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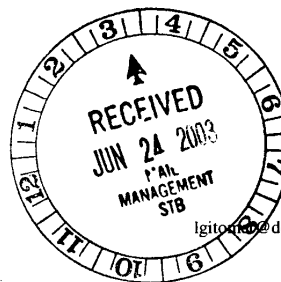
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June 24, 2003

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

ENTERED
Office of Proceeding-

JUN 24 2003

Part of
Public Record

RE: Finance Docket No. 34335, *Keokuk Junction Railway Company.—Feeder Railroad Development Application—Line of Toledo, Peoria and Western Railway Corporation between La Harpe and Hollis, IL*

Dear Secretary Williams:

Enclosed for filing are the original and ten copies of the Reply to Supplemental Evidence by the Toledo, Peoria and Western Railway Corporation, and three diskettes with the file Reply.doc.

Please time and date stamp the extra copy of this letter and the Reply and return it with our messenger. If you have any questions, please contact me.

Respectfully submitted,

Louis E. Gitomer

Enclosures

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34335



KEOKUK JUNCTION RAILWAY COMPANY—FEEDER RAILROAD DEVELOPMENT
APPLICATION—LINE OF TOLEDO, PEORIA & WESTERN RAILWAY CORPORATION
BETWEEN LA HARPE AND HOLLIS, IL

TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION
REPLY TO SUPPLEMENTAL EVIDENCE

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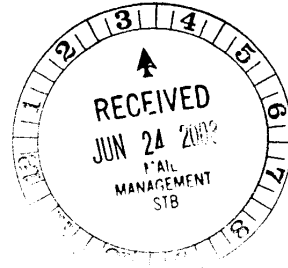
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Attorneys for: TOLEDO, PEORIA AND
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Dated: June 24, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34335



KEOKUK JUNCTION RAILWAY COMPANY—FEEDER RAILROAD DEVELOPMENT
APPLICATION—LINE OF TOLEDO, PEORIA & WESTERN RAILWAY CORPORATION
BETWEEN LA HARPE AND HOLLIS, IL

TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION
REPLY TO SUPPLEMENTAL EVIDENCE

Toledo, Peoria and Western Railway Corporation (“TP&W”) replies to the Supplemental Evidence filed by the Keokuk Junction Railway Company (“KJRY”) on June 9, 2003 (the “Supplement”). TP&W urges the Surface Transportation Board (the “Board”) to conclude that the Supplement filed by KJRY has not provided the information required by *Keokuk Junction Railway Company—Feeder Railroad Development Application—Line of Toledo, Peoria & Western Railway Corporation Between La Harpe and Hollis, IL*, Finance Docket No. 34335 (STB served May 9, 2003) (the “*May 9 Decision*”) at pages 5-6, and that KJRY is subject to the sanctions in ordering paragraph 1 of the *May 9 Decision*. Therefore, TP&W respectfully requests the Board to reject the Application filed under 49 C.F.R. § 1151 by KJRY on April 9, 2003, as supplemented on June 9, 2003.

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BACKGROUND AND ARGUMENT

1. The Application. KJRY filed a Feeder Line Application on April 9, 2003 (the “Application”), seeking to adversely seize TP&W’s 76-mile line of railroad between La Harpe, IL, milepost 194.5, and Hollis, IL, milepost 118.5 (the “Line”).¹ TP&W filed a Petition to Reject on April 24, 2003 (the “Petition”). The United Transportation Union-Illinois Legislative Board filed a comment on May 5, 2003 supporting the Petition (the “Comment”). KJRY replied to TP&W’s Petition on May 7, 2003 (the “Reply”). These pleadings led the Board to issue the *May 9 Decision*.

2. The May 9 Decision. In the *May 9 Decision*, the Board considered the Application, the Petition, the Comment and the Reply.

The Board determined that “KJRY’s application is subject to rejection based on the above deficiencies.” *Id.* at 5. However, the Board then gave KJRY an opportunity to correct the defective application:

¹ The portion of the Line between milepost 194.5 and milepost 123.0 will be referred to as the “Western Line” and has been the subject of proceedings before the Board. See e.g. *Keokuk Junction Railway Co.-Acquisition and Operation Exemption-West End of Toledo, Peoria and Western Railway Corporation*, STB Finance Docket No. 34085 (STB served October 15, 2001); and *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). There were also sale discussions Between TP&W and KJRY for the Western Line, prior to the filing of the Application. The talks failed because KJRY was unwilling to agree on the net liquidation value of the Western Line with TP&W. The portion of the Line between milepost 123.0 and milepost 118.5 will be referred to as the “Eastern Line.” TP&W has not offered to sell the Eastern Line to KJRY since TP&W was acquired by RailAmerica, Inc. (“RailAmerica”).

Accordingly, it is appropriate for KJRY to submit, within 30 days from the service date of this decision either: (1) a GCV estimate along with supporting data for the Mapleton Segment of the Line, additional evidence of financial responsibility to purchase and operate the entire Line, and more detailed operating plans and pro forma financial statements; or (2) evidence of financial responsibility to purchase and operate only the West End and more detailed operating plans and pro forma financial statements. Alternatively, KJRY may file a revised application correcting the above deficiencies and incorporating portions of the instant application by reference. See 49 CFR 1151.2(b)(2). *Id.* at 5-6.

KJRY elected not to file evidence relating only to the Western Line and did not file a revised application, but filed what it calls a Supplement. TP&W believes that the Supplement filed by KJRY is more accurately characterized as an appeal of the *May 9 Decision*.

The *May 9 Decision* warned KJRY that: "The application or the portion of the application that includes the Mapleton Segment will be rejected and the proceeding or the portion of the proceeding that includes the Mapleton Segment will be discontinued if KJRY does not submit, within 30 days from the service date of this decision, the information discussed above." *Id.*

TP&W has carefully reviewed the Supplement, and it is TP&W's view that KJRY has not submitted the information required by the *May 9 Decision*, as will be explained below.

3. Discovery. Concurrent with the filing of the Application, KJRY served discovery on TP&W. TP&W raised specific valid objections to discovery in a response served and filed on April 24, 2003. There is no better proof of the validity of the objections raised by TP&W than KJRY's failure to file a motion to compel under the Board's rules at 49 C.F.R. § 114.31(a).

On May 7, 2003, KJRY sought a protective order, which the Board granted on May 16, 2003 (the "*Protective Order*").

The *May 9 Decision* required KJRY to supplement the record within 30 days. However, instead of expediting further discovery, KJRY waited until May 15 to serve its second discovery

request on TP&W (the "Second Discovery Request").² Oblivious to the approaching deadline, or perhaps hoping to avoid using the results of discovery, the Second Discovery Request stated "Respondents are requested to serve responses to this discovery within 15 days of the date of service hereof unless the parties otherwise agree." Page 3. KJRY never contacted TP&W to expedite the response. TP&W fully responded to the Second Discovery Request on the due date of May 30, 2003. Recognizing the time constraints that KJRY was operating under, and not wishing to prolong the instant proceeding, TP&W presented 106 pages of highly confidential documents in response to the Second Discovery Request to KJRY on June 2, 2003, once KJRY's counsel completed and forwarded the undertakings required by the *Protective Order*.³

TP&W believes that the recitation of the details of the discovery process are necessary to refute any inference that TP&W caused KJRY to fail to comply with the *May 9 Decision*. KJRY states that it did not have time to hire a consultant to review, analyze, and prepare a statement based on the highly confidential material presented by TP&W. Supplement at 15 and Carr at 58. KJRY just was not diligent.

KJRY knew that it would not receive a response to its Second Discovery Request until May 30th, and because KJRY did not provide TP&W with appropriate undertakings under the *Protective Order* in advance of May 30th, TP&W did not deliver the highly confidential material until June 2nd. KJRY also contends that it did not expect the information it sought from TP&W

² Indeed, KJRY waited until so late on May 15, 2003 to fax the Second Discovery Request to TP&W, without any advance notice, that the Second Discovery Request was not received by TP&W's counsel until May 16, 2003.

³ KJRY complains that TP&W preliminarily classified the documents provided in discovery as highly confidential. TP&W took this step in anticipation of a request from KJRY to reclassify some of the information. However, KJRY never made such a request to TP&W.

to be classified highly confidential. Regardless of the relation between TP&W and KJRY,⁴ KJRY had to know that the information it sought from TP&W is commercially sensitive. KJRY sought information for each shipment on the Line, including the revenue earned, origin, destination, point of interchange, and expenses occurred. TP&W views such information as proprietary and KJRY submitted similar information as highly confidential with its Reply. Knowing that the information it sought in discovery would most likely be classified as highly confidential, KJRY should have had the foresight to have the appropriate undertakings executed under the *Protective Order* in advance of May 30, 2003, and to hire an outside consultant prior to the date that TP&W's discovery response was due (in conformance with the *Protective Order* KJRY sought from the Board) to review the information KJRY knew TP&W would produce no sooner than May 30th, only 10 days before the Supplement was required to be filed. KJRY did not.

Instead KJRY complains that TP&W provided documents instead of narrative responses. Had TP&W provided narrative responses, they too would have been classified as highly confidential. Moreover, the Board's rules (49 C.F.R. § 1114.26(b)) permit the production of business records to respond to interrogatories. TP&W fully responded to KJRY's Second Discovery Request in compliance with KJRY's requests and the Board's rules.

In TP&W's view, KJRY is attempting to use its own passivity and lack of diligence in the discovery process as the justification for using KJRY's estimates from 1998 to calculate going concern value instead of the latest data as provided by TP&W in discovery. The data used by KJRY are projections created before RailAmerica acquired TP&W, at a time TP&W carried a

⁴ The relationship between these two railroads can best be described as cool based on KJRY's past attempts to acquire the Line using a rejected and expired option and KJRY's unauthorized,

very different traffic mix than it does today on the Line, and when a contract with The Burlington Northern and Santa Fe Railroad Company ("BNSF") was still in effect,. The contract with BNSF, referred to in the Supplement, page 10, footnote 8, terminated in 1998. KJRY consciously decided not to use the latest data as provided by TP&W.

4. The Supplement. The Supplement does not submit the information required by the Board in the *May 9 Decision*. Instead, the Supplement is an untimely and unpersuasive appeal of the *May 9 Decision*.

The Board's instructions in the *May 9 Decision* to KJRY were very clear. KJRY has disregarded those instructions. The Board told KJRY that if it failed to provide the information ordered in the *May 9 Decision* the Application would be rejected. TP&W urges the Board to reject the Application based on KJRY's failure to comply.

The Board gave KJRY the option to produce evidence of either (1) the going concern value ("GCV") of the Eastern Line along with additional evidence of financial responsibility, *pro forma* financial statements and a detailed operating plan, or (2) to seek only to acquire the Western Line providing additional evidence of financial responsibility, *pro forma* financial statements and a detailed operating plan. KJRY did neither. KJRY has not calculated a GCV for the Eastern Line. Nor has KJRY provided a detailed operating plan for the Eastern Line, the Western Line, or the entire Line. TP&W believes that a detailed operating plan is imperative to show how a Class III railroad intends to operate a 10 mile per hour FRA Class I rail line in an overhead operation that will compete with Class I railroad lines operating at 40 miles per hour. The *pro forma* statements reflect 1998 data, not TP&W's data provided in discovery.

unlawful and unsafe operations over TP&W's Line.

KJRY relies on a commitment letter from the National City Bank of Michigan/Illinois (“NCB”) that requires closing by September 30, 2003 to prove KJRY’s financial responsibility. It is TP&W’s belief that KJRY will not be able to close this proposed transaction by September 30, 2003 and therefore, the letter from NCB is not evidence of financial responsibility. KJRY states that it expects the closing date to be extended, but there is no evidence to that effect, and TP&W expects the commitment not to be extended once NCB is made aware that KJRY must pay the constitutional minimum for the Line which is probably in excess of \$8,000,000, instead of either the NLV or GCV calculated by KJRY. Indeed, it appears that KJRY consistently is seeking to pay about \$3,500,000 or less for the Line, a value far below the constitutional minimum.

The *May 9 Decision* ordered KJRY to calculate the GCV for the Eastern Line and evidence of financial responsibility to acquire and operate the Eastern Line for GCV and the Western Line for NLV. KJRY did not want to do that because even using its depressed and inaccurate values, the constitutional minimum value would approach \$7,000,000, an amount at which KJRY is not financially responsible.⁵ KJRY’s ploy is transparent. It is trying to acquire property with a value in excess of \$8,000,000 for less than \$3,500,000 in order to secure a loan for \$7,000,000, without disclosing the use of the remaining proceeds. TP&W urges the Board to conclude that KJRY has again failed to prove that it is financially responsible.

⁵ TP&W notes that NCB considers the loan of \$7,000,000 to be such an unattractive, high risk transaction that not only is it requiring a blanket lien on KJRY, but also on two other subsidiaries of Pioneer not involved in the transaction, Mississippi Central Railroad and Alabama Railroad.

Instead of providing the information required by the *May 9 Decision*, KJRY essentially filed an appeal to that decision and argued that the Board cannot bifurcate the valuation of the Line, but must accept either the NLV or the GCV for the entire Line. KJRY did not like the *May 9 Decision*, so it decided to create a straw man as a new standard that it could meet. Aside from KJRY being wrong as a matter of law, KJRY is also procedurally wrong.

The *May 9 Decision* was entered by the Director of the Office of Proceedings under delegated authority. 49 C.F.R. §§ 1011.7(b)(8) and 1151.2(b). Appeals from decisions by the Director are governed by 49 C.F.R. §§ 1011.2(a)(7) and 1115.1(c). Such appeals must be filed within 10 days of the service of the Director's decision. *Id.* KJRY's appeal, which was denominated the Supplement, was not filed within the 10-day period. Furthermore, "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." 49 C.F.R. § 1115.1(c).

The *May 9 Decision* merely required additional evidence from KJRY in order for the Board to conclude that sufficient evidence had been presented to commence an application proceeding. The *May 9 Decision* made no substantive conclusions. TP&W is of the belief that the Board has sufficient discretion to require certain evidence from an applicant before it begins a proceeding requiring the use of its scarce resources and imposing litigation costs and risks on non-applicant parties. KJRY has not even tried to demonstrate that there was a clear error of judgment or manifest injustice.

KJRY has used the filing of the Supplement as a tool to present the Board with its skewed version of a decision by one Court of Appeals in a unique situation that is factually distinguishable from the proceeding that KJRY is attempting to begin. KJRY relies on *Caddo Antoine and Little Missouri Railroad Company, et al. v. STB, et al.*, 95 F.3d 740 (8th Cir. 1996) (“*Caddo Antoine*”) for the proposition that the Line cannot be bifurcated and must be treated as one line of railroad. However, KJRY ignores the critical holding by the Court, which limited its definition of the term “a particular railroad line” to “the history of the operation of the Norman Branch, the circumstances under which Arkansas Midland and the Commission bifurcated the line and the legislative history of the feeder line development program....” *Id.* at 745.

The Norman Branch was a branch line of railroad; the Line is part of an overhead route between Logansport, IN and Lomax, IL, not just between the interior points of Hollis and La Harpe, IL. TP&W has never embargoed the Line; it is open for business if shippers are willing to pay for the cost of moving traffic over the Western Line. Unlike Arkansas Midland, TP&W has not filed to abandon the Western Line. Moreover, at the preliminary stage of this proceeding, a decision has not been made whether to bifurcate the Line for acquisition or valuation purposes. Moreover, the issue of valuation was not before the *Caddo Antoine* court, although KJRY attempts to make the *Caddo Antoine* decision into a ruling on the valuation issue, which the Court did not address.

KJRY then misreads the Board's decisions in *Caddo Antoine and Little Missouri Railroad Company—Feeder Line Acquisition—Arkansas Midland Railroad Company Line Between Gurdon and Birds Mill, AR*, STB Finance Docket No. 32479 (STB decisions served May 5, 2000 and June 26, 2000). The Board rejected a partial calculation of the GCV for the southern end of the line in that case because "the parties' supplemental evidence raises questions of accuracy with respect to the previous record, and thus we are persuaded that the record now simply does not contain the information we need to compute a GCV for the southern portion of the line with any degree of accuracy." May 5, 2000 decision at 13. KJRY only cited the next sentence, which appears merely to support the Board's position, and not prohibit the bifurcation of a railroad line for purposes of determining the constitutional minimum value.

The June 26, 2000 decision was made by the Board's Chairman in response to a petition for a stay. Again, KJRY has overstated its case. The Chairman stated "Given AMR's inability to provide either acceptable GCV evidence or sufficient data to allow the Board to compute the GCV for the southern portion with any degree of accuracy, the Board reasonably concluded that the only reliable and verifiable evidence for the constitutional minimum value of this line was the NLV for the entire Norman Branch." Page 10. GCV was rejected because of insufficient evidence and for no other reason.

Moreover, the Line was not built as a railroad line as argued by KJRY. The TP&W line was constructed between Logansport, IN and Lomax, IL on the Mississippi River. The TP&W did not end at Hollis or Peoria, but was a connecting line between Indiana and Iowa. Moreover, KJRY bifurcated the Line when it acquired portions from Lomax east to La Harpe, so there is no historic single line as theorized by KJRY, and the historic line extends much farther east to Logansport.

TP&W believes that under 49 U.S.C. § 10907 the Board is given the authority to exercise an extraordinary power, the adverse taking of property. The statute recognizes that the owner of the property must be compensated at a price not less than the constitutional minimum value for the taking of the property. TP&W also believes that the Board has the discretion to determine whether the GCV applies to one part of the line and the NLV to another part of the line that are so clearly different as the Eastern Line and the Western Line. Moreover, TP&W believes that the Board is correct and properly exercising its discretion to require evidence on this issue so that it can make an informed decision. From the Supplement, it is clear that KJRY does not believe that the Board has any discretion in building a record and weighing evidence.

In sum, TP&W contends that the Board should not be dissuaded from exercising its discretion to seek additional evidence and govern its own proceedings by KJRY's inaccurate characterization of *Caddo Antoine*.

KJRY has had two opportunities to present a clear and cogent application to the Board. KJRY has failed to provide the information the Board required in the Supplement. Moreover, KJRY has confused the intent of its application even more. TP&W is unclear as to the extent of the application. Does KJRY seek to acquire the Line, including the Mapleton Spur? Does KJRY seek to acquire the Line including the Mapleton Spur but grant TP&W trackage rights to serve the shippers on the Mapleton Spur for a fee of \$2.50 per car, or no fee? Does KJRY seek to acquire the Line, but leave the Mapleton Spur in TP&W's possession, with a grant of trackage rights to TP&W to reach the Mapleton Spur? Or is KJRY proposing some other acquisition? From the Application and the Supplement, it is now impossible to determine the exact extent of KJRY's proposed acquisition. Since KJRY has already had two bites at the apple, TP&W respectfully requests the Board to terminate this proceeding and reject the Application because

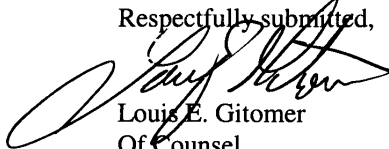
KJRY has persistently demonstrated its inability to describe its intentions as to the Eastern Line and the Mapleton Spur. The Board should not permit parties to create moving targets, as KJRY has done, in proceedings as serious as feeder line applications.

CONCLUSION

TP&W respectfully requests that the Board reject the Application, as supplemented, as incomplete for the reasons stated in this reply and the Petition filed on April 24, 2003. KJRY has failed to comply with the requirements of the *May 9 Decision* and should face up to the consequences of such failure, rejection of the Application. In the alternative, TP&W respectfully requests the Board to reject the Application as to the Eastern Line for the reasons stated in this reply and the April 24, 2003 Petition.

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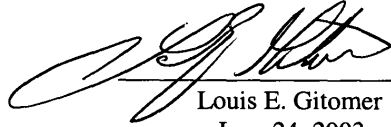
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Attorneys for: TOLEDO, PEORIA AND
WESTERN RAILWAY CORPORATION

Dated: June 24, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served by overnight delivery on all parties of record in STB Finance Docket No. 34335.



Louis E. Gitomer
June 24, 2003