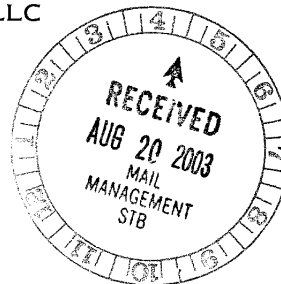


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August 20, 2003

VIA HAND DELIVERY

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

RE: Finance Docket No. 34397
*Rebuttal of Keokuk Junction Railway Company to Response of Toledo,
Peoria and Western railway Corporation to Petition to Provide
Alternative Rail Service*

Dear Secretary Williams:

Enclosed herewith is an original and 11 copies of the Rebuttal of Keokuk Junction Railway Company to the Response filed by Toledo, Peoria and Western Railway Corporation on August 15, 2003 in the above-captioned case. Please date stamp the eleventh copy and return to our courier. An electronic copy of this filing is also included on the enclosed diskettes and color copies have been included.

If you have any questions about this matter, please contact me directly, either by telephone: (202) 637-9499 (ext. 13) or e-mail: wmullins@bakerandmilller.com.

Sincerely,


William A. Mullins

Enclosures

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Public Record**

208739

CONTAINS COLOR MATERIAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34397

KEOKUK JUNCTION RAILWAY COMPANY
--ALTERNATIVE RAIL SERVICE--
LINE OF TOLEDO, PEORIA & WESTERN RAILWAY CORPORATION

REBUTTAL IN SUPPORT OF PETITION
TO PROVIDE ALTERNATIVE RAIL SERVICE



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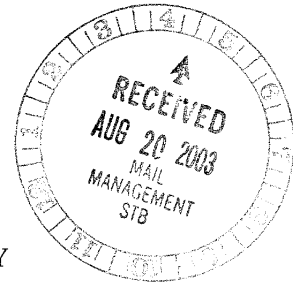
CONTAINS COLOR MATERIAL

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34397

**KEOKUK JUNCTION RAILWAY COMPANY
--ALTERNATIVE RAIL SERVICE--
LINE OF TOLEDO, PEORIA & WESTERN RAILWAY CORPORATION**

**REBUTTAL IN SUPPORT OF PETITION
TO PROVIDE ALTERNATIVE RAIL SERVICE**



Keokuk Junction Railway Company ("KJRY") hereby files this Rebuttal in support of its August 8, 2003, Petition to Provide Alternative Rail Service ("Petition") on a rail line from LaHarpe, Illinois to Hollis, Illinois (the "LaHarpe Line"). The LaHarpe Line is currently owned by Toledo, Peoria and Western Railway Company ("TP&W"), who filed the only opposition to KJRY's Petition ("Response").

I. SUMMARY OF THE ARGUMENT

Despite TP&W's empty statements, the shippers and communities along the LaHarpe Line need rail service that TP&W has shown it is unable or unwilling to provide. First, TP&W's Response admits that shippers have complained about the exorbitant cost of TP&W's rates and that, as a result, none of the shippers have received service from TP&W. TP&W Response at 7 and 13. Indeed, TP&W makes an excellent case for why it is unable to provide economically reasonable rates to shippers. See TP&W Response at 13 (setting out the "high cost of operations"). Second, TP&W's Response incorrectly argues that there has been no attempt to communicate with TP&W

regarding the commercially unreasonable nature of its rates. Compare TP&W Response at 10-13 with KJRY's Petition at 13-14.

Whether these commercially prohibitive rates are due to TP&W's motivation to eventually abandon and scrap the LaHarpe Line or due to its' inability to provide commercially reasonable rates, under either set of facts the shippers have suffered (and will continue to suffer) from a *de facto* embargo and loss of rail service on the LaHarpe Line. As discussed in more detail below, KJRY's Petition demonstrated both a legal and a factual basis for supplying alternative rail service on the LaHarpe Line pursuant to 49 C.F.R. § 1146, and as such, KJRY's Petition should be granted.

II. DISCUSSION

KJRY's Petition demonstrated the four requirements for granting an alternative service petition pursuant to Section 1146, including: (1) substantial, measurable service deterioration or service inadequacy by TP&W; (2) discussions with TP&W and evidence of the unlikely restoration of adequate rail service by TP&W within a reasonable period of time; (3) KJRY's ability to meet current transportation needs in a safe and reasonable manner; and (4) service upon relevant parties. 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). Although KJRY submits that all four requirements have been met, because TP&W has only disputed elements 1 and 2, KJRY hereby limits its Rebuttal to those issues.

A. TP&W Did Not (And Most Likely Cannot) Demonstrate That Commercially Reasonable Service Will Be Provided By TP&W

The Petition has demonstrated that there is no effective service on the LaHarpe portion of the Line because of TP&W's inability to provide commercially reasonable rates for the affected shippers. Specifically, KJRY's Petition provided multiple detailed accounts where shippers had requested rate quotes from TP&W and received unreasonable rates in response. See Petition at 11-13 (describing difficult contacts with TP&W and commercially unreasonable quotes to shippers). As discussed more fully in the Petition, 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.¹ As demonstrated below, both the law and the facts show that TP&W has not (and KJRY submits cannot) provide adequate service on the LaHarpe Line.

1. Finding "inadequate" service is permitted when rates are cost prohibitive

This public interest inquiry (evaluating transportation costs in light of whether quoted rates were cost prohibitive to shippers in order to find that service is inadequate) is not a new or radical idea. In fact, commercially unreasonable rates have been specifically discussed by the Supreme Court as "inadequate" service to shippers in related situations.

¹ 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 petition 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). TP&W does not refute these standards, which KJRY clearly meets in its Petition.

See Interstate Commerce Commission v. J-T Transport Co., Inc., 368 U.S. 81, 136-137 (1961).

In J-T Transport, Justices Frankfurter, Harlan and Stewart raised the importance of an agency's consideration of this very factor in their concurring opinion. Specifically, the Justices noted that the I.C.C. had in the past "recognized what [the Commission] styles as an "embargo" exception to its usual practice of disregarding the level of rates charged by existing carriers." J-T Transport, 368 U.S. at 136.

The comments of Justices Frankfurter, Harlan and Stewart were even more strongly stated by the holdings in H. & F. McBride Extension – Ohio, 62 M.C.C. 779, 790 (1954) and Hermand R. Ewell Extension – Philadelphia, 72 M.C.C. 645, 648 (1957), where a motor carrier's imposition of economically prohibitive service, and no flexibility in lowering those rates, was held to be inadequate service for the affected shipper. As noted in McBride, "there is a real difference between rate cutting and the use of rates to avoid traffic" and "the use of rates which will not move the commodities involved, . . . has in reality effected an embargo on the traffic." McBride, 62 M.C.C. at 790. As noted in Ewell, "[the carrier's] rates have not and will not move traffic; and to this extent the available motor service is inadequate to meet the shipper's requirements." Ewell, 72 M.C.C. at 648. Although J-T Transport and the related cases deal with the use of motor carrier transportation, the evaluation remains the same: if an incumbent carrier imposes inflexible, economically prohibitive rates on shippers, then that carrier cannot be held to be providing "adequate" service; and as such, this type of finding supports a petition for alternative rail service.

This position is particularly relevant in an urgent petition for alternative rail service. If a rail carrier were allowed to hide behind the rubric that economically prohibitive rate

complaints are totally inapplicable to this process, then carriers could simply raise their rates so that no shipper could get service and simultaneously prevent any service from being offered to those shippers. Under this theory, no carrier or shipper who files a petition for alternative rail service under the Board's 1998 rules would ever succeed. To avoid application of those rules, the incumbent carrier who cannot (or will not) provide service will simply raise the rates and use that as a defense to defeat application of the rules. Clearly, this would make a mockery of the Board's remedies as provided in the Expedited Relief for Service Inadequacies. 3 S.T.B. 968 (1998).

In this case, TP&W's Response admits that shippers have complained about the exorbitant costs of the rates and TP&W cannot provide rates below those complained-of levels. Response at 13-14. Because TP&W cannot provide economically viable service to the concerned shippers, it is clear that there is a service problem on the Line and that TP&W is unable to rectify this problem. In contrast, KJRY has not raised its rates for the affected shippers in over three years. Petition at 11. KJRY has lower costs and its route from Keokuk to Canton is much more efficient. It avoids the costly delays at bridges and trackage rights that are incurred by TP&W. As such, KJRY can provide service more economically at more reasonable levels to shippers – as noted above, TP&W cannot. Based on these facts, the public interest of the Board's Ex Parte No. 628 rulemaking proceeding and the evidence introduced by KJRY supports a finding that there has been a substantial, measurable service deterioration and/or service inadequacy provided by TP&W due to the commercially prohibitive nature of its rate scheme. As discussed in more detail below, this finding and a finding that TP&W had received communications about its rate scheme support granting the Petition for alternative rail service.

2. TP&W's misstatement of KJRY's motives

It should also be noted that TP&W has offered an incorrect picture of how traffic moves over the LaHarpe Line and the reasons why KJRY desires to provide service over the Line. For example, TP&W alleged that KJRY is attempting to move the interchange point with BNSF east of Keokuk. Response at 8. This is factually impossible. There is no ability for KJRY to interchange traffic with BNSF because the point referred to was previously a diamond crossing, which as the Board knows, is incapable of switching traffic from one line to another – a diamond crossing will only allow lines to cross over each other. At this time, the diamond crossing has been torn up and there is not even the ability for KJRY and BNSF to cross traffic over each carrier's lines. Therefore, there is not (and could not be) a connection between KJRY's and BNSF's lines at Canton. (A picture evincing this fact is attached hereto as Exhibit A.)

As a result, KJRY's interchanges will remain limited to Keokuk and Fort Madison. KJRY has not filed this Petition as some sham means to move its interchange point with BNSF. KJRY has filed this Petition because shippers need service, TP&W has shown it will not provide service at the rate levels required by shippers, and KJRY can provide that service at the rate levels requested by shippers.

B. TP&W Admits That It Had Notice of the Inadequate Nature Of Service

KJRY's Petition also satisfied the second prong of the alternative rail service test by providing numerous accounts of complaints regarding service, which TP&W has been aware of since before it reacquired the LaHarpe Line. See Petition at 13-15. The burden on the party petitioning for alternative service under Section 1146 is not that they must show lengthy discussions between the petitioner and the respondent, but that the

petitioner merely “discuss service problems in advance with the incumbent railroad and that their petition address the reasons why the incumbent carrier is unlikely to restore adequate service in a reasonable period of time.” Expedited Relief for Service Inadequacies, 3 S.T.B. 968 (1998).

In this case, and despite TP&W’s false accusations that KJRY did engage in rail service discussions with TP&W after February 2003, the facts show that TP&W has been on notice of inadequate service from KJRY and affected shippers. In addition to TP&W’s knowledge that shippers protested the cost prohibitive rates, and TP&W’s familiarity with the procedural relation between this Petition and other cases,² TP&W has

² To accept that TP&W has been unaware of and inactive in the discussions regarding the vast complaints inadequate service on the LaHarpe Line lacks common sense. TP&W has actively participated in litigation regarding the Line since October 2002. See e.g., Motion to Substitute the Toledo, Peoria and Western Railway Corporation for SF&L Railway, Inc., SF&L Railway, Inc. – Abandonment Exemption in Hancock, McDonough, Fulton and Peoria Counties, IL, STB Docket No. AB-448 (Sub-No. 2X), filed October 30, 2002; Toledo, Peoria & Western Railway Corporation Response to Petition to Reopen Administrative Action, 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, filed January 2, 2003; Response to Petition to Provide Alternative Service, Keokuk Junction Railway Company – Alternative Rail Service – Line of SF&L Railway, Inc., STB Finance Docket No. 34310, filed January 28, 2003; Response to Petition to Stay Pending Review, 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, Kern W. Schumacher and Morris H. Kulmer – Continuance in Control Exemption – SF&L Railway, Inc., STB Finance Docket No. 33996, SF&L Railway, Inc. – Abandonment Exemption – In Hockcock, McDonough, Fulton and Peoria Counties, IL, STB Docket No. AB-448 (Sub-No. 2X), filed February 6, 2003; Toledo, Peoria and Western Railway Corporation Response, 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, Kern W. Schumacher and Morris H. Kulmer – Continuance in Control Exemption – SF&L Railway, Inc., STB Finance Docket No. 33996, SF&L Railway, Inc. – Abandonment Exemption – In Hockcock, McDonough, Fulton and Peoria Counties, IL, STB Docket No. AB-448 (Sub-No. 2X), filed February 21, 2003; Toledo, Peoria and Western Railway Corporation Responses to Discovery Requests, Keokuk Junction Railway Company – Feeder Railroad Development Application – Line of Toledo, Peoria & Western Railway Corporation Between La Harpe and Hollis, IL, STB Finance Docket No. 34335, filed April 24, 2003; Toledo, Peoria and Western Railway Corporation Petition for Leave to File Petition to Reject Application and Petition to Reject Application, Keokuk Junction Railway Company – Feeder Railroad Development Application – Line of Toledo, Peoria & Western Railway Corporation Between La Harpe and Hollis, IL, STB Finance Docket No. 34335, filed April 24, 2003; Toledo, Peoria and Western Railway Corporation Reply to Supplemental Evidence, Keokuk Junction Railway Company – Feeder Railroad Development Application – Line of Toledo, Peoria & Western Railway Corporation Between La Harpe and Hollis, IL, STB Finance Docket No. 34335, filed June 24, 2003; Toledo, Peoria and Western Railway Corporation Responses to Discovery Requests, Keokuk Junction Railway Company – Feeder Railroad Development Application – Line of Toledo, Peoria & Western Railway Corporation Between La Harpe and Hollis, IL, STB Finance Docket No. 34335, filed May 30, 2003; Appeal of Toledo, Peoria and Western Railway Corporation, Keokuk Junction Railway

been contacted by KJRY to discuss TP&W's inadequate service. For example, senior officers for KJRY have sent letters offering to purchase the LaHarpe Line and made numerous telephone calls to TP&W to discuss KJRY's ability and willingness to provide service to those shippers who are currently not receiving any from TP&W. In April 2003, J. Michael Carr, Chief Financial Officer of Pioneer Railcorp (the parent company of KJRY), made at least two (if not three) telephone calls to Michael Howe, Vice President and Chief Financial Officer of RailAmerica (TP&W's parent company), during which Pioneer / KJRY offered to purchase the Line in order to offer service to the complaining shippers. In addition, and as discussed in more detail by the Petition, shippers have consistently complained about TP&W's lack of economically viable rail service on the LaHarpe Line. Petition at 7 (describing TP&W's ongoing involvement with the shipper / carrier relationships on the LaHarpe Line). Despite evidence of these communications, TP&W has not offered to negotiate rates, nor has it documented any efforts to explain its prohibitive costs to shippers. As noted in the Ewell case, above, a carrier's failure to at least negotiate with the shippers to make its rate position clear "indicates either decision to forego the traffic except at their present rates or a lack of interest in it at rates at which it can move." Herman R. Ewell, 72 M.C.C. at 648.

Company – Feeder Railroad Development Application – Line of Toledo, Peoria & Western Railway Corporation Between La Harpe and Hollis, IL, STB Finance Docket No. 34335, filed July 18, 2003; Motion to Strike of Toledo, Peoria and Western Railway Corporation, Keokuk Junction Railway Company – Feeder Railroad Development Application – Line of Toledo, Peoria & Western Railway Corporation Between La Harpe and Hollis, IL, STB Finance Docket No. 34335, filed August 7, 2003; Toledo, Peoria and Western Railway Corporation First Discovery Requests to Keokuk Junction Railway Company and Pioneer Railcorp, Keokuk Junction Railway Company – Feeder Railroad Development Application – Line of Toledo, Peoria & Western Railway Corporation Between La Harpe and Hollis, IL, STB Finance Docket No. 34335, filed August 13, 2003; Response of Toledo, Peoria and Western Railway Corporation, Keokuk Junction Railway Company – Feeder Railroad Development Application – Line of Toledo, Peoria & Western Railway Corporation Between La Harpe and Hollis, IL, STB Finance Docket No. 34397, filed August 15, 2003.

In this case, TP&W has offered no evidence that it would be willing to negotiate its rates. Indeed, the only communications that are documented have been the communications from KJRY and shippers regarding the cost prohibitive nature of these rates. Petition at 7-14. As such, KJRY has met the requirements of the second prong of the alternative service test and the Petition should be granted.

CONCLUSION

KJRY has met all four tests for granting a petition for alternative rail service, as required by 49 C.F.R. § 1146, including a showing that service provided by TP&W is inadequate on the Line and a showing that TP&W was on notice of and had participated in discussions regarding the lack of economically viable service. Moreover, TP&W's evidence has supported KJRY's request by showing that TP&W cannot provide economically reasonable rail service on the LaHarpe Line. As such, the Petition should be granted in order to further transportation policy and reduce the ongoing harm to shippers on the LaHarpe Line.

Respectfully submitted by,



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**Attorneys for
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August 20, 2003

CONTAINS COLOR MATERIAL

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34397

**KEOKUK JUNCTION RAILWAY COMPANY
--ALTERNATIVE RAIL SERVICE--
LINE OF TOLEDO, PEORIA & WESTERN RAILWAY CORPORATION**

**REBUTTAL IN SUPPORT OF PETITION
TO PROVIDE ALTERNATIVE RAIL SERVICE**

EXHIBIT A

**William A. Mullins
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August 20, 2003



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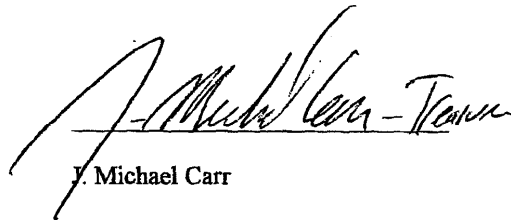
COLOR FIGURE

1

VERIFICATION

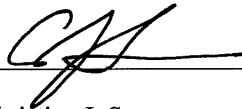
I, J. Michael Carr, Chief Financial Officer for Pioneer Railcorp, the parent company of Keokuk Junction Railway Company, verify under penalty of perjury that I have read the foregoing Rebuttal in Support of Petition to Provide Alternative Rail Service and that it is true and correct. Further, I certify that I am qualified and authorized to file this Rebuttal.

Executed on August 20, 2003


J. Michael Carr

CERTIFICATION OF SERVICE

I certify that I have this 20th of August, 2003, served copies of the foregoing Rebuttal in Support of Petition to Provide Alternative Rail Service upon all parties of record in this proceeding, by first class mail or more expedited service.

A handwritten signature in black ink, appearing to be 'CJS', is written over a horizontal line.

Christine J. Sommer

**Attorney for
Keokuk Junction Railway Company**

Appendix of Color Materials



COLOR FIGURE
1