

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



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Public Record

November 5, 2004

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

RE: Finance Docket No. 34335, *Keokuk Junction Railway Company.—Feeder
Railroad Development Application—Line of Toledo, Peoria and Western Railway
Corporation between La Harpe and Hollis, IL*

Dear Secretary Williams:

Enclosed for filing are the original and ten copies of the Toledo, Peoria and Western
Railway Corporation Petition for Stay and three diskettes.

Please time and date stamp the extra copies of this letter and the Response and return
them with our messenger. Thank you for your assistance. If you have any questions, please
contact me.

Respectfully submitted,

Louis E. Gitomer
Attorney for: Toledo, Peoria and Western
Railway Corporation

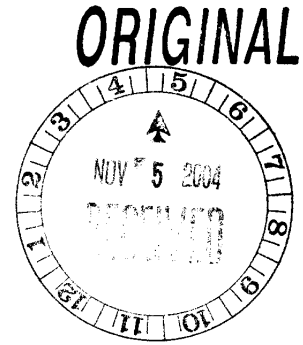
Enclosures

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

PETITION FOR STAY



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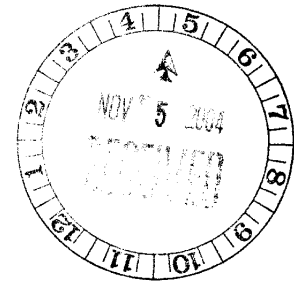
Gary A. Laakso, Esq.
Vice President Regulatory Counsel
RailAmerica, Inc.
5300 Broken Sound Boulevard N.W.
Second Floor
Boca Raton, FL 33487
(561) 994-6015

Louis E. Gitomer, Esq.
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: November 5, 2004

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

PETITION FOR STAY

The Toledo, Peoria and Western Railway Corporation ("TP&W") respectfully petitions the Surface Transportation Board (the "Board") to stay the effectiveness of the Decision served on October 28, 2004 in the above-entitled proceeding (the "*Sale Decision*"). TP&W will file a petition for reconsideration with the Board and an appeal in the U.S. Court of Appeals for the District of Columbia. In the Petition, TP&W will demonstrate changed circumstances as to a portion of the line where a major new shipper will locate and material error as to the valuation of the line. In the Appeal, TP&W will demonstrate that the decision is arbitrary, capricious and an abuse of discretion.

There is a strong likelihood that TP&W will prevail on the merits of the Petition and Appeal, will suffer irreparable harm in the absence of a stay, that other interested parties will not be substantially harmed, and that the public interest supports the granting of the stay.

STAY CRITERIA

The Board has recently said that:

The standards governing disposition of a petition for stay are: (1) whether petitioners are likely to prevail on the merits; (2) whether petitioners will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm

other parties; and (4) whether issuance of a stay is in the public interest. Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). The parties seeking a stay carry the burden of persuasion on all of the elements required for such extraordinary relief. Canal Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

Canadian Pacific Railway Company — Trackage Rights Exemption — Norfolk Southern Railway Company, STB Finance Docket No. 34561 (STB served October 27, 2004).

BACKGROUND

The Keokuk Junction Railway Company (“KJRY”) commenced this proceeding on April 9, 2003, by filing a Feeder Railroad Development Application under 49 U.S.C. § 10907, under the rules at 49 C.F.R. § 1151. KJRY sought an order from the Board compelling TP&W to involuntarily sell to KJRY the line of railroad between La Harpe, IL, milepost 194.5, and Hollis, IL, milepost 118.5, a total distance of 76 miles (the “Line”), including the Mapleton Spur.¹

On April 24, 2003, TP&W filed a combined Petition for Leave to File Petition to Reject Application and a Petition to Reject Application filed under 49 C.F.R. § 1151. The United Transportation Union-Illinois Legislative Board (“UTU”) filed a comment supporting TP&W’s petition to reject on May 5, 2003. KJRY replied on May 7, 2003 (the “May 7th Reply”).² The Board served a decision requiring KJRY to submit certain very specific information by June 8, 2003, or the Board would reject all or a part of the Application and discontinue all or part of the

¹ After vacillating between acquiring the Mapleton Spur or not in its Application, Supplement and other pleadings, KJRY finally withdrew that request in its rebuttal testimony, no doubt because it determined that it could not acquire the Mapleton Spur based on its unquestioned going concern value of \$7,841,000.

² It is interesting to note that in the May 7th Reply, at page 3, while arguing that the Application was complete KJRY submitted another seven pages of evidence. On May 7, 2003, KJRY filed a request for a protective order, TP&W did not object, and the Board granted a protective order. *Keokuk Junction Railway Company—Feeder Line Acquisition—Line of Toledo Peoria and Western Railway Corporation Between La Harpe and Hollis, IL*, Finance Docket No. 34335 (STB served May 16, 2003) (the “Protective Order”).

proceeding. *Keokuk Junction Railway Company—Feeder Line Acquisition—Line of Toledo Peoria and Western Railway Corporation Between La Harpe and Hollis, IL*, Finance Docket No. 34335 (STB served May 9, 2003) (the “*May 9 Decision*”).

KJRY filed Supplemental Evidence Supporting the Feeder Railroad Development Program Application of Keokuk Junction Railway Company on June 9, 2003 (the “Supplement”). TP&W submitted a Reply to Supplemental Evidence on June 24, 2003, asking the Board to again reject the Application, as supplemented, for failure to comply with the requirements of the *May 9 Decision*. KJRY improperly replied on June 27, 2003. The Board accepted the Application. *Keokuk Junction Railway Company-Feeder Line Acquisition-Line of Toledo Peoria and Western Railway Corporation Between La Harpe and Hollis, IL*, STB Finance Docket No. 34335 (STB served July 9, 2003 and as modified by a late release on July 9, 2003) (the “*July 9 Decision*”).

On July 18, 2003, TP&W appealed the *July 9 Decision* and sought clarification concerning the Mapleton Spur (the “July 18 Appeal”). KJRY responded on August 1, 2003 (the “August 1 Reply”). Despite having claimed three times that the Application was complete (in the Application, the May 7th Reply, and the Supplement) KJRY filed another eight pages of evidence on August 1.³

The Board denied the July 18 Appeal and established a new schedule without ruling on the Motion to Compel. *Keokuk Junction Railway Company—Feeder Line Acquisition—Line of Toledo Peoria and Western Railway Corporation Between La Harpe and Hollis, IL*, Finance Docket No. 34335 (STB served September 26, 2003) (the “*Appeal Decision*”).

³ In the *Sale Decision*, the Board denied TP&W’s motion to strike.

TP&W filed its verified comments on October 16, 2003. On November 7, 2003, KJRY filed rebuttal and for the first time in this proceeding produced evidence of land valuation. After the close of evidence, KJRY continuously filed additional evidence of a loan commitment. Since KJRY had continued to file almost monthly supplements of the record, TP&W determined that it would be appropriate for it to supplement the record with evidence of the increase in the value of scrap steel. KJRY objected vociferously, but then filed its own supplemental evidence of the decrease of the value of scrap steel, as well as continuing to supplement the record with loan commitments.

The Board granted KJRY's application. *Keokuk Junction Railway Company—Feeder Line Acquisition—Line of Toledo Peoria and Western Railway Corporation Between La Harpe and Hollis, IL*, Finance Docket No. 34335 (STB served October 28, 2004) (the "*Sale Decision*"). The Board ordered TP&W to sell the Line to KJRY for the Board calculated net liquidation value ("NLV") of \$3,940,756, within 90 days of service of the *Sale Decision*.

TP&W will now demonstrate that the Board should stay the effectiveness of the *Sale Decision*.

A STAY OF THE NOTICE IS JUSTIFIED

1. There is a strong likelihood that TP&W will prevail on the merits of the Petition.

TP&W has been negotiating since March 2004 with a shipper in the Canton area to enter a contract for a major commodity movement. TP&W had expected to have the contract executed this week, until the *Sale Decision* interfered with this important new business. The prospective shipper is now concerned that TP&W will not be able to meet its obligations because the Board has ordered TP&W to convey the Canton to Hollis portion of the Line to KJRY. TP&W will interchange with a railroad at Sommer, IL for movement over TP&W's line to the shipper's

facility in Canton, IL. TP&W anticipates earning net operating revenue of at least \$400,000 per year from this movement and expects the contract to provide sufficient funding to upgrade the line to 286,000 pound standards between Sommer and Canton to handle unit trains.

Because of the *Sale Decision* and a confidentiality agreement between TP&W and the potential shipper, TP&W cannot provide additional detail at this time.

The *Sale Decision* has caused immediate harm to TP&W. TP&W anticipated executing the contract with the shipper between November 1st and 12th. The shipper has decided at this time not to execute the agreement with TP&W because the *Sale Decision* requires TP&W to sell the Canton to Hollis line to KJRY. Not only is TP&W temporarily frustrated in its ability to complete this business opportunity, but it may have permanently lost a customer that would provide the guaranteed business so that TP&W would have had the incentive to attempt to revitalize the local rail business on the Canton to Hollis line. TP&W contends that the changed circumstances of the negotiated contract and possible loss of the contract because of the Sale Decision will result in TP&W prevailing on its Petition for Reconsideration.

In the Petition, TP&W will produce evidence that the annual operating revenue from the contract would be at least \$400,000. Applying the Board's most recent cost of capital⁴ of 9.4% to the annual operating revenue of \$400,000 yields a going concern value of \$4,255,319.10, far in excess of the NLV of the Canton to Hollis line that the Board has ordered KJRY to pay TP&W. TP&W has worked diligently to develop new business over the Canton to Hollis line, and turn this property from one with prospects for only overhead traffic to one with substantial local business. Based on TP&W's hard work to convince a major shipper to use the Canton to Hollis

⁴ *Railroad Cost-Of-Capital* —2003, STB Ex Parte No. 558 (Sub-No. 7) (STB served June 28, 2004).

line, TP&W has made this line into a going concern, with a going concern value of at least \$4,255,319.10. TP&W contends that the hard work it has undertaken to change the nature of the Canton to Hollis line and the new going concern value of \$4,255,319.10 are the type of changed circumstances that the Board will conclude require granting TP&W the reconsideration it seeks to either allow TP&W to retain the Canton to Hollis line or to receive the constitutional minimum value of that line of \$4,255,319.10, in addition to the net liquidation value of the line between La Harpe and Canton, as required by 49 U.S.C. § 10907(b)(2) and Amendment 5 of the United States Constitution.

The only purported shipper on the line between Hollis and Canton is the Hitchcock Scrap Yard, which has not used rail service more recently than 1999. With the line upgraded, TP&W will be able to serve Hitchcock Scrap Yard, if it still desires rail service. However, as part of the overhead trackage rights that TP&W will propose granting to KJRY between Canton and Hollis, TP&W will be amenable to granting KJRY the right to serve Hitchcock Scrap Yard.

TP&W will be able to demonstrate that due to these changed circumstances and new evidence, the Canton to Hollis line has been undervalued using the NLV standard and that the true valuation of the Canton to Hollis line is at least \$4,255,319.10.

TP&W will also demonstrate that the Board denied TP&W due process as to the value of the real estate involved in calculating the NLV. Under the Board's rules, a feeder applicant is required to estimate the NLV in a verified statement. As the Board noted in the *Sale Decision*, at 16, in the Application, KJRY did not submit any information on the quantity of land in the right-of-way or the quality of title. Instead, KJRY waited until TP&W had submitted its evidence to establish land value and then addressed the quality of title and acreage valuation on rebuttal,

knowing full well that it was denying TP&W the opportunity to address KJRY's only evidence of land valuation. TP&W will demonstrate to the Board that TP&W was deprived of due process through the Board accepting the Application without any evidence of the land NLV and allowing KJRY to submit evidence on the issue for the first time in rebuttal when the Board and KJRY knew that TP&W would not have the opportunity to respond. TP&W will demonstrate to the Board that the real estate has a value substantially higher than the \$41,635 estimated by the Board.⁵

2. TP&W will suffer irreparable harm in the absence of a stay.

TP&W has diligently and confidentially negotiated the new contract with the shipper. The *Sale Decision* has put that potential contract in grave danger by requiring TP&W to sell KJRY the Canton to Hollis portion of the Line. Not only is that contract in grave danger, but the potential revitalization of the Canton to Hollis line, by the location of an anchor customer, and surrounding area is also in danger. If the Board does not vacate its order to sell the Canton to Hollis segment of the Line to KJRY, TP&W will suffer the loss of good will from potential customers who will point to this transaction and question whether TP&W will be able to fulfill any agreement with a shipper. In addition to the loss of good will, TP&W will lose an opportunity to substantially improve the rail line between Canton and Hollis. Finally, TP&W will lose an ongoing revenue stream.

3. A stay will not substantially harm other interested parties.

⁵ TP&W will also show the Board that it has sold parcels along the Line that the Board has concluded are not owned by TP&W in fee simple as fee simple property and that the buyer has obtained title insurance for those parcels.

A stay will not harm KJRY or its potential customers. The Board has ordered transfer of the Line by January 26, 2004. That is sufficient time for the Board to correct the errors in its decision and still allow KJRY to acquire the line between LaHarpe and Canton at its true NLV.⁶

Moreover, KJRY will suffer greater harm if it acquires the Line and then is required to pay TP&W an additional \$4,255,319.10 because of the going concern value of the Canton to Hollis line.

4. The public interest supports the granting of the stay.

The status quo in this instance is in the public interest. It is in the public interest that a privately negotiated rail transportation contract be allowed to go in to effect without the shadow of it being terminated because of the acquisition of the line between Canton and Hollis. The constitutional mandate that private property cannot be seized by the government without paying the constitutional minimum value will also be served because the Board will have the opportunity to correct its errors. Interference in the agreement between TP&W and the new shipper is contrary to the public interest.

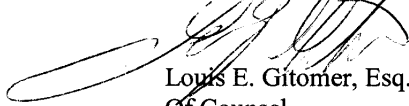
⁶ KJRY accepted the terms of the Board's decision on November 1, 2004, no doubt because KJRY realized that the price set by the Board is a below market bargain.

CONCLUSION

TP&W has demonstrated that a stay of the *Sale Decision* would be consistent with Board precedent. Therefore, TP&W respectfully requests that the Board stay the *Sale Decision* until it rules on the Petition.

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,



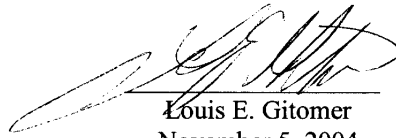
Louis E. Gitomer, Esq.
Of Counsel
BALL JANIK LLP
1455 F Street, N.W., Suite 225
Washington, D.C. 20005
(202) 638-3307

Attorneys for: TOLEDO, PEORIA AND
WESTERN RAILWAY CORPORATION

Dated: November 5, 2004

CERTIFICATE OF SERVICE

I certify that I have this day served copies of this Petition for Stay upon all parties of record in this proceeding, by hand delivery.



Louis E. Gitomer

November 5, 2004