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BAKER & MILLER PLLC

ATTORNEYS AND COUNSELLORS

SUITE 1000
915 15TH STREET, N.W.
WASHINGTON, D.C. 20005-2318
TELEPHONE: (202) 637-9499
FACSIMILE: (202) 637-9394

September 15, 2003



BY HAND DELIVERY

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

ENTERED
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SEP 15 2003
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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
Reply to Motion to Compel Discovery Responses

Dear Secretary Williams:

Enclosed please find an original and eleven copies of the Reply of Keokuk Junction Railway Co., to Toledo, Peoria and Western Railway Corporation's Motion to Compel Discovery Responses, which was filed September 5, 2003. A complete copy of this filing has been served on all required parties of record. A copy of this filing in WordPerfect format is contained on each of the three enclosed diskettes.

Please acknowledge receipt of the enclosed pleading by date stamping the extra copy of the filing and returning it to the individual making this filing for return to me. If there are 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

Enclosure

cc: All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.**

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**

**REPLY OF KEOKUK JUNCTION RAILWAY CO.
TO TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION'S
MOTION TO COMPEL DISCOVERY**

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**William A. Mullins
David C. Reeves
Christine J. Sommer
BAKER & MILLER, PLLC
915 15th Street, N.W., Suite 1000
Washington, DC 20005
Tel: (202) 637-9499
Fax: (202) 637-9394**

**Attorneys for Keokuk Junction
Railway Co.**

DATED: September 15, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.



FINANCE DOCKET NO. 34335

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TO TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION'S
MOTION TO COMPEL DISCOVERY

Keokuk Junction Railway Co. ("KJRY" or "Applicant") hereby replies to the Motion to Compel Discovery ("Motion") that was filed by Toledo, Peoria & Western Railway Corporation ("TP&W") on September 5, 2003. TP&W's Motion, filed without any attempt by TP&W to discuss discovery issues with KJRY's counsel, is largely another attempt by TP&W to muddle the issues and reargue its positions on Appeal.¹ TP&W's Motion should be denied.

¹ During preparation of this reply, TP&W served KJRY with yet another unauthorized pleading containing still further argument concerning KJRY's response to discovery. TP&W's Response to Letter Dated September 9, 2003, Keokuk Junction Railway Co. – Feeder Railroad Development Application – Line of TP&W Between La Harpe and Hollis, IL, Finance Docket No. 34335 (filed September 12, 2003) ("September 12 Letter"). Out of respect for the Board's caseload, KJRY has tailored this Reply to address the additional arguments in the September 12 Letter. Of particular note is the fact that TP&W's September 12 Letter contradicts TP&W's motion to strike KJRY's reply to TP&W's July 18 appeal. By treating KJRY's September 9 letter as an appeal under 49 C.F.R. §1115.1(c), TP&W has conceded that it is decisions of Board staff under power delegated by the Chairman, *see* 49 C.F.R. §1011.6(c), rather than appeals from delegations by the entire Board under 49 C.F.R. §1011.7, that are appealable under Section 1115.1(c). TP&W took the opposite position in seeking to strike KJRY's reply to TP&W's July 18 appeal.

INTRODUCTION

KJRY filed its Application with the Surface Transportation Board (“Board”) on April 9, 2003, as part of its ongoing effort to provide service to those shippers located on the railroad line between La Harpe, IL and Hollis, IL (“the Line”), the majority of whom have effectively been denied rail service by TP&W for nearly three years. Since KJRY’s Application, TP&W has steadfastly refused to materially comply with discovery requests from KJRY and as such is in a rather ironic position by requesting the Board to grant this Motion.

On April 9, 2003, KJRY issued its First Discovery Request (“First Request”) to TP&W, which replied on April 24, 2003 (“First Response”) (copy attached as Exhibit A hereto). In its First Response, TP&W unilaterally limited the relevant period to four weeks (KJRY had requested that discovery responses cover up to five years) and refused to supply any information prior to February 10, 2003, the date it reacquired the Line; objected to production of any document readily available from any government agency or court; and objected to producing documents KJRY could readily obtain from its own files. In addition, TP&W provided no documents and no substantive information in the First Response; and TP&W rested a substantial portion of its refusal to respond on its disagreement with KJRY’s definition of the Line. TP&W did not, however, offer a contrary definition. Instead, TP&W manufactured a technicality and provided no substantive response to the First Request.

On May 15, 2003, KJRY issued its Second Request for Discovery (“Second Request”) to TP&W, and TP&W responded at the end of the day on Friday, May 30, 2003, and produced the documents the following Monday, June 2, following receipt of KJRY’s confidentiality undertakings. In that instance, TP&W chose to respond to discovery requests only by producing documents, all of which it labeled as highly confidential, limiting their usefulness. TP&W knew

that KJRY's filing was due June 9, and that by producing documents at the last minute (though it said it could have produced them earlier) and labeling them Highly Confidential that the documents were essentially useless as KJRY could not hire an expert outside consultant to analyze the documents and incorporate that analysis into its filing by June 9.

Thus, on two different occasions it was TP&W who failed to provide meaningful discovery responses. On the other hand, KJRY and Pioneer have maintained a record of providing relevant information on a consistent basis. On May 7, 2003, June 9, 2003, August 1, 2003 and August 11, 2003, KJRY & Pioneer voluntarily produced detailed information that supports KJRY and Pioneer's qualifications to operate the Line. In addition, when TP&W issued its First Discovery Request on August 13, 2003, KJRY & Pioneer did not hide behind a unilateral discovery limitation (such as TP&W's refusal to produce any information relating to periods prior to February 10, 2003). Rather, KJRY & Pioneer provided information and documents responsive to TP&W's request covering the entire period of the litigation, and have pledged to continue their search for information, if any, that responds to that request. Based on this history, KJRY must agree with TP&W that "[t]he responses to discovery by TP&W and KJRY could not be more different." September 12 Letter at 7.

ARGUMENT

TP&W's Motion should be denied because its allegations lack a colorable basis in either law or fact. A party requesting a Motion to Compel bears the burden of demonstrating that the opposition did not substantially comply with **valid** requests for discovery. As held by the Board in *Duke Energy*, "discovery requests must be narrowly drawn, directed toward a relevant issue, and not used for a general fishing expedition" and "it is unduly burdensome to require a party to produce information that is available from public records or through less intrusive means." *Duke*

Energy Corporation v. Norfolk Southern Railway Company, STB Docket 42069, *et al.*, slip op. at 4 (STB served July 26, 2002). This position is buttressed by the cases in TP&W's Motion, which clearly limit the scope of discovery and prevents discovery that is unduly burdensome or redundant. Compare Motion at 5, with *Trailer Bridge, Inc. v. Sea Star Lines, Inc.*, STB Docket No. WCC-104, slip op. at 4-6, 9 (chastising the party propounding discovery to "be mindful of the relevancy" requirement) and *FMC Wyoming Corp. v. Union Pac. Railroad Co.*, STB Docket No. 42022, slip op. at 5-7 (STB served Feb. 5, 1998) (discussing the higher burden on the movant to show that the production of burdensome evidence requires a *substantial* showing of relevance).

A. TP&W's MOTION TO COMPEL IS A DELAY TACTIC AND SHOULD NOT BE GRANTED.

KJRY submits that TP&W's Motion is not based on a genuine need for information to build its case; rather, TP&W's Motion is another attempt to re-argue its position regarding the Appeal and to further stall this proceeding. The lateness of TP&W's discovery requests – served approximately 5 weeks after the Board's July 9 order accepting KJRY's application² - tends to impeach TP&W's representations that it needs the information it seeks, creating instead the appearance of a plan to create a last-minute discovery dispute to delay the proceeding. The Board has frowned upon such a litigation tactic, and it should do so here as well. *Illinois Central Railroad Co. – Construction and Operation Exemption – In East Baton Rouge Parish, LA*, STB Finance Docket No. 33877 (STB served May 25, 2001), 2001 STB LEXIS 510, at *7 (denying a motion to compel by a party that did not serve its discovery as an attempt to elicit information it needed in order to reply to the petitioner's case in chief, "which is the essential purpose of

² At the same time, however, TP&W's June 24 "Reply to Supplemental Evidence" criticized the alleged tardiness of KJRY's discovery requests that were filed a mere 6 *days* after the Board's May 9 order in this case.

discovery”). Indeed, TP&W has aggressively litigated its case against KJRY, filing a number of unauthorized pleadings, but only now, four months and several pleadings later, argues that the discovery propounded on KJRY and Pioneer is necessary. As such, TP&W should not be allowed to compel KJRY or Pioneer to engage in fruitless discovery.

In addition, the STB encourages parties to omit from discovery requests (1) information that has been previously provided, (2) information the responding party contends it does not have, and (3) information that the movant can retrieve through independent access. *Puerto Rico Freight System, Inc. v. Trailer Marine Transport Corp.*, 6 I.C.C. 2d 337, 1989 MCC LEXIS 475, at *15 (recommending these guiding factors and stating that “any motion to compel must relate specifically to the moving party’s burden of proof”). As discussed in more detail below, almost all of the information TP&W seeks is one of these three types, and because TP&W has not met its burden, the Motion should be denied.

B. TP&W’S CONTESTED REQUESTS ARE UNDULY BURDENSOME, IRRELEVANT, OR SEEK INFORMATION ALREADY IN THE POSSESSION OF TP&W OR CAN BE OBTAINED THROUGH INDEPENDENT ACCESS. ACCORDINGLY, THE MOTION TO COMPEL SHOULD BE DENIED.

Although styled as requests for discovery, TP&W’s Motion is really attempting to reargue its appeal and a fishing expedition. As discussed above, this is not a proper ground for compelling a party to submit documents or information. This is clear from the general categories of information requested by TP&W: (1) information that is already in TP&W’s possession; (2) easily accessible, public information; (3) information that does not exist in a producible form (*e.g.*, estimates based on industry experience and knowledge); and (4) information that is irrelevant to TP&W’s case in chief. As previously noted, the Board discourages this type of discovery, yet the information TP&W seeks is precisely this type of discovery. *See, supra, Duke*

Energy, Illinois Central and Puerto Rico Freight. KJRY submits that it responded appropriately to these requests, and where proper, produced information and/or documents responsive to the requests. Indeed, either in the Application or the June 9 Supplement, or in its discovery responses, KJRY has produced hundreds of pages of information and has provided TP&W with all of the relevant information it needs to challenge KJRY's claims. Other than as a means of adding further delay or harassing KJRY, further discovery is both unnecessary and unwarranted.

In reality, TP&W is simply using its pleadings as another opportunity to argue its case, which is an inappropriate attempt to supplement its appeal and further supports the Board's disregard of this Motion. As demonstrated by the case law, above, and the evaluation of the requests, below, TP&W's Motion should be denied.

1. TP&W Does Not Need Further Information to Challenge KJRY's Valuation Analysis.

TP&W's Motion incorrectly argues that TP&W is entitled to determine the veracity of KJRY and Pioneer's valuation³ of the Line,⁴ rather than the Board. First, TP&W insists that KJRY and Pioneer did not respond to Interrogatory 3 and Document Request ("DR") Nos. 2, 6, 13 and 39, which request KJRY and/or Pioneer to produce information and documents on valuation. Motion at 5-6. Information and materials responsive to those requests, however, was provided over four months ago as part of the Application. *See* Application at pp. 180-187 (including formulas and assumptions for valuation study). Notwithstanding that information, KJRY has continued to review its file for additional information. The only document that has

³ This power belongs to the Board as the decision-making authority in this case, not to TP&W. 49 C.F.R. § 10907(b)(2).

⁴ The requests addressed in this section of the Motion include: Interrogatory No. 3 and Document Requests ("DR") No. 2, 4, 6, 13, 28, 35-36, 39 and 40. The inclusion of DR 39, however, seems to be a typographic error because it is not discussed in any depth by TP&W.

been located since KJRY's August 28 response to TP&W's discovery requests is the TP&W track charts, "Track Profile for TP&W Railroad, revised 5/88." Obviously, TP&W must have copies of its own track charts. Therefore, KJRY need not produce them, just as TP&W objected to producing items in KJRY's possession.

Second, TP&W insists that KJRY has not met its discovery obligations by failing to provide documents that respond to DR 4, which asked for "historic value" documents. Clearly, this position is wrong because TP&W knows that exact documents are not available to anyone other than TP&W because RailAmerica, its parent company, holds the only copies of the most recent titles, updated track charts and title records. In fact, when KJRY requested this information in discovery, TP&W refused to produce it. *See* KJRY's First Requests, Request No. 2. As such, TP&W's own parent company made it impossible for KJRY and/or Pioneer from making any exact determination of title issues.

As a result of TP&W's failure to provide the most up-to-date information, KJRY and Pioneer were forced to rely upon commonly known industry information and experience to estimate land appraisals on the Line. KJRY also relied upon knowledge obtained from materials previously provided to KJRY by TP&W when TP&W was first seeking buyers for the line before selling it to SF&L. Using TP&W's own materials (*i.e.*, track charts) and general industry experience, KJRY was able to determine its valuation. There are no additional documents known to KJRY which served as the basis for the "historic values." If TP&W disagrees with that valuation, they should provide their own evidence rebutting KJRY's analysis rather than asking for documents that have already been provided or that were TP&W's own documents.

Next, TP&W argues that KJRY should provide a published book KJRY cited in its Application: Stringham, Paul H., *Toledo, Peoria & Western – Tried, Proven & Willing*, Deller

Archive, Inc. 1993 (“Stringham Book”). In fact, TP&W insists that it has attempted to obtain the Stringham Book, “but the book is not publicly available.” Motion at 7. The Board should reject this contention. A simple search of the Library of Congress website reveals that the book is available and that TP&W’s Washington, D.C. counsel, located within a few minutes of the nation’s largest public library, has ready access to this material. *See* Exhibit B, attached hereto and made part hereof, containing a print out of that website information.

Last, TP&W argues that KJRY should be compelled to provide valuation materials in response to DR 35 and 36, collectively referred to as documents relating to the “self-sustaining” nature of the Line. KJRY submits that this request is improper because TP&W already has documentation of the Line’s viability in its possession. *See* June 9 Supplement, Exhibits D and E, containing Highly Confidential Information, at pp. 85-96 (containing KJRY and Pioneer’s detailed projections for the Line). There is no written marketing plan nor is there a written strategic plan to be produced. Also, KJRY submits that TP&W clearly overreaches by representing that “KJRY and Pioneer must produce those documents so that TP&W can test KJRY’s marketing plan and analysis.” Obviously, if TP&W believes that KJRY cannot generate the traffic it projects, TP&W should produce evidence to that effect. In sum, because TP&W’s Motion does not demonstrate that KJRY or Pioneer have failed to provide TP&W with all relevant information or that TP&W could not obtain the information from its own files or public sources, the Board should reject TP&W’s request to compel this information.

2. TP&W’s Argument Regarding Documents Related to KJRY’s Financial Responsibility Is Also Flawed.

The Board should also deny TP&W’s request to compel KJRY and Pioneer to produce information already in the possession of TP&W regarding “financial responsibility.” Motion at 8-11. First, TP&W argues that it should be able to ascertain whether any affiliate of KJRY is a

Class II railroad by compelling KJRY and/or Pioneer to provide information in response to its Interrogatory 4 and DR 30. In fact, however, TP&W already has this information and can easily find it in the Application. A Class II railroad is one with revenues exceeding \$20,000,000 in 1991 dollars for three consecutive years. *See* 68 Fed. Reg. 53631-2 (Sept. 11, 2003) and 49 C.F.R Part 1201, General Instruction 1-1(b)(1)). As can be seen from Page 78 of the Application (Pioneer Railcorp's Form 10-KSB filed March 26, 2003), the collective railway operating revenue of Pioneer's 16 railroad subsidiaries is \$14,969,833. Accordingly, none exceeded, or even approached, \$21,758,050 (current equivalent of \$20,000,000 in 1991 dollars, based on the Board's deflator published in the *Federal Register*) in annual railway operating income. Thus, none was a Class II railroad.

Second, TP&W argues that KJRY and/or Pioneer failed to respond to Interrogatory 5 by failing to provide information regarding the cost of rehabilitation of the Line for the next three years. Motion at 9. This argument is another clear example of TP&W failing to review information already in its possession because this data was supplied to TP&W as part of KJRY's supplement to the Application. *See* June 9 Supplement, pages 85-96 (maintenance of way costs). *See also* Verified Statement of B. Allen Brown, Application at 164 (stating "I estimate \$200,000 will be required to restore the track structure to safe Class 1 track condition." Mr. Brown's estimate was a conclusion based upon his industry experience and his review of TP&W's own documents. As such, there are no further documents responsive to this request. Finally, TP&W's request for information on rehabilitation costs should be denied inasmuch as TP&W stated on page 11 of its August 15 Response to KJRY's Petition to Provide Alternative Rail Service that the portion of the Line between Mileposts 194.5 and 138.5 (which TP&W refers to

in that pleading as “the Canton Line”) is already in FRA Class 1 standards. (*See* true copy of that page attached as Exhibit C hereto). Therefore, KJRY submits that the issue is moot.

Likewise, TP&W demands information responsive to Interrogatory 7 and DR 3, 8, 31-32 and 34, which related to financial and other agreements between KJRY and Pioneer and their subsidiaries and/or affiliates. Not only is this the type of request rejected by TP&W’s own case law as irrelevant and overly broad,⁵ but TP&W already has reasonably comparable information in its possession in Pioneer’s Form 10-KSB. Furthermore, although KJRY’s First Requests encompassed affiliates of TP&W, TP&W provided no information about any of them. Allowing RailAmerica, a major competitor, of Pioneer, to fish through sensitive corporate records that are not relevant to this case would rewrite Board precedent on the scope of discovery. Likewise, TP&W engages in irrelevant requests when it demands detailed accounting of car repair revenues and a written strategic growth plan in Interrogatories 52 and 53, and DR 20.

Next, TP&W has demanded that KJRY and/or Pioneer produce Pioneer’s Articles of Incorporation and By-laws as requested by DR 1. Because the Articles of Incorporation are publicly available documents and could, with a little foresight, have been easily obtained from the State of Iowa, KJRY did not produce them. KJRY also submits that Pioneer’s By-laws are irrelevant to and unnecessary for TP&W’s prosecution of its case, particularly because the corporate actions contained in KJRY’s filings have been attested to by Pioneer’s corporate secretary. *See* June 9 Supplement to Application at 112. However, rather than have TP&W’s intransigence cause further delay, KJRY hereby produces as Exhibit D a copy of its articles of

⁵ *Compare* Motion at 5, *with Trailer Bridge*, at 6 (Board rejects portions of a motion to compel clearly designed to facilitate “an unnecessary fishing expedition into [opponents’] corporate structure and operations).

incorporation, with amendments. KJRY also is simultaneously serving on TP&W's counsel under seal a copy of Pioneer's non-public by-laws.

Last, TP&W argues that KJRY and Pioneer failed to adequately respond to DR 11, which requests documents used by Mr. Brenkman in his evaluation of the feeder line project. Motion at 11. KJRY submits that the Board should reject this position because the only document that has been found in KJRY's possession or control that was used for this purpose is the TP&W track charts. They are the same charts as used by Mr. Gohmann, referred to above. Those charts are undoubtedly in TP&W's possession. Accordingly, they need not be produced.

Again, TP&W has ignored information already in its possession and requested other responses that are clearly outside the scope of permissible discovery. As such, the Board should reject TP&W's demand for additional "financially responsibility" discovery.

3. The Board Should Reject TP&W's Attempt to Slip In Argument on PC&N.

As discussed previously, TP&W's Motion should be rejected because a discovery motion is no place for supplementing an appeal filed several weeks ago regarding the public convenience and necessity ("PC&N"). *Compare*, discussion at pp. 6-7, *supra*, with Motion at 12-14. Even if the Board ignored TP&W's interjection of argument, the Board should still reject TP&W's request to compel KJRY and/or Pioneer to produce more information that TP&W claims is relevant to the PCN test. This is especially true given that all of the information used by KJRY was TP&W's own information or was already produced in the Application or its June 9 Supplement.

In the first instance, TP&W argues that it is entitled to information relating to the safety practices of KJRY, Pioneer and Pioneer's other subsidiaries as demanded by Interrogatories 32-37, 49-51, and DR 27. Motion at 12-13. This sort of request is irrelevant and clearly outside the

purview of this proceeding because it is the FRA that oversees safety issues relating to rail carriers, not TP&W.⁶ Likewise, the Board should reject TP&W's argument that the PCN test supports an order to compel KJRY and Pioneer to produce discovery in response to Interrogatory 20, which asks for information relating to future conditions. In response to this Interrogatory, KJRY and Pioneer have already represented that they do not anticipate that any conditions will be imposed. By that, KJRY and Pioneer mean that they will not impose on shippers preconditions for receiving service that are outside those ordinarily established by common carriers in their dealings with shippers. Accordingly, there is no basis for KJRY and Pioneer to repeat their answer to that request. Finally, TP&W attempts to sneak in more evidence of its position vis-à-vis shippers on the Line in the guise of DR 15 and 16. The Board should flatly reject this portion of TP&W's argument because KJRY and Pioneer have already provided TP&W with all written communications with shippers.⁷ Because TP&W cannot show that the portion of its Motion addressing PCN issues contains viable discovery-related complaints, the Board should deny that section of the Motion in its entirety.

⁶ Having reviewed available feeder line decisions, KJRY is unaware of any feeder line case in which the operational safety of the applicant has been an issue under the PC&N test. That issue clearly is not stated in the statutory PC&N test of 49 U.S.C. §10907(c).

⁷ It is interesting to note that TP&W takes a different degree of interest in shippers on the portion of the Line west of Mapleton than those located on the Mapleton Spur, and this Dr. Jekyll/Mr. Hyde approach seems rooted in purely self-serving interests.

For instance, in the Motion, TP&W admits its knowledge of seriously dissatisfied shippers west of Mapleton, and bluntly limits its inquiry to a lone document request with no mention of any desire to rectify this problem. Motion at 14. In the September 12 Letter, however, TP&W insists that if the Application is approved, KJRY will be "seizing TP&W's most profitable traffic" and actually argues that a result of KJRY's application is that a shipper, Roquette, will be better off. September 12 Letter at 5.

**4. TP&W's Arguments on "Burden of Proof"
Should Also Be Rejected**

In a last ditch effort to introduce argument under the veil of its Motion to Compel, TP&W requests the Board command KJRY and Pioneer to respond to DR 5 regarding requests to inspect the Line. KJRY and Pioneer submit that any written requests are already in the possession of TP&W and as such, need not be reproduced. Also, KJRY and Pioneer never represented that only written requests were made. Based on these reasons, TP&W cannot show that KJRY and Pioneer have not satisfied their production responses to DR 5, and as such, this section of TP&W's Motion should be denied.

CONCLUSION

TP&W has failed to demonstrate that KJRY and Pioneer did not properly respond to valid discovery requests and the Motion improperly attempts to introduce argument in a motion to compel discovery. As discussed in more detail above, these reasons are not sufficient to grant a motion to compel. KJRY has already produced all information necessary for TP&W to challenge KJRY's analysis and evidence, and any further information is either within TP&W's own possession, custody or control or has no relevance to the proceeding at this stage. Therefore, KJRY and Pioneer respectfully request that the Board deny TP&W's Motion.

If TP&W believes that the KJRY feeder line application has not met the PC&N test, it should make its case and proceed with the filing of evidence. The motion should be denied, the procedural schedule should be reinstated, and the case should proceed.

Respectfully submitted,



William A. Mullins
David C. Reeves
Christine J. Sommer
Baker & Miller, PLLC
915 15th Street, NW - Suite 1000
Washington, DC 20005
TEL: (202) 637-9499
FAX: (202) 637-9394

September 15, 2003

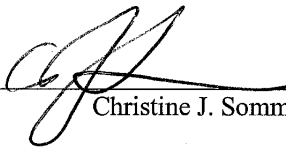
Attorneys for Keokuk Junction Railway Co.
and Pioneer Railcorp

CERTIFICATE OF SERVICE

I hereby certify that September 15, 2003, I have caused the foregoing Reply of
Keokuk Junction Railway Co. and Pioneer Railcorp to Toledo, Peoria & Western Railway
Corporation's Motion to Compel Discovery to be served by courier on:

Louis E. Gitomer
BALL JANIK LLP
1455 F Street, NW
Washington, DC 20005

and by first class mail or more expeditious service on other parties of record.



Christine J. Sommer

Exhibit A

BALL JANIK LLP

ATTORNEYS

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

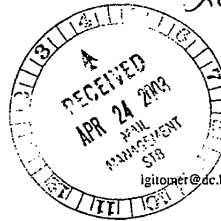
www.balljanik.com

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

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

April 24, 2003

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



ENTERED
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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 Responses to Discovery Requests of Keokuk Junction Railway Company by the Toledo, Peoria and Western Railway Corporation, and three diskettes with the file Discovery Response.doc.

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

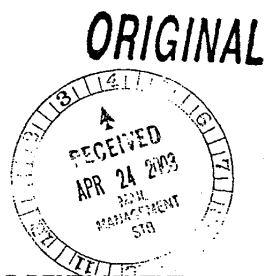
Respectfully submitted,

Louis E. Gitomer

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 RESPONSES TO
DISCOVERY REQUESTS OF KEOKUK JUNCTION RAILWAY COMPANY

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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

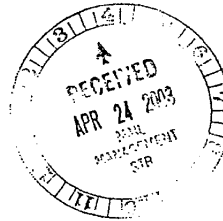
Louis E. Gitomer
Of Counsel
BALL JANIK LLP
1455 F Street, N.W., Suite 225
Washington, D.C. 20005
(202) 638-3307

Attorneys for: TOLEDO, PEORIA AND
WESTERN RAILWAY CORPORATION

Dated: April 24, 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 RESPONSES TO
DISCOVERY REQUESTS OF KEOKUK JUNCTION RAILWAY COMPANY

Toledo, Peoria and Western Railway Corporation ("TP&W") responds to the Discovery Requests of Keokuk Junction Railway Company ("KJRY") served on April 9, 2003 and received on April 10, 2003 (the "Discovery Request").

GENERAL RESPONSES

The following general responses are made with respect to all of the discovery requests.

1. TP&W has conducted a reasonable search for responsive documents and information to respond consistent with the stated objections.¹
2. Where objections have been raised to the scope of the request, TP&W is willing to discuss searching for and producing documents or information covered by a more limited request taking into account the stated objection.
3. Production of information or documents does not necessarily imply that they are relevant to this proceeding, and is not to be construed as waiving any applicable objection.

¹ Thus, any response that states that responsive documents are being produced is subject to the General Objections, so that, for example, any documents subject to attorney-client privilege or the work product doctrine are not being produced.

GENERAL OBJECTIONS

The following general objections are made with respect to all of the discovery requests. Any additional specific objections are stated at the beginning of the response to each discovery request.

1. TP&W objects to production of, and is not producing, documents or information subject to the attorney-client privilege, the work product doctrine, or administratively confidential documents or information.
2. TP&W objects to production of, and is not producing, documents prepared in connection with, or information relating to, possible settlement of this or any other matter.
3. TP&W objects to production of, and is not producing, public documents or information that is readily available, including but not limited to documents on public file at the Surface Transportation Board ("STB"), the Securities and Exchange Commission, or any other government agency or court, or that have appeared in newspapers or other public media.
4. TP&W objects to the production of, and is not producing, information or documents that are as readily attainable by the KJRY from its own files.
5. TP&W objects to the production of, and is not producing, information or documents containing confidential or sensitive commercial information, including information subject to disclosure restrictions imposed by law in other proceedings or by contractual obligation to third parties, and that is of insufficient materiality to warrant production here even under a protective order.

6. TP&W objects to the production of, and is not producing, information or documents to the extent they are sought in a form not maintained by TP&W in the regular course of business and are not readily available in the form requested, on the ground that such documents or information could only be developed, if at all, through unduly burdensome and oppressive special studies, which are not ordinarily required and which TP&W objects to performing.

7. TP&W objects to the discovery requests as overbroad and unduly burdensome to the extent that they seek information or documents for indeterminate periods of time and periods prior to February 10, 2003, the date TP&W reacquired the 71.5-mile line of railroad between La Harpe, IL, milepost 194.5, and west of Peoria, IL, milepost 123.0.

8. TP&W objects to KJRY' Definitions and Instructions to the extent that they seek to impose requirements that exceed those specified in the applicable discovery rules and guidelines.

DISCOVERY REQUESTS

In accord with the foregoing definitions and instructions, please produce the following information:

DISCOVERY REQUEST NO. 1

All records demonstrating the origin, destination, commodity, car type, car ownership, shipment weight, number of shipments, and routing of all shipments tendered to TP&W for movement to or from any point on the Line east of Milepost 123.0.

Response:

TP&W objects to Discovery Request No. 1 as being overly broad and unduly burdensome; as requesting confidential or other information that is either not relevant or reasonably calculated to lead to the discovery of admissible evidence or is insufficiently relevant to warrant search and production; and as being vague and ambiguous.

TP&W objects to Discovery Request No. 1 in that it is impossible from KJRY's Definitions and Discovery Request No. 1 for TP&W to determine the location, in that KJRY did not define the term "Line" in the Definitions. TP&W further objects to Discovery Request No. 1 in that it requests TP&W to subject itself to a fine and to violate 49 U.S.C. § 11904(b) by providing "information about the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to" it "for transportation." TP&W further objects to Discovery Request No. 1 in that KJRY has solicited (49 U.S.C. § 11904(a)(2)) "information about the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to" TP&W "for transportation" in violation of 49 U.S.C. § 11904(b). TP&W further objects to Discovery Request No. 1 in that it is overly broad and burdensome since it is an open ended request with no limit on the time period for which TP&W must respond. TP&W further objects to Discovery Request No. 1 in that it is not relevant to the case-in-chief presented by KJRY which rejects the calculation of going concern value based upon KJRY's novel, unconstitutional, unsubstantiated, and unjustified trackage rights theory.

DISCOVERY REQUEST NO. 2

All valuation maps, real estate records, deeds, track charts, maintenance records, hi-rail and other inspection records with respect to the Line.

Response:

TP&W objects to Discovery Request No. 2 as being overly broad and unduly burdensome and as being vague and ambiguous.

TP&W objects to Discovery Request No. 2 in that it is impossible from KJRY's Definitions and Discovery Request No. 2 for TP&W to determine the location, in that KJRY did not define the term "Line" in the Definitions. TP&W further objects to Discovery Request No. 2

in that any valuation maps, real estate records, and deeds are matters of public record and readily available to KJRY. TP&W further objects to Discovery Request No. 2 in that KJRY either possesses or has access to the track charts that it believes are relevant based on the application (page 13) and Mr. Gohmann's verified statement (pages 174-175 and 180). TP&W further objects to Discovery Request No. 2 in that it is overly broad and burdensome since it is an open ended request with no limit on the time period for which TP&W must respond.

DISCOVERY REQUEST NO. 3

All agreements, court orders, and other documents relating to crossings of the Line over, under or at-grade with any public or private road or drive, and any stream, river or other body of water.

Response:

TP&W objects to Discovery Request No. 3 as being overly broad and unduly burdensome; as requesting confidential or other information that is either not relevant or reasonably calculated to lead to the discovery of admissible evidence or is insufficiently relevant to warrant search and production; and as being vague and ambiguous.

TP&W objects to Discovery Request No. 3 in that it is impossible from KJRY's Definitions and Discovery Request No. 3 for TP&W to determine the location, in that KJRY did not define the term "Line" in the Definitions. TP&W objects to Discovery Request No. 3 in that this information is publicly available to KJRY through observation and the use of publicly available maps. TP&W further objects to Discovery Request No. 3 in that it is overly broad and burdensome since it is an open ended request with no limit on the time period for which TP&W must respond. TP&W further objects to Discovery Request No. 3 in that it request material containing confidential or sensitive commercial information.

DISCOVERY REQUEST NO. 4

A list of the names and mailing addresses of all shippers who have originated or received shipments at points on the Line during the 12 months preceding the date of these requests.

Response:

TP&W objects to Discovery Request No. 4 as being overly broad and unduly burdensome; as requesting confidential or other information that is either not relevant or reasonably calculated to lead to the discovery of admissible evidence or is insufficiently relevant to warrant search and production; and as being vague and ambiguous.

TP&W objects to Discovery Request No. 4 in that it is impossible from KJRY's Definitions and Discovery Request No. 4 for TP&W to determine the location, in that KJRY did not define the term "Line" in the Definitions. TP&W further objects to Discovery Request No. 4 in that it requests TP&W to subject itself to a fine and to violate 49 U.S.C. § 11904(b). TP&W further objects to Discovery Request No. 4 in that it is overly broad and burdensome since it is an open ended request with no limit on the time period for which TP&W must respond. TP&W further objects to Discovery Request No. 4 in that KJRY apparently has such information in its possession as evidenced by its contacting TP&W's customers and especially contacting TP&W's customers in the Mapleton area as evidenced by Mr. Sauer's attached verified statement.

DISCOVERY REQUEST NO. 5

All records concerning any complaint about the provision of rail service on the Line made or received by TP&W or any of its affiliates within the 5 years preceding the date of these requests.

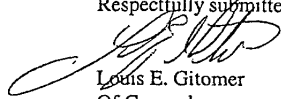
Response:

TP&W objects to Discovery Request No. 5 as being overly broad and unduly burdensome and as being vague and ambiguous.

TP&W objects to Discovery Request No. 5 in that it is impossible from KJRY's Definitions and Discovery Request No. 5 for TP&W to determine the location, in that KJRY did not define the term "Line" in the Definitions. TP&W further objects to Discovery Request No. 5 in that it is overly broad and burdensome since it requests five years of information. TP&W further objects to Discovery Request No. 5 in that TP&W cannot be held accountable for complaints that have been "made" but not "received" by TP&W. TP&W further objects to Discovery Request No. 5 in that KJRY has in its possession a number of, and perhaps all, documents responsive to Discovery Request No. 5. See Verified Statement of Catherine Busch (pages 115-159, especially Exhibit A, pages 121-134, and Exhibit B, pages 135-144). TP&W further objects to Discovery Request No. 5 in that KJRY has the information concerning the illegal entry onto the Line by KJRY officers on August 23, 2001 in a hy-rail vehicle in which the operator was not qualified to operate on the Line, had no permission from the dispatcher to be on

the Line, and was investigated by both the Federal Railroad Administration and the Illinois Commerce Commission and the subject of a disciplinary hearing by TP&W.

Respectfully submitted,



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

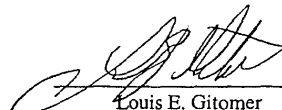
Gary A. Laakso, Esq.
Vice President Regulatory Counsel
RailAmerica, Inc.
5300 Broken Sound Boulevard N.W.
Second Floor
Boca Raton, FL 33487
(561) 994-6015

Attorneys for: TOLEDO, PEORIA AND
WESTERN RAILWAY CORPORATION

Dated: April 24, 2003

CERTIFICATE OF SERVICE

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



Louis E. Gitomer
April 24, 2003

VERIFIED STATEMENT OF ALFRED M. SAUER

My name is Alfred M. Sauer and I am Senior Vice President Marketing and Sales for RailAmerica, Inc. and its railroad subsidiaries, including the Toledo, Peoria and Western Railway Corporation ("TP&W"). The purpose of this statement is to advise the Surface Transportation Board (the "Board") that the Keokuk Junction Railway Company ("KJRY") has begun contacting customers of TP&W, not served by KJRY, located in the vicinity of Mapleton, IL, alleging that KJRY will shortly be taking over operations from TP&W and thereby interfering with TP&W's business relationships with its customers.

As the Board is aware, on April 9, 2003, KJRY filed an application to attempt to force TP&W to sell KJRY TP&W's 76-mile line of railroad between La Harpe, IL, milepost 194.5, and Hollis, IL, milepost 118.5 (the "Line"). STB 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*. I am informed that a final decision by the Board will most likely not occur in 2003. Based upon counsel's analysis, I am also informed that the Board has not even accepted the application, that the application is incomplete and should be rejected by the Board, and that KJRY has not met the statutory criteria in the application and the Board will deny the application, if it is even accepted,

I became aware of KJRY's contacts with our customer, the Lonza Group, located in Mapleton, IL on TP&W's line more than 75 miles from KJRY's rail line, through voicemails left the night of April 22, 2003 by Al Satunas (General Manager of TP&W) and Scott Hulstrom (Regional Vice President of RailAmerica). Mr. Satunas informed me that he had received a voicemail from Roger Lowe, TP&W's primary contact at the Lonza Group, informing him that KJRY wished to meet with the Lonza Group to discuss the customer's rail service needs once KJRY takes over the TP&W trackage serving the Lonza Group's facility. Based on this contact,

I directed the staff of the TP&W to determine whether any of our other customers at Mapleton had been contacted by KJRY. It appears that KJRY has contacted all of TP&W's Mapleton customers and sought their business under KJRY's presumption that the Board will automatically approve KJRY's Feeder Line Application, enabling KJRY to adversely acquire TP&W's rail line.

I have also been informed that KJRY is seeking the addresses of TP&W's Mapleton customers in discovery in the application case. Based on KJRY's contacts with those customers it is apparent that KJRY already has those addresses as well as additional information.

TP&W currently serves its shippers in Mapleton at least six days per week. Not only does TP&W serve Mapleton, but the Union Pacific Railroad Company ("UP") serves Mapleton shippers pursuant to a switch agreement between TP&W and UP, whereby TP&W performs switch service for UP cars between Mapleton customers and the UP yard at Sommer, IL. The Mapleton traffic generates about 15 percent of TP&W's revenue. The forced sale of the Mapleton segment of TP&W's line would have an adverse effect on TP&W.

VERIFICATION

I, Alfred M. Sauer, 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
23rd day of April 2003.



Alfred M. Sauer

Exhibit B

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SEARCH RESULTS: Displaying 1 of 1.

x	x
x Brief	x Subjects/Content x Full x MARC Tags x Non-Roman Test

Toledo, Peoria & Western : tried, proven & willing / Paul H. Stringham.

LC Control Number: 93090979

Type of Material: Book (Print, Microform, Electronic, etc.)

Brief Description: Stringham, Paul.

Toledo, Peoria & Western : tried, proven & willing / Paul H. Stringham.
 Peoria, Ill. : Deller Archive, c1993.
 vii, 149 p. : ill., maps ; 28 cm.

CALL NUMBER: TF25.T65 S77 1993

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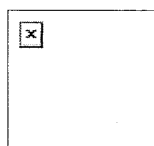
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-- **Status:** Not Charged

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Authorities
URL: <http://authorities.loc.gov/>

Exhibit C

identified period of time there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service by TP&W.

KJRY did not discuss service problems and the reasons therefore with TP&W.

Nowhere in the Petition does it state that KJRY discussed service over the Line with TP&W. Instead, KJRY relies on pleadings filed during litigation involving KJRY and TP&W and letters from shippers to the Board.

KJRY did not hold a discussion with TP&W. As defined by Webster's New Collegiate Dictionary, a discussion is "consideration of a question in open and usually formal debate."

KJRY presents documents submitted in legal proceedings as its discussion.

TP&W believes that the reason KJRY did not engage in a discussion with TP&W about service over the Canton Line is that the only issue discussed would have been the rates TP&W has quoted. TP&W has repaired the Canton Line so that it can be operated as an FRA Class I railroad. TP&W has the locomotives, equipment, and employees available to provide service. The only element missing is a request for service from a shipper. Since reacquiring the Peoria Line from SF&L, TP&W has not received a request to provide service over the Canton Line. TP&W does not equate a request for a rate as the same as a request for service, nor should the Board.

The Board considered the discussion between the incumbent railroad and the prospective petitioner so critical that it made the discussion a condition precedent to the filing of a petition. "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." *Expedited Relief for Service Inadequacies*, 3 S.T.B. 968, 977 (1998).

Exhibit D

Pottawattamie

FILED

FEB 11 1993

COMPARED

86 16821 A267033

8601

STATE OF IOWA Pottawattamie County
Filed for record the 11 day of Feb
1993 at 11 o'clock A.M. and record
in book 86 page 16821

John Scirtino
Recorder
Deputy

ARTICLES OF INCORPORATION
OF
PIONEER RAILROAD COMPANY, INC.

ARTICLE ONE: This Corporation shall be incorporated under the provisions of the business Corporation Act (Chapter 496A) of the Code of the State of Iowa, and shall have the name "PIONEER RAILROAD COMPANY, INC."

ARTICLE TWO: The duration of this Corporation shall be perpetual.

ARTICLE THREE: This Corporation shall be organized for the purpose of acquiring, forming, buying, leasing, and/or operating one or more railroad lines or railroad-related companies, within and/or without the State of Iowa, and for the transaction of any and all other lawful business for which corporations may be incorporated under the Iowa Business Corporation Act.

ARTICLE FOUR: The Corporation shall have the authority to issue up to 20,000,000 shares, each having a par value of \$ 0.001 per share, and each being entitled to one vote.

ARTICLE FIVE: All shares of the Corporation shall be classed as "common," and no shareholder shall have any pre-emptive right to acquire additional shares of the Corporation, or treasury shares thereof.

ARTICLE SIX: The initial registered office of the Corporation shall be at 403 First National Bank Building, Broadway and Main Sts., in the City of Council Bluffs, Pottawattamie County, Iowa. The initial registered agent shall be Mr. John W. Kocourek.

ARTICLE SEVEN: The initial Board of Directors shall consist of five directors, who shall serve until the first annual meeting of shareholders, or until their successors be elected and qualify.

86 16821

(2)

COMPARED

-2-

The names and addresses of the persons who are to serve as said directors are:

Name	Address
<u>GUY L. BRENKMAN</u>	<u>1517 SUNSET DR. EAST PEORIA, ILL 61611</u>
<u>A. ROBERT JOHNSON</u>	<u>2811 5th ST. EAU CLAIRE, WISCONSIN 54703</u>
<u>ORVEL L. COX</u>	<u>1114 FLINT ST. RED BUD, ILL. 62278</u>
<u>JOSEPH J. SYKES</u>	<u>2731 N. 76th COURT ELMWOOD PARK, ILL 60635</u>
<u>LAUNCELOT D. ERICKSON</u>	<u>P.O. BOX 3182 OMAHA, NEBRASKA 68103</u>

ARTICLE EIGHT: This Corporation's existence shall begin on the date on which it is incorporated.

ARTICLE NINE: The undersigned incorporators hereby adopt these Articles of Incorporation for PIONEER RAILROAD COMPANY, INC.

Signature and Names	Address
1. <u><i>Guy L. Brenkman</i></u> Signature	<u>1517 Sunset Dr.</u> Street
<u>GUY L. Brenkman</u> Name (print)	<u>East Peoria, Ill. 61611</u> city/state/zip

STATE OF IOWA)
) SS
COUNTY OF POLK)

On this 31st day of January, 1986, before me, a Notary Public in and for the State of Iowa, personally appeared Guy Brenkman to me known to be the person named in and who executed the foregoing Articles of Incorporation and acknowledged that he executed the same as his voluntary act and deed.



86 16822

Frances Rae James
Notary Public in and for the
OFFICE State of Iowa STATE
DES MOINES, IOWA

This instrument recorded in Book _____ Page 1/31 19 86
Expires perpetual Case No. C037071
Filed by Guy Brenkman 1517 Sunset Dr. / E. Peoria, Ill. 61611
Filing Fee 50.00 Recording Fee _____

ARTICLES OF AMENDMENT

of

PIONEER RAILROAD COMPANY, INC.

TO THE SECRETARY OF STATE OF THE STATE OF IOWA:

Pursuant to Section 1003 and 1006 of the Iowa Business Corporation Act, the undersigned corporation adopts the following amendment to the corporation's Articles of Incorporation.

1. The name of the Corporation is "Pioneer Railroad Company, Inc."
2. The amendment is: The name of the corporation is "Pioneer Railcorp".
3. The date of adoption of the amendment was October 19, 1991.
4. The amendment was approved by the shareholders. The designation, number of outstanding shares, number of votes entitled to be cast by each voting group entitled to vote on the amendment, and the number of votes of each voting group indisputably represented at the meeting is as follows:

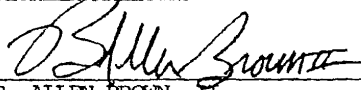
Designation of Group: Common Shares
Shares Outstanding: 1,870,102
Votes Entitled to be Cast on Amendment: 1,870,102
Votes Represented at Meeting: 1,476,435

- 4A. The total number of votes cast for and against the amendment by each voting group entitled to vote on the amendment is as follows:

Voting Group: Common Shares
Votes For: 1,462,315
Votes Against: 14,120

5. The number of votes cast for the amendment by each voting group was sufficient for approval by that voting group.
6. The effective date of this amendment is October 19, 1991.

PIONEER RAILCORP


B. ALLEN BROWN, II
Secretary-Treasurer

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ARTICLES OF AMENDMENT
of
PIONEER RAILCORP

TO THE SECRETARY OF STATE OF IOWA:

Pursuant to Sections 490.1003 and 490.1006 of the Iowa Business Corporation Act, the undersigned corporation adopts the following amendment to the corporation's Articles of Incorporation.

1. The name of the corporation is "Pioneer Railcorp".
2. The amendment is: "Article 10. The Corporation shall have the authority to issue, in accordance with this Article, stock warrants for the purchase of the Company's Class A common stock at the price of \$2.00 per share. The warrants shall not have any voting rights, or rights in the event of liquidation or dissolution, and shall be neither redeemable for cash, or callable, and shall have such other terms and conditions upon exercise as the Board of Directors may decide. The Board of Directors shall be authorized to declare, as a dividend to stockholders, warrants for 4,196,084 shares (or so many shares as are outstanding at the close of business June 30, 1995, taking into account the stock split declared that date, be it more or less), and said warrants shall be issued July 1, 1995, or as soon thereafter as the appropriate Securities & Exchange Commission (and any required state security act) filings permit, and shall, if unexercised, expire twenty (20) years after the issue date. The shares purchased with any of said warrants shall be restricted as to resale for a period of one (1) year."
3. The date of the adoption of the amendment was June 24, 1995.
4. The amendment was approved by the shareholders. The designation, number of outstanding shares, number of votes entitled to be cast by each voting group entitled to vote on the amendment, and the number of votes of each voting group indisputably represented at the meeting is as follows:

Designation of Group: Common shares (Class A)
Shares Outstanding: 2,098,042
Votes Entitled to be Cast on Amendment: 2,098,042
Votes Represented at Meeting: 1,695,650
5. The total number of votes cast for and against the amendment by each voting group entitled to vote on the amendment is as follows:

Voting Group: Common Shares (Class A)
Votes For: 1,688,174
Votes Against: 7,476

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(2)

0705951218D.C00011599484ENH*SO5 \$50.00

6. The effective date of this amendment is June 24, 1995.

PIONEER RAILCORP

By: *Daniel A. Lakemper*
DANIEL A. LAKEMPER
SECRETARY.

IOWA/AMD-ART/06-28-95.

PAUL D. PATÉ
Secretary of State
FILED
Date: 7-3-95
Time: 3:55
Receipt: W81392

007182