997 abandonment decision, there is no milepost 53.0 on the

Respondents former rail line. Petitioner relies on two decisions for the proposition that its proposed construction is a relocation. Both decisions rely on facts that are different than in Petitioner's proposal.

The Canadian National Railroad Company ("CN") proposed to build a new railroad tunnel 90 feet north of and parallel to its existing tunnel between Port Huron, MI and Sarnia, Ontario. In concluding that CN's construction was a relocation, an exhaustive analysis of the legislative history and court and agency precedent were made. *City of Detroit v. Canadian National Ry. Co., et al.*, 9 I.C.C.2d 1208 (1993) ("*City of Detroit*") *aff'd sub nom Detroit/Wayne County Port Authority v. ICC*, 58 F.3d 1314 (D.C. Cir. 1995). The ruling was premised, in part, on the analysis that "Congress did not give any indication that it intended to erect regulatory hurdles to **a carrier investing its capital to improve its own plant.**" *Id.*, at 1216 (emphasis added). The decision also stated that "Many carrier improvements **to their existing system** lie outside our jurisdiction." *Id.*, at 1218 (emphasis added). The key factor in *City of Detroit* that is missing from Petitioner's proposal is the construction of the new line by the railroad that owns the existing line.

Union Pacific Railroad Company ("UP") proposed to reactivate one of its parallel abandoned rail lines as a "double track." The Board concluded that UP's reactivation of that line did "not come within the Board's section 10901 jurisdiction." *Union Pacific Railroad Company—Petition for Declaratory Order—Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX*, STB Finance Docket No. 33611 (STB served August 21, 1998), at 7 ("*UP Petition*"). Consistent with *City of Detroit*, *UP Petition* stated "UP's reactivation of the previously abandoned ... line only adds capacity to its existing operations,

Line.

and therefore it is not a construction of an extension or additional rail line that requires our approval under section 10901.” *Id.*, at 9. *UP Petition* is based on the addition of capacity, not the relocation of a line as proposed by Petitioner or as reviewed in *City of Detroit*. However, *UP Petition* is contrary to Petitioner’s position in that it concludes the Board lacks jurisdiction where the UP is increasing its own capacity. But *UP Petition* is instructive in that it relies on UP’s building of the rail line, not a third party such as Petitioner.

Petitioner is not a railroad. Petitioner does not own a line of railroad, much less the line it seeks to relocate. *City of Detroit* and *UP Petition* are distinguishable from Petitioner’s proposal since they involve the unregulated construction of a rail line by the railroad that owns the rail line being relocated.

2. Petitioner’s proposed construction will invade new territory.

The Board and its predecessor have consistently held to the view of the Supreme Court that there is jurisdiction over the construction of a new rail line “If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short” *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266, 278 (1926).

It bears repeating that Petitioner is not a railroad and provides no rail service anywhere, much less Naco, AZ. Petitioner’s proposed construction will invade Naco, AZ, which today does not receive rail service. Petitioner proposes to operate in foreign commerce by interchanging trains to and from Mexico, which is subject to the Board’s jurisdiction pursuant to 49 U.S.C. § 10501(a)(2)(F).

The proposed construction by Petitioner is not a relocation project. It is the invasion of a

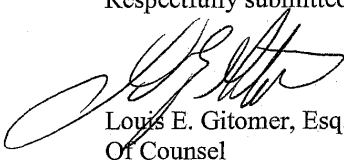
new territory. As such, the proposed construction is subject to the Board's jurisdiction under 49 U.S.C. § 10901.

CONCLUSION

Respondents respectfully request the Board to deny Petitioner's request to institute a Declaratory Order Proceeding. The issues raised by Petitioner are well settled. Further, Respondents respectfully request the Board to rule that the line of railroad that Petitioner proposes to construct is subject to the Board's jurisdiction under 49 U.S.C. § 10901 and requires Board approval or exemption, after a full environmental review.

Respectfully submitted,

Gary A. Laakso, Esq.
Vice President Regulatory Counsel
SWKR Operating Co. and San Pedro Trails, Inc.
5300 Broken Sound Boulevard N.W.
Second Floor
Boca Raton, FL 33487
(561) 994-6015



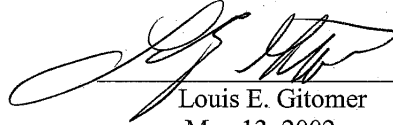
Louis E. Gitomer, Esq.
Of Counsel
BALL JANIK LLP
1455 F Street, N.W., Suite 225
Washington, D.C. 20005
(202) 638-3307

Attorneys for: SWKR Operating Co. and San Pedro
Trails, Inc.

Dated: May 13, 2002

CERTIFICATE OF SERVICE

I hereby certify that I have caused the Response of SWKR Operating Co. ("SWKR") and San Pedro Trails, Inc. to Request to the request for Declaratory Order filed by Charles M. Sotelo to be served upon Charles M. Sotelo by first-class mail, postage pre-paid.



Louis E. Gitomer
May 13, 2002