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September 5, 2003

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

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 Motion to Compel Discovery Responses 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,

A handwritten signature in dark ink, appearing to read 'Louis E. Gitomer'.

LOUIS E. GITOMER
Attorney for: Toledo, Peoria and Western
Railway Corporation

Enclosures

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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
MOTION TO COMPEL DISCOVERY RESPONSES

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WESTERN RAILWAY CORPORATION

Dated: September 5, 2003

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KEOKUK JUNCTION RAILWAY COMPANY—FEEDER RAILROAD DEVELOPMENT
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TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION
MOTION TO COMPEL DISCOVERY RESPONSES

Pursuant to 49 C.F.R. §§ 1114.30 and 114.31, the Toledo, Peoria and Western Railway corporation (“TP&W”) hereby moves the Surface Transportation Board (the “Board”) for an order compelling Keokuk Junction Railway Company (“KJRY”) and Pioneer Railcorp (“Pioneer”) to provide adequate responses to TP&W’s First Discovery Requests (the “First Discovery Requests”).

INTRODUCTION

On April 9, 2003, as supplemented May 7, 2003, June 9, 2003, August 1, 2003, and August 11, 2003, KJRY filed an Application under 49 U.S.C. § 10907 pursuant to the rules at 49 C.F.R. § 1151 to adversely seize a 76-mile railroad line of the TP&W between La Harpe, IL, milepost 194.5, and Hollis, IL, milepost 118.5 (the “Line”).

The Application was accepted by the Surface Transportation Board (the “Board”) subject to filing an environmental report and a schedule was adopted. *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 July 9, 2003) (the “*July 9 Decision*”). After the August 11, 2003 filing of additional evidence by KJRY, TP&W filed the First Discovery Requests to KJRY on August 13, 2003. See Attachment A. KJRY and Pioneer, KJRY’s parent, submitted a Response on August 28, 2003 (the “Response”). See Attachment B.

The instant motion is necessitated by the failure of KJRY and Pioneer to provide meaningful responses to TP&W’s First Discovery Requests. TP&W’s requests are directed primarily to the issues of whether KJRY and Pioneer are financially responsible, the constitutional minimum value of the Line, and whether the public convenience and necessity (“PC&N”) require or permit the sale of the Line. KJRY and Pioneer have steadfastly refused to produce information or documents relating to these critically important issues.

The statute, 49 U.S.C. § 10907, and the Board’s rules, 49 C.F.R. § 1151, contain very specific requirements that must be met before the Board is permitted to find that the public convenience and necessity require or permit the sale of the Line. In particular “the burden of proving that the public convenience and necessity require or permit the sale of a particular railroad line is on the person filing the application to acquire such line.” 49 U.S.C. § 10907(c)(2).

ARGUMENT

The Board’s rules authorize broad, liberal discovery, providing in part that a party “may obtain discovery ... regarding any matter, not privileged, which is relevant to the subject matter

of a proceeding.” 49 C.F.R. § 1114.21. The Board has repeatedly reaffirmed the broad scope of discovery permitted in its proceedings. *See, e.g., FMC Corporation et al v. Union Pacific Railroad Company*, STB Docket No. 42022 (STB served February 5, 1998) at 8 (“parties may obtain discovery regarding any non-privileged matter which is relevant to the subject matter”); *Trailer Bridge, Inc. v. Sea Star Lines*, STB Docket No. WCC-104 (STB served October 27, 2000). In particular, the Board’s rules require a party to produce all responsive non-privileged information so long as the requested for that information is reasonably calculated to lead to the discovery of admissible evidence. 49 C.F.R. § 1114.21(a)(2) (“It is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence”).

1. TP&W is entitled to test KJRY’s valuation of the Line.

The Board cannot require the owning railroad to sell its line of railroad for less than the constitutional minimum value. 49 U.S.C. § 10907(b)(2). KJRY and Pioneer value the Line at \$3,461,434 on a going concern value (“GCV”) basis and \$3,393,363 on a net liquidation value (“NLV”) basis.

In Interrogatory No. 3, TP&W asked KJRY and Pioneer to “Identify the spur track, side track, yard track, interchange track, switching track industrial track, team track, and buildings included in the Valuation Study presented at page 179 of the Application.” KJRY and Pioneer did not respond to this interrogatory. KJRY and Pioneer chose to respond to an interrogatory that TP&W did not propound when KJRY and Pioneer responded “Definitions used are TP&W definitions (valuation based on their information).” TP&W did not ask KJRY and Pioneer for

definitions. TP&W was seeking information on the components of the KJRY and Pioneer Valuation Study that was presented beginning on page 179 of the Application. In testing the KJRY and Pioneer valuation, it is important to know the assets that were valued. Therefore, TP&W respectfully requests that the Board order KJRY and Pioneer to respond to Interrogatory No. 3, not some unasked interrogatory.

TP&W also asked KJRY and Pioneer to “produce all documents relied on or used by Mr. Gohmann in preparing the Valuation Study” in DR 2, to “produce the ‘list of the quality and quantity of rail and track materials’ identified on page 11 of the Application” in DR 6, to “produce track charts used by Mr. Gohmann in preparing the Valuation Study” in DR 13, and to “produce all documents used or referenced by Mr. Gohmann and Mr. Lane in preparing the Valuation Study” in DR 40.¹ KJRY and Pioneer objected to the burden of these requests. In preparing the Valuation Report, Mr. Gohmann and Mr. Lane must have had available the documents they used and should be readily able to compile them. Moreover, KJRY and Pioneer stated that information is being collected and “will be furnished as soon as practicable.” The deadline for responding to discovery was August 28, 2003. KJRY and Pioneer never requested an extension to respond, it unilaterally elected to violate 49 C.F.R. § 1114.26(a). TP&W would have granted an extension, but KJRY and Pioneer never asked. The documents sought by TP&W would allow it to test the Valuation Report relied upon by KJRY and Pioneer to justify their NLV. Therefore, TP&W respectfully requests that the Board order KJRY and Pioneer to produce documents responsive to DRs 2, 6, 13, and 39.

¹ The Document Requests are referred to as “DR.”

TP&W requested KJRY and Pioneer to “produce all land appraisals for the Line, the Western Line and Eastern Line” in DR 4. KJRY and Pioneer responded that “the valuation is based on historic values.” However, KJRY and Pioneer failed to produce any documents. TP&W contends that KJRY and Pioneer had to use some type of document to develop “historic values” and that KJRY and Pioneer must produce those documents so that TP&W can test the land valuation of KJRY and Pioneer, a key component of NLV. In the alternative, TP&W is willing to accept a stipulation from KJRY and Pioneer that they used no documentation to develop land valuation.

KJRY and Pioneer have recounted a history of the TP&W and cited to a specific book. In DR 28, TP&W requested KJRY and Pioneer to “produce the book cited at page seven of the Supplement in footnote 5 as Stringham, Paul H., *Toledo, Peoria & Western – Tried, Proven & Willing*, Deller Archive, Inc. 1993.” KJRY and Pioneer refused “on the ground that it is unduly burdensome and on the ground that materials subject to this response are publicly available.” TP&W questions the burden of producing a book cited extensively in the Supplement. Moreover, TP&W has attempted to obtain this book publicly, but the book is not available. Therefore, TP&W respectfully requests that the Board order KJRY and Pioneer to produce the book responsive to DR 28.

In DRs 35 and 36, TP&W sought production of “the marketing campaign referred to on page 10 of the Application” and “all documents relating to the Line being self-sustaining as discussed on page 10 of the Application.” KJRY and Pioneer objected that DR 35 was irrelevant and that DR 36 was vague. In the Application, KJRY and Pioneer contend that their marketing

campaign will make the Line viable and that the Line will be self sustaining. The viability of the marketing campaign is obviously important to the value KJRY and Pioneer attach to the Line and their financial responsibility. The same is true with respect to whether the Line will be self-sustaining under KJRY ownership. Such documents are highly relevant and cannot be vague because KJRY and Pioneer raised the issue in the Application. In fact, KJRY and Pioneer used the words “self-sustaining” on page 10 of the Application. KJRY and Pioneer must produce those documents so that TP&W can test KJRY’s marketing plan and analysis that the Line will be self-sustaining. In the alternative, TP&W is willing to accept a stipulation from KJRY and Pioneer that (1) there is no written marketing plan and no documents have been reviewed to prepare a marketing plan, and (2) there is no written analysis that the Line will be self-sustaining.

2. KJRY and Pioneer must prove that they are financially responsible.

The feeder line statute is only available to a financially responsible person. 49 U.S.C. § 10907(b)(1)(B). KJRY and Pioneer must prove that they are financially responsible to acquire the Line for its constitutional minimum value and to assure adequate operation of the Line for three years. 49 U.S.C. § 10907(a)(1 and 2). A financially responsible person does not include a Class II railroad, 49 U.S.C. § 10907(a) or “an entity affiliated with a ... class II railroad.” 49 C.F.R. § 1151.4(a)(2).

In Interrogatory No. 4 and DR 30 TP&W sought to probe whether affiliates of KJRY and Pioneer were Class II railroads. KJRY and Pioneer did not object or respond to Interrogatory No. 4 for KJRY’s railroad affiliates. KJRY and Pioneer objected to DR 30 on the ground that the financial statements of Pioneer’s railroad subsidiaries are “irrelevant.” KJRY and Pioneer have

filed an application under 49 U.S.C. § 10907. TP&W is entitled to determine review documents that allow it to test whether any of Pioneer's subsidiaries or KJRY's affiliates are Class II railroads as defined by the Board. TP&W respectfully requests the Board to compel KJRY and Pioneer to respond to Interrogatory No. 4 and produce documents sought under DR 30. In the alternative, TP&W is willing to accept a stipulation from Pioneer and KJRY that one of the railroad subsidiaries of Pioneer is a Class II railroad.

Interrogatory No. 5 asked KJRY and Pioneer to identify the rehabilitation cost of the Line, a key factor in determining whether KJRY can adequately operate the Line for three years. Pioneer and KJRY refused to identify the cost of rehabilitation. TP&W requests the Board to compel KJRY and Pioneer to identify the cost of rehabilitation for three years.

TP&W sought to identify additional costs incurred by KJRY and Pioneer in Interrogatory No. 7 (cost to Pioneer to acquire each railroad subsidiary), and DRs 3 (loan agreements), 8 (loan agreements), 31 (agreements for affiliates to provide services to KJRY), 32 (agreements for affiliates to provide services to KJRY), and 34 (equipment financing costs). Existing obligations are fully relevant to whether KJRY and Pioneer can meet future obligations to operate the Line, and to the question of whether there are covenants that might prohibit KJRY and Pioneer from even acquiring the Line. As such, TP&W contends that KJRY's and Pioneer's financial obligations are relevant to determining whether they are financially responsible and requests the Board to compel a response and production.

In Interrogatory Nos. 52 (car repair revenues) and 53 (additional revenue per car) and DR 20 (strategic growth plan), TP&W sought information concerning the source of additional

revenues that KJRY and Pioneer claim will be generated by their operation of the Line. KJRY and Pioneer objected on grounds of relevancy and, as to the “strategic plan,” that it contains proprietary information. KJRY and Pioneer have claimed that car repair and anticipated additional revenues per car in Highly Confidential Exhibit 1 will be generated only because of the operation over the Line. TP&W is seeking to test these claims that appear in the Application, as supplemented. TP&W contends those claims made in the Application are relevant to a determination of financial responsibility and requests the Board to compel KJRY and Pioneer to respond in a meaningful way to Interrogatory Nos. 52 and 53. A strategic growth plan is relevant to the level of traffic KJRY and Pioneer plan to generate over the Line. That it is proprietary is no basis for withholding the plan since there is a protective order in place in this proceeding. TP&W requests that the Board compel KJRY and Pioneer to produce the strategic growth plan referred to on page 161 of the Application and all documents related thereto. TP&W is willing to accept a stipulation from KJRY and Pioneer that there is no strategic growth plan.

Pioneer has objected to producing its Articles of Incorporation (the “Articles”) and by-laws (DR 1) as the Articles are in the public record and the by-laws not relevant. Pioneer has submitted a resolution purportedly authorizing Mr. Brenkman to take certain actions in an effort to demonstrate that KJRY and Pioneer are financially responsible. TP&W has requested the Articles and by-laws to verify that the resolution is properly authorized and authorizes proper corporate action. The Articles and by-laws are critical to such an analysis. Producing the Articles should be no burden on Pioneer and certainly less of a burden than requiring TP&W to

search out the proper state of incorporation and search through the state records. TP&W requests that the Board compel Pioneer to produce its Articles and by-laws.

DR 11 requests KJRY and Pioneer “produce all documents that Mr. Brenkman used to make ‘my investigation of this project’ referred to on page 36 of the Application.” KJRY and Pioneer objected to production stating “Mr. Brenkman has independent knowledge of the line based upon personal experience as a TP&W crew member and based on an inspection trip he made a few years ago. He has also reviewed documents of others, but not has produced any independently.” TP&W did not request documents “produced” by Mr. Brenkman, but documents he “used.” The response admits that Mr. Brenkman used documents, but they are not produced. Here, KJRY and Pioneer are again responding to a discovery request that TP&W did not propound, but to one of their own fabrication. In the Application, Mr. Brenkman states, under oath, that he made an investigation of the project. In the Response, KJRY and Pioneer admit that Mr. Brenkman used documents to make his investigation. TP&W requests that the Board compel production of the documents used by Mr. Brenkman to make his investigation. The investigation by Mr. Brenkman, the Chairman, CEO, President and largest share holder of Pioneer, goes to the heart of this proceeding and the financial viability of Pioneer and KJRY. TP&W is willing to accept a stipulation that Mr. Brenkman made no “investigation of this project.”

3. KJRY and Pioneer must meet the public convenience and necessity test.

Before the Board may order the sale of a rail line that has not been noticed for abandonment,² it must find that the applicant has proven that the PC&N require or permit the sale. In making the PC&N determination, the Board must consider, and the applicant must prove, under 49 U.S.C. § 10907(c)(1):

(c) (1) For purposes of this section, the Board may determine that the public convenience and necessity require or permit the sale of a railroad line if the Board determines, after a hearing on the record, that - (A) the rail carrier operating such line refuses within a reasonable time to make the necessary efforts to provide adequate service to shippers who transport traffic over such line; (B) the transportation over such line is inadequate for the majority of shippers who transport traffic over such line; (C) the sale of such line will not have a significantly adverse financial effect on the rail carrier operating such line; (D) the sale of such line will not have an adverse effect on the overall operational performance of the rail carrier operating such line; and (E) the sale of such line will be likely to result in improved railroad transportation for shippers that transport traffic over such line.

TP&W propounded discovery aimed at testing the Application with regard to the PC&N test. In particular, TP&W sought information as to whether KJRY would be able to provide “improved railroad transportation for shippers.” One facet of improved service is safe operation. To that end TP&W sought information about KJRY’s and Pioneer’s safety practices in Interrogatory Nos. 32-37 and 49-51 and DR 27. Pioneer and KJRY objected that response and production of documents meant to discover whether KJRY and Pioneer’s other railroad subsidiaries were safe operators was not relevant. The Board has recognized the importance of safety in its regulatory review: “the ICC and the Board, in consultation with the Federal Railroad Administration (FRA), which has primary responsibility over railroad safety enforcement, have routinely considered safety in their environmental review of all rail mergers, acquisitions, line

² 49 U.S.C. §10907(b)(1)(A)(ii).

constructions, and similar transactions. In 1993, the ICC denied an application because the agency believed that no conditions could sufficiently mitigate the unsafe conditions arising out of the proposed construction of the rail line.” *Safe Implementation of Board-Approved Transactions*, STB Ex Parte No. 574 (STB served December 1, 1997) (the “*Safety ANPR*”). This feeder line proceeding is one of the similar transactions that the Board was referring to in the *Safety ANPR*. If KJRY and Pioneer have the stellar safety record they claim in the Response, then they should be proud of that record and glad to share it with the public and the Board. However, if there are safety problems with Pioneer and KJRY, then those are issues which the Board must be made aware of in making its PC&N ruling. Either way, TP&W contends that the safety history of Pioneer and KJRY is highly relevant to the PC&N requirements of the statute and respectfully request that the Board compel response and production in response to TP&W’s discovery requests.

Another factor weighing in the PC&N test as far as future operations are the conditions sought by the acquiring entity. In answer to Interrogatory No. 20, KJRY and Pioneer respond, as they did in the Application, that “... KJRY and Pioneer do not anticipate any future conditions at this time.” Interrogatory No. 20 was designed to reach behind the similar statement made in the Application so that TP&W, the Board, and the shippers on the Line would be advised of any preconditions that KJRY and Pioneer might seek. The response evades the interrogatory. TP&W requests the Board compel KJRY and Pioneer to publicly disclose any conditions that they might seek under 49 U.S.C. § 10907(d) and (g)(1), including but not limited to prescribed trackage rights, regulatory exemption in whole or in part, preconditions on shippers, etc. TP&W

will accept a binding stipulation from KJRY and Pioneer that they will not seek any conditions at any time under 49 U.S.C. § 10907(d) and (g)(1).

Another PC&N test concerns adequate service to shippers on the line by the incumbent railroad. Based on the representations by KJRY and Pioneer in the Application, as supplemented, it appears to TP&W that the shippers on the Line have expressed their unhappiness with service on the Line to KJRY and Pioneer, but not TP&W. TP&W is merely seeking all documents concerning those communications between the shippers KJRY and Pioneer identified at page 116 of the Application and KJRY and Pioneer concerning the instant proceeding in DRs 15 and 16. KJRY and Pioneer object, but have produced some email communications in response to DR 15 and state all written communications have been produced in the filings made by KJRY and Pioneer in this proceeding in response to DR 16. However, KJRY and Pioneer also state that “most contact ... was made via telephone” in response to DR 15. But they do not say that all written communications were by email. TP&W urges the Board to compel KJRY to produce all documents between themselves and the shippers identified on page 116 of the Application because they bear on the adequacy of TP&W’s service. TP&W is willing to accept a stipulation from KJRY and Pioneer that there are no other communications between them and the shippers identified on page 116 of the Application.

4. KJRY and Pioneer must carry the burden of proof.

Throughout the Application, as supplemented, and even the Response, KJRY and Pioneer claim that TP&W has denied them access to inspect the Line. In DR 5, TP&W requested the production of “all requests made by Pioneer, et al. to TP&W to inspect the Line between

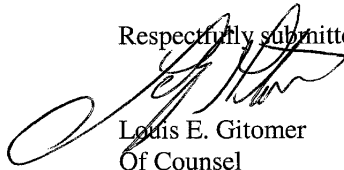
February 1, 2003 and April 8, 2003.” KJRY and Pioneer objected “to this request as unduly burdensome in that the relevant e-mail correspondence is within TP&W’s possession.” A central theme running through KJRY’s and Pioneer’s inability to value the track and land, estimate rehabilitation, produce a GCV, and many other issues was the failure of TP&W to make the Line available for inspection. TP&W does not have any record of KJRY or Pioneer making a written request to inspect the Line once it was reacquired by TP&W in February 2003. Even KJRY and Pioneer admit in response to Admission No. 23 that they may not have requested an inspection of the Line after TP&W reacquired the Line in February 2003. Since KJRY and Pioneer have made the lack of an inspection of the Line a linchpin of their proposal, TP&W requests the Board to compel them to produce the documentation supporting their claim. TP&W will accept a stipulation that KJRY and Pioneer have not requested permission from TP&W to inspect the Line since it was reacquired by TP&W in February 2003.

CONCLUSION

For all the foregoing reasons, the Board should grant TP&W's motion to compel answers to interrogatories and production of documents, and require KJRY and Pioneer to provide full and complete responses to the items discussed herein promptly upon issuance of the Board's decision compelling such production.

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Respectfully submitted,



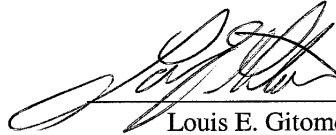
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Attorneys for: TOLEDO, PEORIA AND
WESTERN RAILWAY CORPORATION

Dated: September 5, 2003

CERTIFICATE OF SERVICE

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



Louis E. Gitomer
September 5, 2003