

208911

BALL JANIK LLP

A T T O R N E Y S

1455 F STREET, NW, SUITE 225
WASHINGTON, D.C. 20005

www.balljanik.com

TELEPHONE 202-638-3307
FACSIMILE 202-783-6947

LOUIS E. GITOMER
OF COUNSEL
(202) 466-6532



September 12, 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 10 copies of the Response to Letter dated September 9, 2003 of the Toledo, Peoria and Western Railway Corporation and three diskettes. Please time and date stamp the extra copy of this letter and pleading and return them 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

ENTERED
Office of Proceedings

SEP 12 2003

Part of
Public Record

Enclosures

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
RESPONSE TO LETTER DATED SEPTEMBER 9, 2003

Gary A. Laakso, Esq.
Vice President Regulatory Counsel
RailAmerica, Inc.
5300 Broken Sound Boulevard N.W.
Second Floor
Boca Raton, FL 33487
(561) 994-6015

Louis E. Gitomer
Of Counsel
BALL JANIK LLP
1455 F Street, N.W., Suite 225
Washington, D.C. 20005
(202) 638-3307

Attorneys for: TOLEDO, PEORIA AND
WESTERN RAILWAY CORPORATION

Dated: September 12, 2003

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
RESPONSE TO LETTER DATED SEPTEMBER 9, 2003

Toledo, Peoria and Western Railway Corporation (“TP&W”) responds to the letter filed on September 9, 2003 (the “Letter”) by the Keokuk Junction Railway Company (“KJRY”). TP&W believes that the Surface Transportation Board (the “Board”) properly exercised its discretion to extend the procedural schedule “to provide time for the Board to address TP&W’s appeal and its alternative request that clarification be ordered.” *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 September 5, 2003) (the “September 5 Decision”) at page 1.

KJRY has provided no statutory or regulatory basis for the Letter. As a response to an employee decision that postponed procedural dates¹, TP&W believes that the Letter should be construed as an appeal under 49 C.F.R. § 1115.1(c). To prevail, KJRY must demonstrate that there are “exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.” *Id.* TP&W contends that KJRY has not met that burden.

¹ 49 C.F.R. § 1011.6(c)(1).

As the Board well knows, the basis for this proceeding is the Feeder Line Application filed on April 9, 2003 (the “Application”) by KJRY, seeking to adversely seize TP&W’s 76-mile line of railroad between La Harpe, IL, milepost 194.5, and Hollis, IL, milepost 118.5 (the “Line”).

ARGUMENT

KJRY wrongly claims that the *September 5 Decision* effects a stay of the July 9, 2003 procedural decision. *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*”). Under 49 U.S.C. § 10907(c)(1), the Board is required to conduct a hearing on the record. However, there is no requirement in 49 U.S.C. § 10907 that the Board conduct a hearing within a time certain or issue a decision within a fixed deadline. The Board has substantial discretion to control its own docket and the schedule of this proceeding.²

² KJRY knowingly argues wrongly that the rail shippers at Hollis, which includes the Mapleton Spur, have not had rail service for “nearly three years.” TP&W must take exception to that statement. TP&W serves the shippers on the Mapleton Spur six days per week and has done so over the three year period noted by KJRY.

On July 18, 2003, TP&W filed an appeal of the *July 9 Decision* and KJRY replied. TP&W recognizes that the appeal presents the Board with difficult issues and that the Board is faced with a crowded docket. Many of the proceedings on the Board's docket require it to act within extremely tight deadlines, while the instant proceeding does not. The instant proceeding also involves the potential exercise of one of the Board's greatest powers, requiring the involuntary sale of a rail line to an adverse buyer. On September 2, 2003, when TP&W filed the Motion to Hold Proceeding in Abeyance (the "*Abeyance Motion*"), TP&W was seeking to promote the orderly processing of this proceeding. KJRY was on notice that TP&W was seeking expedited action on the *Abeyance Motion* by the capitalized bold-type heading on the motion stating "EXPEDITED HANDLING REQUESTED." TP&W realized that filing under the original schedule on September 15, 2003, possibly before the Board issued its ruling on the Appeal, that TP&W might be faced with filing another round of comments and the Board would be forced to review and analyze multiple comments of parties because of an intervening decision. TP&W sought to promote economy and efficiency of its resources and the Board's resources in this proceeding, and the Board agreed.

KJRY also claims that its proposal will make TP&W better off. TP&W disagrees. There is no evidence as to how any portion of KJRY's proposal would make TP&W better off. From taking TP&W's property for less than the constitutional minimum value to seizing TP&W's most profitable traffic, TP&W sees no benefit to itself from KJRY's adverse proposal. The only parties better off under KJRY's proposal will be KJRY and Roquette America.

KJRY next claims that TP&W sought the delay to continue to benefit from a contract among one of KJRY's shippers, Roquette America, a subsidiary of Roquette Freres a multi-billion euro French company ("Roquette"), and TP&W and The Burlington Northern and Santa Fe Railway Company ("BNSF") for traffic moving between Keokuk, IA and Peoria, IL. KJRY is wrong. TP&W is not party to any contract with Roquette. TP&W receives traffic from BNSF at Galesburg, IL for haulage to Peoria, IL. TP&W receives a fixed haulage fee per car, regardless of commodity. TP&W does not receive any other revenue per car, such as a division of the line haul rate. Indeed, TP&W does not receive information concerning the shipper of the traffic. TP&W is merely told that the traffic must be moved between Galesburg and Peoria. TP&W is not involved in the contract between BNSF and Roquette and did not know until the Letter that the contract was expiring.³

KJRY next attempts to compare the responses to the discovery it sought from TP&W to its responses to the discovery that TP&W sought. KJRY fails to mention that TP&W responded to all of KJRY's May 15, 2003 discovery requests in a timely manner and without objection. Moreover, the discovery requests were complete in that KJRY did not seek additional information or file a motion to compel. KJRY did not use the information provided by TP&W because KJRY failed to retain an outside consultant to review information that it knew would be highly confidential.

³ However, KJRY has finally admitted that the reason it filed the feeder line application in this proceeding and the request for alternative rail service in *Keokuk Junction Railway Company—Alternative Rail Service—Line of Toledo, Peoria & Western Railway Corporation*, Finance Docket No. 34397 (the "*Alternative Service Proceeding*"), is to assist Roquette negotiate rates or obtain competitive access for overhead traffic without following the rate complaint process or the competitive access rules at 49 C.F.R. § 1144.

On the other hand, KJRY objected to and failed to respond to over 30 discovery requests from TP&W. TP&W filed a motion to compel responses on September 5, 2003. As of the date of this filing, KJRY has not provided to TP&W, or apparently even completed gathering, documents that it stated it would provide to TP&W in its response to discovery. The responses to discovery by TP&W and KJRY could not be more different.

KJRY refused to use the information provided by TP&W in discovery, while it has failed to provide full and timely discovery to TP&W. If anything, KJRY's response to discovery supports the *September 5 Decision*.

KJRY claims that its intentions for the Mapleton Spur do not need to be clarified because KJRY has left the disposition of the Mapleton Spur to TP&W. KJRY is not being forthright with the Board. KJRY says that it will either acquire the Mapleton Spur or give TP&W access to the Mapleton Spur, at TP&W's option. TP&W's choice is that neither the Mapleton Spur, nor the rail line accessing the Mapleton Spur between mileposts 118.5 and 123.0 be part of the instant feeder line application.

KJRY then claims it has a right to file an application to acquire the Line, including the Mapleton Spur. TP&W's point is that KJRY filed an application, but KJRY never made clear what it intended to do under that application. In one of the first proceedings adopting a case-in-chief requirement similar to that adopted under 49 C.F.R. § 1151, the Interstate Commerce Commission (the "ICC") stated:

We have decided to adopt final regulations which generally provide for the **complete submission of all pertinent evidence** at the time a consolidation application is filed with the Commission. This will ensure our timely consideration of the proposed transactions and will also **enable the public and the Commission to obtain a complete initial understanding of the scope and effect** of a proposed railroad consolidation.

Railroad Consolidation Procedures, 348 I.C.C. 771, 772 (1977) (emphasis added).⁴ KJRY continues to prevent TP&W, the public, and the Board from being able to determine the scope and effect of its proposal vis-à-vis the Mapleton Spur. TP&W has asked the Board to require KJRY to select one position for the Mapleton Spur so that TP&W, the Board and other interested members of the public can analyze KJRY's proposal.

Today, TP&W owns the Mapleton Spur and the Line from milepost 118.5 west. KJRY proposes to acquire the Line from milepost 118.5 west. Once KJRY acquires the Line west of milepost 118.5, it will also acquire Kolbe and control access to the Mapleton Spur, including the dispatch of TP&W trains to the Mapleton Spur. KJRY offers TP&W access to the Mapleton Spur, but also relies on traffic to and from the Mapleton Spur to make its operations viable. KJRY is trying to claim it is leaving the Mapleton Spur in TP&W's hands while at the same time claiming the benefits of the traffic generated by the Mapleton Spur. TP&W urges the Board to order KJRY to provide its concrete plan regarding the Mapleton Spur.

KJRY's remaining arguments are directed to the *Alternative Service Proceeding*. TP&W will shortly submit a report on that proceeding where it will respond to KJRY's statements about that proceeding made in the Letter.

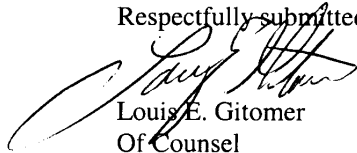
CONCLUSION

⁴ TP&W notes that KJRY's failure to file a complete application is responsible for each and every delay in this proceeding.

TP&W respectfully requests that the Board deny KJRY's request to reinstate a procedural schedule. The Board has very serious and difficult issues before it in this proceeding. The Board also has great discretion in controlling its docket and scheduling its proceedings. The Board should not be rushed to judgment where it is being asked to exercise its very serious and extraordinary power that would force one railroad involuntarily to sell its property for the benefit of another railroad. KJRY has not even attempted to meet any of the regulatory criteria for such an appeal. Moreover, KJRY has only its own intransigent posturing to blame for any delay in this proceeding.

Gary A. Laakso, Esq.
Vice President Regulatory Counsel
RailAmerica, Inc.
5300 Broken Sound Boulevard N.W.
Second Floor
Boca Raton, FL 33487
(561) 994-6015

Respectfully submitted,



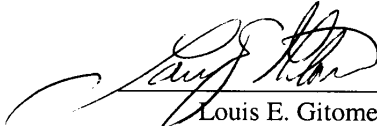
Louis E. Gitomer
Of Counsel
BALL JANIK LLP
1455 F Street, N.W., Suite 225
Washington, D.C. 20005
(202) 638-3307

Attorneys for: TOLEDO, PEORIA AND
WESTERN RAILWAY CORPORATION

Dated: September 12, 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 12, 2003