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August 25, 2003

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

RE: Finance Docket No. 34397, *Keokuk Junction Railway Company—Alternative Rail Service—Line of Toledo, Peoria and Western Railway Corporation*

Dear Secretary Williams:

Enclosed for filing are the original and 10 copies of a Motion to Strike or in the Alternative Seek Leave to Respond of the Toledo, Peoria and Western Railway Corporation and three diskettes.

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

Respectfully submitted,

Louis E. Gitomer

Enclosures

ENTERED
Office of Proceedings
AUG 25 2003
Part of
Public Record

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34397



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

MOTION TO STRIKE OR IN THE ALTERNATIVE SEEK LEAVE TO RESPOND OF
TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION

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WESTERN RAILWAY CORPORATION

Dated: August 25, 2003

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Toledo, Peoria and Western Railway Corporation (“TP&W”), moves to strike as improper rebuttal one sentence and the verification of the Rebuttal in Support of Petition to Provide Alternative Rail Service (the “Rebuttal”) filed by Keokuk Junction Railway Co. (“KJRY”) on August 20, 2003. In the alternative, TP&W seeks leave to respond.

On page 10 of the rebuttal, where KJRY is desperately attempting to show that it met the criteria of 49 C.F.R. § 1146.1(b)(1)(ii), it states that “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), during which Pioneer/KJRY offered to purchase the Line in order to offer service to the complaining shippers.” In addition, Mr. Carr submits a verification to the Rebuttal.

“Rebuttal may not be used in SAC cases as an opportunity to introduce new evidence that could and should have been submitted in the party’s case-in-chief. General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases, STB Ex Parte No. 347 (Sub-No. 3) (STB served Mar. 12, 2001), slip op. at 5.” *Duke Energy Corporation v. CSX Transportation, Inc.*,

STB Docket No. 42070 (STB served March 25, 2003), at 4 (“*Duke Power*”). Although the current proceeding is not a “SAC” proceeding, the policy adopted in *Duke Power* should also be applied to this proceeding to protect the due process rights of TP&W.

The discussions between Mr. Carr and Mr. Howe took place before the initial petition was filed on August 8, 2003. However, KJRY consciously elected not to present this evidence at that time when TP&W would have had a fair opportunity to rebut such evidence. Instead, KJRY waited until filing its rebuttal to present this purported evidence. As can be seen from the attached Verified Statement of Mr. Todd N. Cecil, TP&W disputes Mr. Carr’s recollection. Moreover, KJRY provides no explanation or reason for waiting until it filed rebuttal to suggest that discussions relating to 49 C.F.R. § 1146.1(b)(1)(ii) ever took place between KJRY and TP&W, a conclusion that TP&W disputes.

As the Board stated in *Duke Power*, at 4, “Here, the challenged evidence is new evidence and not a mere correction of an inadvertent error in its earlier submission. ... While the changes Duke offers address infirmities in its opening evidence that were pointed out in CSX’s reply, they go beyond the proper scope of rebuttal. In choosing to redesign the SARR on rebuttal, Duke has gone beyond simply seeking to support what it presented in its opening evidence or adopting evidence submitted by CSX. Fairness dictates that CSX would need an opportunity to address the feasibility and cost of a new SARR design and how that change might alter other evidence in the record. Therefore, in the interest of fairness and orderly handling of the case, we will not accept this evidence on rebuttal.”

The situation is identical here. KJRY is required to demonstrate discussions between TP&W and KJRY to resolve service problems before it could even file the August 8 petition. 49 C.F.R. § 1146.1(b)(1)(ii). KJRY did not do that in the petition and TP&W raised that issue in its August 15 reply. KJRY's rebuttal addresses infirmities pointed out by TP&W, but "has gone beyond simply seeking to support what it presented in its opening evidence or adopting evidence submitted by" TP&W. "Fairness dictates that" TP&W "would need an opportunity to address" the discussion. "[I]n the interest of fairness and orderly handling of the case," the Board should "not accept this evidence on rebuttal." *Id.*

TP&W respectfully urges the Board in this proceeding to adopt the well-thought out procedures of SAC cases on not accepting new evidence on rebuttal, particularly where the evidence was available at the time KJRY filed the August 8 petition and KJRY offers no explanation of the delay in filing.

If the Board elects not to reject the new rebuttal evidence submitted by KJRY, TP&W requests permission to respond to that evidence.

The verified statement of Mr. Cecil recounts the discussion between Mr. Howe and Mr. Carr.¹ Mr. Howe did not discuss service issues with Mr. Carr. He merely indicated that he would provide a price to Mr. Carr to acquire the Line. Moreover, Mr. Howe is the Chief Financial Officer of RailAmerica. Mr. Carr holds the same position with Pioneer Railcorp. Mr. Howe is not the Chief Operating Officer or the Senior Vice President - Marketing & Sales, the appropriate people to talk to at RailAmerica about service issues. There is no plausible reason for two Chief financial Officers to discuss service issues. In fact, they did not. The telephone conversations between Mr. Carr and Mr. Howe were not the “summary of the petitioner's discussions with the incumbent carrier of the service problems and the reasons why the incumbent carrier is unlikely to restore adequate rail service consistent with current transportation needs within a reasonable period of time” envisioned in 49 C.F.R. § 1146.1(b)(1)(ii). Moreover, a discussion about a potential sale price does not meet the standards for discussions envisioned by the Board. “Advance discussions between the parties are indispensable. They may help solve or ameliorate the service problems; narrow the issues in dispute; or, at a minimum, enable a more complete and informative record to be developed upon which we can assess the situation and the proposal for relief. Thus, it is in all parties' interests to engage in full, good faith discussions.” *Expedited Relief for Service Inadequacies*, 3 S.T.B. 968, 977 (1998).

¹ Another adverse affect of KJRY waiting until rebuttal to recount the conversation between Mr. Howe and Mr. Carr is that Mr. Howe is now on vacation, and the exigency of responding to KJRY's misleading statement requires TP&W to respond without waiting for Mr. Howe's return. Had the issue been raised in the August 8 petition, Mr. Howe would have been available to directly respond.

The telephone calls that KJRY refers to are not the prerequisite good faith discussions required by 49 C.F.R. § 1146.1(b)(ii). TP&W urges the Board to conclude that KJRY has failed to meet the initial hurdle in the relief that it seeks and deny the request for emergency service.

In addition to presenting claimed negotiations for the first time, KJRY essentially admits that this proceeding is about TP&W's rates, not its service. Rebuttal pages 4-8. KJRY for the first time equates high rates with inadequate service, and claims that it can be much more efficient than TP&W.

KJRY claims that it can be the more efficient operator between Keokuk and Canton. However, the line that KJRY is seeking to provide service over is between LaHarpe and Canton. LaHarpe is about 27 mile east of Keokuk. Indeed, Keokuk is not relevant to this proceeding, unless KJRY intends to use emergency service to provide competitive overhead operations, the emergency service rules "are not intended to address demands for more competitive service." *Expedited Relief for Service Inadequacies*, 3 S.T.B. 968, 970 (1998).

With regard to operations between LaHarpe and Canton, KJRY has not explained how it will be more efficient than TP&W. KJRY will operate over the same line of railroad as TP&W without making any improvements. Certainly KJRY cannot be more efficient in that regard, unless KJRY intends to exceed the speed limit on the Line in violation of FRA rules. The only basis for KJRY's claim that it can be more efficient than TP&W must be that KJRY is a non-union railroad and TP&W is operated by union members. KJRY cannot do this. KJRY is required to use employees who normally have performed the work. 49 U.S.C. § 11123(d). TP&W urges the Board that it would be highly inequitable to allow a non-union railroad to adversely operate over the line of a union railroad only because the owning railroad is unionized. Additionally, such a ruling would, in TP&W's view, not only violate the statute, but would create

bad public policy in favoring non-union rail operations over union operations. Congress did not intend section 11123 be used by a non-union carrier to take union jobs on the basis its costs are less. Congress specifically required the use of the incumbent railroad's employees. It is incredible to believe that KJRY could operate over the same track between LaHarpe and Canton with the same employees more efficiently than TP&W while complying with FRA requirements.

TP&W believes that KJRY's current shippers have convinced KJRY to institute the instant proceeding so that they can avoid any costs of challenging TP&W's rates. It is bad public policy for the Board to allow emergency service to be substituted for rate regulation. The Board has not limited emergency service to shippers served by a market dominant railroad. However, granting emergency service in this instance would provide rate relief to shippers that had not even made a pretense of demonstrating that they are served by a market dominant railroad. Granting emergency service on the grounds that shippers think rates are too high, even though those shippers have not even tried to negotiate with TP&W about rates, will be equivalent to the Board repealing 49 U.S.C. § 10701, 10702, 10703, 10704, 10705, and 10707, without Congressional action.

It is not TP&W that refused to negotiate rates with its potential customers on the Line. The customers never negotiated. At the request of customers, TP&W quoted single car rates. TP&W also indicated that those rates would be reduced if the potential customers were willing to make volume commitments or to enter into take or pay arrangements. TP&W has yet to hear from any of the potential shippers on the Line about rates, just as no potential shipper on the Line has requested service from TP&W. The potential shippers have made their complaints to KJRY and the Board, not TP&W. Were the potential shippers to approach TP&W, they would find a railroad receptive to negotiation. But TP&W cannot negotiate with parties that refuse to respond to TP&W, and will not negotiate with itself. TP&W has provided rates. It has not heard direct complaints and has not received counter-proposals.

KJRY confirms that this proceeding is only about rates. In the Petition filed August 8, KJRY claimed that TP&W was not providing service. TP&W explained that it was not providing service because no shipper had asked for service. Now, in the Rebuttal, KJRY claims that TP&W's service is inadequate because it is not offering "economically viable service to concerned shippers." KJRY bases its theory on a motor carrier case from the period of strict regulation and a concurring opinion in a Supreme Court decision, which most likely does not even rise to the level of dicta. KJRY relies on its inadequate economic service argument to disguise its inability to respond to the fact that because no shipper has requested service and no shipper has been denied service, there is no demonstrated need or prerequisite for emergency service.

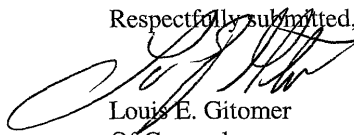
KJRY also reinforces TP&W's point that there is no reason for KJRY to operate east of milepost 183.53, the location of Farmers Elevator Company of Sciota, the easternmost shipper on the Line. Sciota is about 43 miles west of Canton. KJRY admits that it cannot interchange with The Burlington Northern and Santa Fe Railway Company at Canton. KJRY has not produced one shipper on the Line east of milepost 183.53 that is requesting service. The reason is clear. There are no local shippers between milepost 183.53 and milepost 138.5. Without local shippers, there is no possible need for emergency service east of milepost 183.53.

CONCLUSION

TP&W respectfully requests the Board reject the sentence from page 10 of the rebuttal cited above and the verification of Mr. Carr to the extent that it includes that sentence. In the alternative, TP&W requests that the Board accept its reply. TP&W reiterates its request that the Board deny the request for emergency service.

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Respectfully submitted,



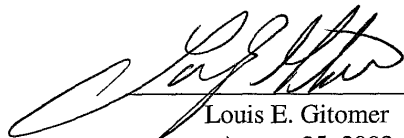
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Attorneys for: TOLEDO, PEORIA AND
WESTERN RAILWAY CORPORATION

Dated: August 25, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served by overnight delivery or more expeditious means on all parties of record in STB Finance Docket No. 34397.



Louis E. Gitomer
August 25, 2003

VERIFIED STATEMENT OF TODD N. CECIL

My name is Todd N. Cecil. I am employed as Vice President, Real Estate, for RailAmerica, Inc. ("RailAmerica"), which includes the Toledo, Peoria & Western Railway Corporation ("TP&W"). My office address is 4040 Broadway, Suite 200, San Antonio, Texas 78209.

I am filing this statement in response to the sentence on page 10 of the Rebuttal filed by the Keokuk Junction Railway Company ("KJRY") alleging that Mr. Carr of KJRY discussed service issues on the TP&W rail line between LaHarpe, IL, milepost 194.5, and Peoria, IL, milepost 123.0 (the "Line") with Mr. Michael Howe, Senior Vice President & Chief Financial Officer of RailAmerica. I am filing this statement because Mr. Howe is on vacation and unavailable to refute the inaccurate report of the telephone discussions between Mr. Carr and Mr. Howe. Had the allegation of the phone call been filed with the KJRY's initial pleading on August 8, 2003, Mr. Howe personally would have been able to respond.

Along with other officers of RailAmerica, I discussed the calls between Mr. Carr and Mr. Howe with Mr. Howe, immediately after the calls. Mr. Howe did not discuss service issues with Mr. Carr. Mr. Howe listened to Mr. Carr and merely responded that he would get back to Mr. Carr with a price for the Line. There were no negotiations over service. Nor did Mr. Carr or any of the shippers on the Line make rate proposals to TP&W or offer to negotiate.

In addition, Mr. Howe is not the appropriate person at RailAmerica to discuss service issues. It is appropriate to discuss those issues with either the Chief Operating Officer or the Senior Vice President – Marketing and Sales. No such discussions occurred.

TP&W continues to be ready and able to serve the Line.

VERIFICATION

I, Todd N. Cecil, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this Verified Statement. Executed this
21st day of August 2003.

A handwritten signature in black ink, appearing to read 'Todd N. Cecil', is written over a horizontal line.

Todd N. Cecil