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September 11, 2003

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

ENTERED
Office of Proceedings

SEP 12 2003

Part of
Public Record

Re: Finance Docket No. 34397, *Keokuk Junction Railway Co. – Alternative Rail Service – Line of Toledo, Peoria and Western Railway Corporation*

Dear Secretary Williams:

Enclosed for filing please find the original and 11 copies of the Reply of Keokuk Junction Railway Co. to the Motion to Strike filed by the Toledo, Peoria and Western Railway Corporation in the above-captioned case. Please date stamp the eleventh copy and return it to our courier.

As can be seen from the certificate of service, a copy of this filing has been served today on all parties of record in this proceeding. If you have any questions about this matter, please contact me directly, either by telephone: 202-637-9499 (ext. 13) or by e-mail: wmullins@bakerandmiller.com.

Sincerely,

William A. Mullins

Enclosures

cc: All parties of record.

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34397



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

REPLY TO MOTION TO STRIKE

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September 11, 2003

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SURFACE TRANSPORTATION BOARD**

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

REPLY TO MOTION TO STRIKE

Pursuant to Section 1104.13, Keokuk Junction Railway Co. ("KJRY"), files this Reply to the Motion to Strike ("Motion") filed by the Toledo, Peoria & Western Railway Corporation ("TP&W") on August 25, 2003. As discussed in more detail below, KJRY respectfully requests that the Surface Transportation Board ("Board") deny TP&W's Motion because (1) TP&W's Motion fails to satisfy the high burden placed on a proponent of a motion to strike; and (2) TP&W's Motion is simply a poorly-disguised impermissible reply to a reply.

ARGUMENT

On August 8, 2003, KJRY filed its Petition for Alternative Rail Service ("Petition"). In that Petition, KJRY provided the Board with the information required by the applicable regulation; namely, 49 C.F.R. Part 1146. Specifically, the Petition provided evidence that supports a grant of alternative service, including evidence that TP&W failed to provide service and that TP&W was on notice of that failure.

On Friday, August 15, 2003, TP&W filed its Response to KJRY's Petition, which alleged that KJRY had failed to demonstrate a lack of service by TP&W and that KJRY was deficient in its attempts to notify TP&W of its failure to provide service. On Wednesday, August 20, 2003,

KJRY filed its Rebuttal to that pleading, as permitted by 49 C.F.R. Section 1146.1(b)(3), and included detailed responses to rebut TP&W's allegations regarding the sufficiency of the Petition. Subsequently, TP&W filed its Motion on August 25, 2003. As discussed in more detail below, that Motion should be denied and the evidence it attempts to sneak into the record should be disregarded by the Board.

I. TP&W's MOTION FAILS TO SATISFY THE BURDEN ON A PARTY MOVING TO STRIKE BECAUSE IT FAILS TO SHOW THAT THE DEBATED EVIDENCE COULD NOT BE OFFERED OR THAT, IF OFFERED, IT WAS IMPROPER

There is a high burden that a party moving to strike a pleading must meet, as per 49 C.F.R. Section 1104.8, which is the basis for the Board's power to strike information from the record. *See Bituminous Coal – Hiawatha, Utah, to Moapa, Nevada Aggregate Volume Rate on Coal – Acco, Utah, to Moapa, Nevada*, 1990 ICC LEXIS 416 at *5-6 (1990) (“*Bituminous Coal*”). This authority extends to materials of an “objectionable nature,” and the Board's authority rests upon a finding that the information is redundant, irrelevant, immaterial, impertinent, or scandalous in order to be stricken from any document. 49 C.F.R. Section 1104.8.

In the first instance, TP&W fails to show that KJRY's submission of the evidence at issue was in any way improper. Indeed, it was entirely proper rebuttal, specifically authorized by the Board's regulations. The Board's rules clearly grant KJRY an opportunity to rebut any opposition to the Petition. 49 C.F.R. Section 1146(b)(3). Furthermore, the Board has held that proper rebuttal includes additional support for assailed evidence – especially in a case where that evidence does not redefine the issues or broaden the scope of the proceeding. *Seaboard System Railroad, Inc. – Abandonment – In Levy County, FL*, Docket No. AB-55 (Sub-No. 160), 1986 ICC LEXIS 281, at *3-5 (1986); *cf. Chrysler de Mexico, S.A. v. Penn Central*, 353 I.C.C. 512, 515-516 (1977). Because the KJRY evidence directly relates to the fact that TP&W was on

notice of a lack of service, TP&W did not show (and KJRY submits could not show) that it redefines the issues or broadens the scope of this proceeding. Thus, TP&W's Motion fails this test.

In addition, application of this extraordinary remedy has been limited by the Board, and its predecessor the I.C.C., to cases in which the agency and the movant would be subject to a "substantial" burden in analyzing the evidence in question. *See Bituminous Coal*, 1990 ICC LEXIS 416 at *5-6 (granting a motion to strike when a new and complex rate study, encompassing previously excluded geographic areas, is introduced in rebuttal and acceptance of the new evidence would necessitate a substantial burden and expense on the Commission and the movant); *cf. Associated Traffic Services, Inc. – Petition for Declaratory Order – Certain Rates and Practices of Saia Motor Freight Line, Inc.*, STB Docket No. 41996, slip op. at 3 n. 3 (STB served May 8, 1998) (declining to strike evidence related to the intent of the parties and limiting its decision to strike to proponent's introduction of new legal theory). TP&W has made no showing whatsoever that the KJRY evidence that TP&W complains of is any sort of substantial burden on TP&W.

Under ICC and STB precedent, TP&W must show that inclusion of the contested information is outside the scope of KJRY's Petition or that it would place a high burden on it and the Board. Clearly, this is not the case.

First, KJRY did not file improper rebuttal. As permitted by Part 1146(b)(3), *and in reaction to TP&W's specific allegation that there was not sufficient communication between the incumbent and the proposed carrier*, KJRY offered a detailed account of its attempts to notify TP&W of the lack of service. Rebuttal at 10 (describing the communications between Pioneer and RailAmerica. As noted by the Board in prior cases, this type of evidence is properly offered

as rebuttal to an opposing party's allegations. *Seaboard System*, 1986 ICC LEXIS 281, at *3-5 (1986). Second, TP&W fails to make any mention of how admission of this sentence could place a "substantial burden" on either it or the Board. Indeed, the *Duke Power* case relied upon by TP&W supports this point because the Board conditioned a grant of a motion to strike on the stress that would result from admitting a new and complex rate scheme. By contrast, there is no argument of any inconvenience of any kind that would result from KJRY's argument. Finally, even if the Board were to inclined to grant the Motion, it should be denied on the basis that including the Pioneer Railcorp / RailAmerica communications creates a more complete record. *See, e.g., Delaware and Hudson Co. – Lease and Trackage Rights – Springfield Terminal Railway Co.*, 1993 ICC LEXIS 132, *4-5 (1993); *Chelsea Property Owners – Abandonment – Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY*, Docket No. AB-167 (Sub-No. 1094), 8 I.C.C. 2d 773. 774 (ICC Served Sept. 16, 1992). Therefore, TP&W's Motion should be denied.

II. TP&W's MOTION IS A PROHIBITED REPLY TO A REPLY, AND AS SUCH, SHOULD BE DISREGARDED, OR IN THE ALTERNATIVE, KJRY SHOULD BE PERMITTED TO REBUT THE NEW ARGUMENTS IN THE MOTION

As noted above, the evidence offered in KJRY's Rebuttal was properly put before the Board. The material that should be rejected, however, is TP&W's, which is clearly a "Reply to a Reply." If TP&W's improper reply to a reply is accepted, however, KJRY should be permitted to offer sur-rebuttal.

A. TP&W's Reply Is Improper Under The Board's Regulations

TP&W's introduction of new evidence in this Motion, in an attempt to rebut KJRY's Rebuttal, clearly represents a disguised attempt to enter a "Reply to a Reply", as prohibited by 49 C.F.R. § 1104.13(c). Indeed, the Motion itself supports a denial of TP&W's request to use

rebuttal as “an opportunity to introduce new evidence that could and should have been submitted in the party’s case-in-chief.” Motion at 3, *citing Duke Energy Corp. v. CSX Trans., Inc.*, STB Docket No. 42070 (STB served March 25, 2003), at 3-4. Specifically, the Motion attempts to introduce the Verified Statement of Mr. Todd N. Cecil to contradict the verification of Mr. J. Michael Carr of Pioneer Railcorp (parent company of KJRY). Motion at 4. Not only was Mr. Cecil not a party to the conversations between Pioneer and TP&W regarding service issues, but *there is no specific statement by Mr. Cecil to support TP&W’s claims. Compare* Motion at 4 (“As can be seen from the attached Verified Statement of Mr. Todd N. Cecil, TP&W disputes Mr. Carr’s recollection,” and “[t]he verified statement of Mr. Cecil recounts the discussion between Mr. Howe and Mr. Carr.”) *with* Motion at 13 (Mr. Cecil’s verified statement is devoid of any factual statement relating to discussions between the companies regarding service, Mr. Cecil’s participation in those discussions, or any service-related issues; indeed, **a mere cursory glance at Mr. Cecil’s verified statement reveals that it is bare of any facts whatsoever**). As such, TP&W not only attempts to introduce the testimony of a non-party to the service related discussions under the guise of a motion to strike, but it fails to support the statements in its Motion with any specific facts that could rebut the evidence offered by KJRY’s Petition and Rebuttal.

B. In Response TP&W’s Introduction of New Evidence in Its Motion, KJRY Submits That The Petition Remains Unrefuted and That TP&W Has Not Provided Reasonable Service to Shippers Who Need Viable Rail Service

Because TP&W cannot refute these facts, it filed its Motion and its Reply to a Reply, in a petty attempt to distract the Board from the larger issue – TP&W’s failure to provide service to shippers. Neither its request to strike a portion of KJRY’s Rebuttal, nor its attempt to provide additional and, KJRY submits, superfluous evidence should be allowed. (Indeed, as the Board

held previously in related cases, a petitioner has been prohibited from introducing additional evidence and it would only be equitable to hold TP&W to the same standard.) Nonetheless, if the Board accepts the unlawful Reply to a Reply, then KJRY offers the following sur-rebuttal.

In its thinly-disguised Reply to a Reply, TP&W relies on five basic arguments to launch another attack on KJRY's Petition. They are: (1) TP&W has not effected an economic "embargo" resulting in inadequate service; (2) KJRY did not satisfy the notice requirement of Part 1146; (3) KJRY failed to demonstrate that it would operate as a more efficient carrier; (4) the shippers are really to blame because they failed to negotiate rates; and (5) because there is no shipper on a small portion of the Line, alternative service should be denied. In reality, these issues can be distilled into two broader points – first, whether TP&W has provided adequate service and second, whether KJRY's Petition was sufficient. As discussed in more detail below, TP&W's arguments on these points are inaccurate and contravene the letter and the spirit of transportation law and policy.

1. *TP&W's Economically Prohibitive Service Represents Insufficient Service as Defined by ICC and Supreme Court Precedent.*

As discussed in depth in the Rebuttal in Support of KJRY's Petition to Provide Alternative Rail Service (filed August 20, 2003), but completely ignored by TP&W's Reply to a Reply, both the Supreme Court and the Board's predecessor, the I.C.C., have held that commercially unreasonable rates are the equivalent of "insufficient service." Rebuttal at 5-8. Also discussed in the Rebuttal was the fact that each requirement of Section 1146,¹ including the notice provision of sub-section 1146.1(b), had been satisfied by KJRY's Petition. Rebuttal 4-5.

¹ Under 49 U.S.C. § 11123, the Board may issue an order directing a rail carrier to provide alternative rail service when the incumbent carrier "cannot transport the traffic offered to it in a manner that properly serves the public." The Board has interpreted this statute as requiring a petition for alternative service to (1) show substantial, measurable service deterioration or

TP&W re-argues its position that it has provided sufficient service even though it has imposed an unofficial embargo on the Line and that the rail transportation policies permit this type of behavior. Motion at 6-7. This is not true. In fact, the shippers' neglected need for service along the La Harpe Line is exactly the situation that the Board's Ex Parte No. 628 rulemaking proceeding intended to address. In fact, the Supreme Court included a discussion of the fact that quoted rates, if cost prohibitive to shippers, merit a finding of "inadequate" service to shippers in related situations. *See Interstate Commerce Commission v. J-T Transport Co., Inc.*, 368 U.S. 81, 136-137 (1961). As noted in the Rebuttal, but not addressed by any filing from TP&W, three 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. Furthermore, the Commission itself used even stronger language to promote equitable rates as part and parcel to deciding the adequacy of service 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). The common theme in those cases – a carrier's imposition of economically prohibitive rates being found to be inadequate service for the affected shippers – should be applied here.

service inadequacy; (2) summarize discussions with the incumbent carrier and show why the incumbent is unlikely to restore adequate service within a reasonable period; (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 properly served upon 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 did not refute that KJRY clearly met these standards in its Petition.

In this case, TP&W has offered contradictory statements about its ability to provide service, while KJRY has consistently offered to provide service to the shippers on the La Harpe Line. TP&W's Response to the Petition goes on for two pages about the allegedly exorbitant costs it must absorb to provide service, and emphatically states that those costs "must be recovered from the traffic on the [La Harpe] Line." Response at 13-14. Of course, KJRY believes that it can provide that service and recoup its costs. Accordingly, if TP&W cannot provide the service, then the Board should allow KJRY to provide service.

TP&W has also refused to negotiate with the shippers over the rate levels or the terms of service. Now, however, TP&W claims that it is now "receptive to negotiation." Motion at 9. Such an offer to now negotiate should not be used to deflect the purposes of the Board's 1998 Rules regarding alternative service when compared to KJRY's consistent offer of service and the shippers constant complaints about the economically prohibitive rates quoted by TP&W. *Expedited Relief for Service Inadequacies*, 3 S.T.B. 968 (1998) ("1998 Rules"); compare Petition at 12-13 (specific complaints of shippers regarding inflexible rate negotiations with TP&W) with Response at 13-14.

2. *TP&W's Attempts to Enter Facts Through An Impermissible Reply to a Reply Are Insufficient to Rebut KJRY's Petition For Alternative Service.*

Procedurally and factually, TP&W's Motion does not support denying KJRY's Petition and should not be permitted to undermine the policies of the 1998 Rules. For example, TP&W's Motion repeats the argument that TP&W has not received sufficient notice of the inadequacy of available service for the La Harpe Line. A plain reading of the 1998 Rules demonstrates that the purpose behind the requirement that the petitioning carrier and the incumbent discuss the service problems is to put the incumbent on notice; in fact, the Board noted that under these Rules

“significant process will in fact be provided” to the incumbent carrier. *1998 Rules*, slip op. at 5. The rules do not, as TP&W argues, require protracted conversations that, as evinced by Mr. Carr and various shippers, are fruitless exchanges. Petition at 15.

This case, in one form or another, has been active for almost three years and therefore TP&W cannot seriously claim that it did not have adequate notice of service issues or that it did not know that KJRY was prepared to provide service. Rather, the Petition and the related pleadings in this case have provided ample evidence of TP&W’s knowledge that shippers were not receiving economically viable rates and were therefore victims of inadequate service. Petition at 15-16; Rebuttal at 8-10. *See also Keokuk Junction Railway Co. – Alternative Rail Service – Line of SF&L Railway, Inc.*, STB Finance Docket No. 34310 (STB served Feb. 14, 2003) (conditioning its denial of alternative rail service upon TP&W’s representation that service would resume speedily and that TP&W would “be able to operate the Line . . . with *minimal investment*”) slip op. at 2 (emphasis added). Therefore, as noted above, the Board should not grant TP&W’s Motion, nor should the Board recognize TP&W’s attempt to provide additional, superfluous evidence at this stage of the proceeding.

CONCLUSION

For the reasons stated above, TP&W's Motion should be denied. It fails to demonstrate that either the single sentence in KJRY's Rebuttal was prohibited by the Board's regulations or that this evidence would place a "substantial burden" on any of the parties to this proceeding. Indeed, it is TP&W's arguments in its Motion that should be stricken as an impermissible "reply to a reply." In the alternative, if the Board does not *sua sponte* disregard the Motion, then KJRY submits that it would be appropriate to recognize KJRY's supplemental information to create a full and complete record.

Respectfully submitted by,



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September 11th, 2003

CERTIFICATION OF SERVICE

I certify that I have this 11th day of September, 2003, served copies of the foregoing
Reply to Motion to Strike of Toledo, Peoria and Western Railway 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**