

207886

BALL JANIK LLP

A T T O R N E Y S

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

www.balljanik.com

TELEPHONE 202-638-3307

FACSIMILE 202-783-6947

SWITENEL
Office of Proceedings
MAY 27 2003

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

lgitomer@dc.bjllp.com

May 27, 2003

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

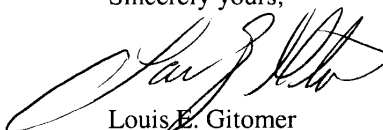
RE: Finance Docket No. 34191, *Petition for Declaratory Order of Charles M. Sotelo*

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 letter 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.

Enclosures



ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34191

RECONSIDERATION OF DENIAL OF 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 27, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34191

RECONSIDERATION OF DENIAL OF 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 letter dated May 12, 2003 by Charles M. Sotelo (“Mr. Sotelo”). In the letter, Mr. Sotelo states that “we filed for ‘Reconsideration’” and “nobody is contesting our ‘*Petition for Declaratory Order*’” (the “Petition”).

Respondents opposed the Petition filed by Mr. Sotelo. *See, Charles M. Sotelo–Petition for Declaratory Order–Line Relocation in Cochise County, AZ*, STB Finance Docket No. 34191 (STB served October 25, 2002), at 3 (the “*Decision*”). The Surface Transportation Board (the “Board”), through the Director of the Office of Proceedings, determined that “Mr. Sotelo seeks to construct ... an entirely new rail line” and “must apply for authority” and “there is no reason to institute a declaratory order proceeding.” *Decision*, at 3.

Mr. Sotelo filed a document dated January 6, 2003, but stamped received by the Board on January 21, 2003 (the “January 21 Document”), which he called a “formal request for ‘Reconsideration.’” Respondents did not respond to the January 21 Document because it was filed nearly three months late¹ and it did not address that the criteria of 49 C.F.R. § 1115.1(c).²

¹ The appeal was required to be “filed within 10 days after service of the Director decision,”

By letter dated May 12, 2003 and filed May 15, 2003 (the "May 12 Letter"), Mr. Sotelo urges the Board to grant the request in the January 21 Document because "nobody is contesting our *"Petition for Declaratory Order"*. Respondents are now compelled to respond to the May 12 Letter to correct Mr. Sotelo's misstatement that there is no opposition to the Petition.³

As was recognized in the *Decision*, Respondents opposed the Petition. The January 21 Document made no arguments that caused Respondents to rethink their position. Respondents continue to oppose the Petition and also the January 21 Document and the May 12 Letter.

BACKGROUND

In October 2001, Mr. Sotelo 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"),⁴ a response to Petitioner was delayed. In the May 13, 2002 response to the Petition, Respondents stated that they were not interested in participating in the project with Petitioner on the terms proposed by Petitioner. Nothing in the January 21 Document or the May 12 Letter has caused Respondents to change their position in the slightest.

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

which was November 4, 2002. 49 C.F.R. §§ 1011.2(a)(7) and 1115.1(c).

² "Such appeals are not favored; they will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice."

³ To the extent that this response can be construed as a response to the January 21 Document, Respondents respectfully request the Board to grant an extension to respond based on the misrepresentation of Respondents position in the May 12 Letter, as provided in 49 C.F.R. § 1011.2(a)(7).

⁴ 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).

exempted by the Board in a Decision and Notice of Interim Trail Use or Abandonment.⁵

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.⁶ 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.⁷ 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, 1997.⁸

On April 13, 1998, SP Trails filed a request for issuance of a notice of interim trail use, which was granted by the Board.⁹ The Board stated that "The parties may negotiate a trail use agreement during the 180-day period prescribed below.¹⁰ If the parties reach a mutually acceptable final agreement, further Board approval will not be necessary." *Id.*, at 2-3. The 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

⁵ *SWKR Operating Co.—Abandonment Exemption—in Cochise County, AZ*, STB Docket No. AB-441 (Sub-No. 2X) (STB served February 14, 1997).

⁶ *SWKR Operating Co.—Abandonment Exemption—in Cochise County, AZ*, STB Docket No. AB-441 (Sub-No. 2X) (STB served April 4, 1997).

⁷ *SWKR Operating Co.—Abandonment Exemption—in Cochise County, AZ*, STB Docket No. AB-441 (Sub-No. 2X) (STB served November 12, 1997).

⁸ *SWKR Operating Co.—Abandonment Exemption—in Cochise County, AZ*, STB Docket No. AB-441 (Sub-No. 2X) (STB served December 2, 1997).

⁹ *SWKR Operating Co.—Abandonment Exemption—in Cochise County, AZ*, STB Docket No. AB-441 (Sub-No. 2X) (STB served July 7, 1998).

¹⁰ 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.

obligation. Petitioner does not possess any legal interest in the Line.

The Petition sought a ruling to the effect that without regulatory approval or exemption, Mr. Sotelo should be able to build a new 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.

ARGUMENT

Respondents continue to oppose the Petition, contrary to Mr. Sotelo's belief. Even if Respondents did not reply, Mr. Sotelo has a heavy burden because appeals such as his are not favored under 49 C.F.R. § 1115.1(c). Mr. Sotelo has not even attempted to show that the Director committed a clear error of judgment or that reversing the Director is necessary to prevent manifest injustice. Mr. Sotelo has submitted generalities, but no specifics with either the January 21 Document or the May 12 Letter.

The January 21 Document claims that denying the Petition will adversely affect the environment and energy consumption, but does not justify that conclusion.

The January 21 Document claims that Mr. Sotelo has not been contacted by RailAmerica concerning his proposal. RailAmerica did respond to Mr. Sotelo through its subsidiaries, Respondents in the May 13, 2002 response, which indicated a lack of interest in Mr. Sotelo's project.

Mr. Sotelo claims there are one or two rail carriers interested in his project, but he does not even identify them, much less provide any evidence of their interest in his scheme. Mr. Sotelo also fails to support his contention that the construction of a new railroad line will not invade an unserved territory when he admits there is no rail service.

The *Decision* fully addressed all of the issues that Mr. Sotelo seeks to relitigate and resolved those issues against Mr. Sotelo. Respondents request the Board to uphold the Director's

Decision.¹¹

As the *Decision* noted, Mr. Sotelo is not without relief. Instead of trying to take a short cut that is legally not available to him, he can follow the same process as everyone else attempting to build a new railroad. Mr. Sotelo is free to file an application seeking a finding of public convenience and necessity from the Board under the appropriate statute and regulations.

Mr. Sotelo is trying to get a third and fourth bite at the apple with the January 21 Document and the May 12, Letter. He has just repackaged the same arguments without addressing the issues corrected resolved in the *Decision*. Respondents respectfully request that the Board deny the request in the January 21 Document as supplemented by the May 12 Letter.

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

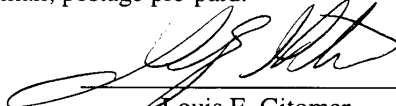
Attorneys for: SWKR Operating Co. and San Pedro
Trails, Inc.

Dated: May 27, 2003

¹¹ If the Board decides to treat the January 21 Document as a petition to reopen under 49 C.F.R. § 1115.4, Respondents urge denial for the same reasons. Mr. Sotelo has failed to address, much less prove material error, new evidence or substantially changed circumstances.

CERTIFICATE OF SERVICE

I hereby certify that I have caused the Response of SWKR Operating Co. 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 27, 2003