

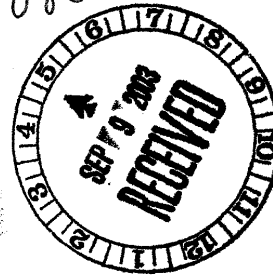
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September 9, 2003



BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings

SEP - 9 2003

Part of
Public Record

RE: Finance Docket No. 34335
*Keokuk Junction Railway Co.--Feeder Railroad Development Application--
Line Of Toledo, Peoria & Western Railway Corporation Between La Harpe And
Hollis, IL*

Dear Secretary Williams:

This letter responds to the Board's order that was issued unexpectedly on Friday, September 5, 2003, partially granting Toledo, Peoria and Western Railway Corporation's ("TP&W") motion to hold the procedural schedule in abeyance pending resolution of TP&W's appeal and completion of the discovery period. The Board's order was decided a mere two days after TP&W's motion was filed, without notice to Keokuk Junction Railway Company ("KJRY") and without waiting for the twenty day period for filing replies to motions as provided at 49 C.F.R. § 1104.13(a). The order, in effect, grants a stay of the July 9th order without the requisite analysis or application of the Holiday Tours test.¹ KJRY objects to both the legal implications of the Board's decision and the delay that it has achieved, especially given that shippers on the affected line have effectively been without rail service for nearly three years. KJRY also reiterates its previous clarification of the Mapleton Spur issue, and responds to the numerous other statements contained in TP&W's filing. KJRY hereby respectfully requests that the Board lift its partial stay of the July 9th order and proceed with the procedural schedule.

As an initial matter, KJRY objects to the Board granting TP&W's non-emergency request only two days after the request was filed, without waiting for or ascertaining whether KJRY was going to respond. TP&W apparently filed its request sometime the afternoon of September 2. The order issued Friday is labeled as having been decided September 4. KJRY intended to reply to TP&W's request and would have done as early as noon on Friday had the

¹ Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); and Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921 (D.C. Cir. 1958).

Board's unexpected order not interrupted that process. KJRY understands that in true emergencies, the Board sometimes must act without waiting for replies, but KJRY does not believe the current situation required such action. By granting relief in situations like this, on an essentially ex parte basis, the appearance is one of the Board acting in haste and without a full consideration of the merits of both sides of an argument. Such a quick decision sends an unintended message that parties are free to manipulate the schedule, and forces opponents of any motion to drop everything else and reply immediately, lest the Board rule without waiting for a reply. Indeed, if the Board believes that the existing rules allowing for a 20 day response to any motion are not adequate under certain circumstances, then the Board should at least inform the other parties of its desire to act quickly and ask the parties to provide comment on the motion sooner than the 20 day period. Furthermore, if the Board needs to change its rules to provide for situations such as TP&W's request, then it should do so.

Regardless of the process issues in this case, TP&W is simply wrong on the merits of its claim for delay. KJRY has filed a feeder line application which offers to make everyone, including TP&W, better off. Yet TP&W continues to drag its feet and seek delay, even though shippers on the Hollis to La Harpe line (the "Line") have suffered nearly three years of TP&W's effective denial of rail service. Whatever the reason behind TP&W's desire for delay - be it a reprise of the SF&L transaction or an effort to assure that Roquette has no choice but to sign new contracts with TP&W/BNSF for traffic between Peoria and Keokuk² - it clearly is not because TP&W wants to serve the line. TP&W has said nothing indicating that it intends to provide service to the shippers on the Line. On this basis alone, TP&W should not have been allowed to delay this proceeding.

The fact that there is an outstanding discovery dispute should not serve as the basis for the delay either.³ By granting the partial delay, the Board has in effect allowed TP&W's own delay in serving discovery to serve as the excuse to delay the feeder line proceeding. Despite having criticized KJRY for the timing of its discovery efforts, *see* TP&W's June 24 Reply to Supplemental Evidence at 6-8, TP&W delayed filing discovery for over a month following first notice of the Board's decision accepting KJRY's application. By that delay, and by not asking KJRY to respond earlier than 15 days from service of the discovery (for which TP&W's June 24 Reply also criticized KJRY), TP&W has managed to create last-minute discovery disputes to use as an excuse for delay. KJRY did not use the timing and nature of TP&W's June 2 discovery

² KJRY has reason to believe that TP&W is delaying both the feeder line proceeding and the Alternative Service Order ("ASO") proceeding (F.D. No. 34397) because it wants to ensure that Roquette, which is located in Keokuk and previously used the Line as an overhead route to/from Peoria, remains captive to a TP&W/BNSF routing via Galesburg when Roquette's contracts soon expire so Roquette would not have the option of using a KJRY routing to/from Peoria. This fact could explain why TP&W is fighting so hard to delay the processing of the feeder line Application on a line that they don't even use.

³ KJRY will shortly be responding to the Motion To Compel filed Friday, September 5, 2003. KJRY notes that TP&W made absolutely no effort to discuss its discovery requests before filing its Motion To Compel and that TP&W currently possesses all of the documents necessary for it to make its own evidentiary filings with respect to the feeder line application.

response to delay its compliance with the Board's order to supplement the application on June 9. TP&W should be held to the same standard. The Board should not use TP&W's own delay in filing discovery as an excuse to delay further the time for which TP&W should be required to file its evidence. TP&W has all of the information in its own files to either agree with or dispute KJRY's going concern value or its net liquidation value. TP&W should be required to proceed with presenting that evidence. Further delay is unwarranted and unnecessary.

Likewise, there is no need to delay this proceeding in order to consider whether or not there needs to be a clarification of the application with respect to the Mapleton Spur, although the Board's order implies that perhaps there may be some confusion on this issue. KJRY would like to again set forth what it said in its June 9 supplement and in its response to TP&W's July 18 appeal. As disclosed therein, if TP&W desires to continue to own the Mapleton Spur⁴ and to handle the traffic for those shippers, KJRY would agree to let them do that. KJRY is willing to provide this concession notwithstanding the fact that KJRY has the legal right under the Caddo Antoine decision to file a feeder line application to purchase the entire line, including the Mapleton Spur. KJRY offered TP&W access to the Mapleton Spur and continued ownership of that spur to eliminate TP&W's contentions that the proposed purchase would harm TP&W and in an attempt to eliminate unnecessary issues of dispute in order to speed resolution of this case. If TP&W is not willing to promptly proceed under the feeder line schedule on the assumption that it can continue to own and operate the Mapleton Spur, then KJRY is willing and able to purchase and operate the entire Line, including the Mapleton Spur.

In furtherance of allowing TP&W the option of continuing to serve the Mapleton Spur, KJRY presented evidence of both the going concern value for the Line, including KJRY acquiring and operating over the Mapleton Spur (Supplement at 62) and has also provided evidence of the net liquidation value of the Line, either with or without the Mapleton Spur. Indeed, KJRY's original Application presented a net liquidation value estimate for the Line, including the Mapleton Spur (Application at 195), while KJRY's Supplement shows the net liquidation value without the Mapleton Spur (Supplement at 106). Accordingly, all necessary information has been submitted for TP&W and the Board to review and respond.

If TP&W desires to continue to own and operate the Mapleton Spur, then as noted, KJRY is willing to allow it to do so and TP&W should present its evidence on whether or not it agrees with KJRY's NLV valuation for the Line without the Mapleton Spur (as obviously the Line, without the Mapleton Spur, would have no going concern value because TP&W has managed to discourage current use of much of the Line). If TP&W desires for KJRY to own and operate the Line, including the Mapleton Spur, then TP&W is free to present evidence that KJRY has either undervalued or overvalued the going concern value of the Line, including the Mapleton Spur. There should be no confusion on TP&W's or the Board's part. TP&W was given a choice and it

⁴ As set forth in the Application and the Supplement, TP&W doesn't even own the tracks that connect its system with the Mapleton Spur. To serve any shipper on the Line or on the Mapleton Spur, TP&W must get off of its line in Peoria and then operate via trackage rights over two other carriers before it even reaches the Line or the Mapleton Spur.

chose not to respond, but instead to seek delay. This can only lead to the conclusion that TP&W wants to stonewall rather than proceed to the merits of the case.

The fact that there is an appeal pending should likewise not delay the proceeding. In the circumstances of this case, the regulations do not provide for delaying the effect of a Director's order while an appeal is pending. When the July 9th order was issued, TP&W did not file a request to stay that order. Instead, it filed an appeal of the order. Appeals of a Director's order to accept or reject a feeder line application are appeals directly to the Board and should be filed pursuant to the time frames set forth under 49 C.F.R. § 1011.2(a)(7).⁵ Appeals filed under that section, as opposed to appeals properly filed under 49 C.F.R. §1115.2, do not automatically stay the effect of the order being appealed. TP&W did not claim to be filing its appeal under §1115.2 so as to effectuate a stay. Accordingly, the order was not stayed. By granting the "abeyance" of the July 9th order, the Board has in effect granted a stay of the time frames contained in the July 9th order without complying with the requirements of the Holiday Tours test. This action may in and of itself constitute reversible error; however the Board has an opportunity to remedy this error by immediately reinstituting the procedural schedule, an action that KJRY requests.

Finally, the fact that there is a related proceeding involving a portion of the Line does not provide a basis to hold the feeder line proceeding in abeyance pending resolution of that case or the related negotiations over the proposed lease of a portion of the Line, which discussions TP&W abruptly terminated yesterday. As the Board is aware, on August 8, 2003 KJRY filed, in Finance Docket No. 34397, a request to provide alternative rail service over a portion of the Line pursuant to the regulations contained at 49 C.F.R. § 1146.1. Because numerous shippers have effectively been denied rail service for approximately three years and TP&W has not agreed to provide that service, KJRY is prepared to respond to the customers' immediate needs, especially given the upcoming harvest season, and seeks to meet those needs immediately.

Instead of responding to the needs of at least the online shippers and KJRY's request to serve from La Harpe to Canton, TP&W has sought to delay an expeditious review of the ASO proceeding as well. The latest tactic was to offer to lease to KJRY a small portion of the line between La Harpe and Sciota, only to withdraw the offer when KJRY responded that it was willing to discuss the possibility as long as all of the online shippers could be served. TP&W's offer to lease such a small portion would have done nothing to help the substantial majority of the shippers who either used the Line in the past or could use the Line in the future.⁶ The lease proposal also did nothing to restore the historic nature of the Line as a through route from La

⁵ TP&W cited the wrong section as the basis for its appeal (49 C.F.R. §1115.1(c)) and, based upon its mistaken belief that the time frame for filing replies was set forth in that section, TP&W moved to strike KJRY's reply as untimely. As KJRY explained in its August 11, 2003 reply to the motion to strike, TP&W misread the Board's regulations and KJRY's reply was timely.

⁶ The lease proposal would help two local shippers located between La Harpe and Sciota but does nothing for the local shippers in or near Canton or the overhead users of the historic TP&W through route from Keokuk to Peoria. If TP&W were truly concerned about providing immediate relief to the shippers, as it claims to be in its lease letter, one must ask why they are not willing to agree to the ASO request.

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Harpe to Hollis. As such, the lease proposal contained in a September 2, 2003 letter, which TP&W has filed in F.D. No. 34397 and has since withdrawn, should not be used as a means to allow further delay of the processing of the Application as filed in this proceeding.

In summary, the Board, acting through the Director of the Office of Proceedings, had no legal basis on which to partially grant the motion to hold the procedural schedule in abeyance. Under the Board's rules, the filing of an appeal did not automatically stay the effective date of the Director's order accepting the Application and thus the mere existence of an appeal should not result in a delay of the schedule. Furthermore, the fact that there is an outstanding discovery dispute, caused by TP&W's own actions, or that TP&W has offered to lease a small portion of the Line, likewise do not justify holding the procedural schedule in abeyance. The Board should reinstate its procedural schedule and move forward with the proceeding.

Please acknowledge receipt of the original and eleven copies of this filing by date stamping the extra copy of the filing and returning it to the individual making this filing for return to me. By my signature below, I certify that a copy of this filing has been served today on all parties of record by first class mail or by some more expeditious means.

Sincerely,



William A. Mullins

cc: Keokuk Junction Railway Co.
All Parties of Record