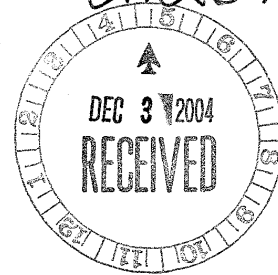


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December 3, 2004

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BY HAND DELIVERY

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

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

Dear Secretary Williams:

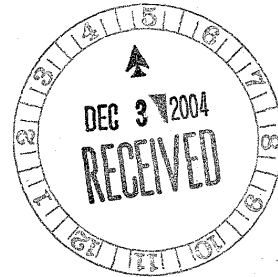
Enclosed herewith on behalf of Keokuk Junction Railway Co. ("KJRY") are an original and eleven copies of a Motion To Strike portions of the November 29 Petition for Reconsideration submitted by Toledo, Peoria and Western Railway Corporation ("TP&W"). Please acknowledge receipt of the enclosed pleading 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) 663-7823 or by e-mail: wmullins@bakerandmiller.com.

KJRY requests expedited ruling on this motion. KJRY's response to TP&W's Petition for Reconsideration is due December 20, 2004. In order to know what evidence and arguments it must respond to and to prepare its response, KJRY requests

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BEFORE THE
SURFACE TRANSPORTATION BOARD

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

MOTION TO STRIKE

ENTERED
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EXPEDITED RULING REQUESTED

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Attorneys for Keokuk Junction Railway
Co.

DATED: December 3, 2004

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**

MOTION TO STRIKE

EXPEDITED RULING REQUEST

TP&W's Petition for Reconsideration, filed Monday, November 29 and received by KJRY on Tuesday, November 30, in effect reargues the entire case, based largely on evidence and arguments that could and should have been presented before, but were not. KJRY herein moves to strike that evidence. Expedited ruling on this motion is needed to prevent KJRY from expending resources (that would better be spent restoring service on the involved line) in preparing a reply to TP&W's wide-ranging and improper evidentiary submission and the arguments based thereon.

Under the Board's regulations, 49 C.F.R. §1104.13(a), KJRY's deadline to respond to TP&W's Petition is December 20. KJRY has striven throughout this proceeding toward the goal of restoring service on the involved line without unnecessary delay, and accordingly does not want to have to request an extension of the deadline for its reply to TP&W's Petition if doing so would extend the date for closing of the transaction. Accordingly, KJRY requests that the Board act promptly to strike the wholly-improper new evidence and argument that TP&W presents, as requested in this Motion.

PROCEDURAL BACKGROUND

In late December 2000, TP&W sold 71.5 of the 76 miles of the track at issue here to SF&L, Inc. ("SF&L"), for \$2.18 million.¹ Decision at 8. KJRY later proved, and the Board later held, that SF&L improperly used the Board's procedures to acquire the track in order to scrap it rather than to operate it.² The Board directed SF&L to sell the line back to TP&W.

KJRY applied to the Board on April 9, 2003, to acquire the Line under 49 U.S.C. Section 10907. The Board accepted the Application by decision served July 9, 2003, and issued a procedural schedule calling for the final evidentiary submission to be made on September 26, 2003. However, due to discovery and procedural delays, scheduled closing of the record did not occur until November 7, 2003. Following a number of unscheduled filings initiated by TP&W, the Board issued its Decision on October 28, 2004, holding that the public convenience and necessity requires sale of the Line to KJRY. The Board's decision set the purchase price based on NLV of the Line, and called for closing on the sale by January 26, 2005.

TP&W and United Transportation Union-Illinois Legislative Board ("UTU-IL") petitioned the Board on November 5 and 8, respectively, to stay the Board's decision served October 28, 2004. Those petitions were denied in a Chairman's order served on November

¹ Given that prices between willing buyers and willing sellers are often the best indication of market value, TP&W continues to strain credulity by arguing that the value of the track is almost four times the amount for which it previously sold the track.

² *SF&L Railway, Inc.-Acquisition and Operation Exemption-Toledo, Peoria and Western Railway Corporation Between LaHarpe and Peoria, IL*, STB Finance Docket No. 33995, et al., served October 17, 2002, slip op. at 18-19.

24, 2004. After receiving KJRY's reply to its stay petition, TP&W requested a 20-day extension of the due date for filing its reconsideration petition. The Board granted TP&W and UTU-IL a 12-day extension by order served November 16. TP&W, but not UTU-IL, petitioned for reconsideration of the Board's Decision on November 29. KJRY hereby moves to strike portions of TP&W's Petition as improperly submitted.

SUMMARY OF ARGUMENT

KJRY hereby moves to strike (1) Sections II.B, II.C., and III of the legal argument; (2) the Verified Statement of Mark D. Garvin, except for his last sentence on page 27 and the right-hand column on his Exhibit E; (3) the Opinion of Wildman, Harrold, Allen & Dixon; and (4) the Verified Statements, in their entirety, of Messrs. Charles W. (Sandy) Rex III and Douglas S. Golden. The challenged evidence is not "new" evidence that was unavailable at the time that TP&W filed its Comments on October 16, 2003, and acceptance and consideration of that evidence by the Board is not necessary to satisfy TP&W's due process rights.

Sections II.B. and II.C., the Opinion of Wildman, Harrold, Allen & Dixon, and the Verified Statements of Messrs. Rex and Golden all involve the submission of supplemental real estate title and valuation evidence that was clearly available to TP&W on October 16, 2003 and is thus not "new" evidence. With the exception of the right-hand column on Exhibit E and the last sentence of his statement, the evidence submitted by Mr. Garvin merely attempts to support a new argument by TP&W that the Board must value the Line as of the date of its decision. Section III of the legal argument is merely new argument in the nature of a settlement offer by TP&W, and has nothing whatsoever to do with the merits of the Board's decision.

New evidence can be submitted to support a petition for reconsideration, but only if the new evidence was not available during the course of a proceeding. Here, instead of submitting that type of new evidence, TP&W seeks reconsideration based upon evidence that was previously available but that TP&W did not bother to seek out or present, choosing instead to rely on statements from their own in-house witnesses. However, now that the Board has found much of TP&W's evidence unconvincing, TP&W wants another "bite at the apple" to attack both the underlying rationale of the Board's decision and KJRY's previously-submitted evidence. In other words, TP&W wants to rebut KJRY's previously submitted rebuttal and to make new arguments regarding the Board's decision, rather than filing and arguing truly "new" evidence. The Board should reject this approach.

The mere fact that the Board found TP&W's previous evidence unconvincing does not justify TP&W's submission of previously-available but unused evidence. Accordingly, TP&W's proffered evidence concerning its title to the right-of-way, the price of scrap and relay steel, and its proffer of yet another revised valuation methodology should not be considered by the Board and should be stricken.

ARGUMENT

TP&W's proffered "new" evidence concerning title to the right-of-way real estate, the value of scrap and relay steel, and appropriate valuation methodologies was available and could and should have been submitted in TP&W's October 16 reply to KJRY's Supplemental Application. The submission of such evidence is not necessary to remedy an alleged due process violation nor is it truly "new" evidence, but instead is merely "newly-raised" evidence.

Initially it should be noted that KJRY does not seek to strike portions of the Petition that actually are “new” evidence or result from changed circumstances. Accordingly, KJRY does not seek to strike TP&W’s evidence regarding the alleged new shipper on the Line, as that appears possibly to be a changed circumstance or new evidence. *But see Denver Terminal Railroad Company—Adverse Discontinuance—In Denver, CO*, Docket No. AB-446 (Sub-No. 2) (served Jan. 9, 1997), slip op. at 4 (evidence occurring between the close of the record and issuance of a decision is not new evidence). Although KJRY could argue that this evidence should be stricken because TP&W has admitted that it was in negotiations with this alleged shipper in March 2004, around the time it filed evidence on fluctuations in steel prices, KJRY is not moving to strike this evidence. Likewise, KJRY does not seek to strike the evidence and argument related to the tax credit issue, as that truly is a changed circumstance arising from a statute that was signed into law less than a week prior to service of the Board’s October 28 Decision. Neither does KJKRY seek to strike the evidence of “reroll” steel prices which arguably was invited by the Board and to which KJRY will reply by December 9, pursuant to the Board’s invitation on page 15 of its October 28 Decision herein. Although none of the evidence and arguments on these issues is convincing, they are arguably permissible, and KJRY will respond to them. Thus, KJRY’s motion to strike is narrowly tailored to cover only those portions of the Petition that involve evidence and argument that was previously available to TP&W on October 16, 2003 but that TP&W did not submit.

Failing to strike TP&W’s evidence with respect to the real estate issues and the valuation of scrap steel will only encourage TP&W and parties to other Board proceedings to wait until the Board rules against them before preparing and presenting the best evidence they

can muster. Such a procedure is inimical to orderly handling of matters before the Board and is completely contrary to previous Board precedent.

I. EVIDENCE PRESENTED TO SUPPORT RECONSIDERATION OF A BOARD DECISION MUST HAVE BEEN UNAVAILABLE AT EARLIER STAGES OF THE PROCEEDING TO BE CONSIDERED “NEW.”

Board precedent requires that purported new evidence supporting a petition for reconsideration be evidence that was not previously available. “[N]ewly raised evidence is not the same as *new* evidence.” *Friends of the Sierra R.R., Inc. v. ICC*, 881 F.2d 663, 667 (9th Cir. 1989). “[N]ew evidence’ is not newly presented evidence, but rather is evidence that could not have been foreseen or planned for at the time of the original proceeding.” *Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Incorporated – Control – Illinois Central Corporation, Illinois Central Railroad Company, Chicago Central and Pacific Railroad Company, and Cedar River Railroad Company*, STB Finance Docket No. 33356, slip op. at 6 (STB served Aug. 27, 2002)(“*CN/IC*”). This principle was reaffirmed just two months ago, when the Board said:

[T]he Board generally does not consider new issues raised for the first time on reconsideration where those issues could have and should have been presented in the earlier stages of the proceeding. Moreover, the term “new evidence” refers to evidence that was not reasonably available to the party when the record was developed, and not simply newly raised. See *Friends of Sierra R.R., Inc. v. ICC*, 881 F.2d 663, 667 (9th Cir. 1989). Nothing in the statute or the Board’s regulations obliges the agency to rethink its decisions whenever a party wishes to try out a new theory or finds new information at a late stage in the process. *Connecticut Trust for Historic Preservation v. ICC*, 841 F.2d 479, 484 (2d Cir. 1988). And if a party were free to reshape its case, so long as it did so within 20 days after a decision, the administrative process might never end. The agency is not expected to “behave like Penelope, unraveling each day’s work to start the web again the next day.” *Western Coal Traffic League v. ICC*, 735 F.2d 1408, 1411 (D.C. Cir. 1984).

Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42056 (served Sept. 27, 2004), slip op. at 3.

The Board will accept evidence that is genuinely new. *See, e.g., Duke Energy Corporation v. Norfolk Southern Railway Company*, STB Docket No. 42069, *et al.* (served Oct. 20, 2004) (accepting a new government coal production forecast as the basis for recalculating volumes on which stand-alone costs were determined). It will not, however, accept evidence which is merely newly-produced. *See Pejepscot Industrial Park, Inc., d/b/a Grimmel Industries – Petition for Declaratory Order*, STB Finance Docket No. 33989 (served Nov. 7, 2003), slip op. at 3:

Parties in proceedings such as this one are strongly encouraged to provide the Board with a complete and accurate record prior to the issuance of the Board's decision. Indeed, the Board would not ordinarily accept evidence or argument offered in connection with a petition for reconsideration unless the material in question is truly new (as opposed to newly offered) evidence. [Footnote citing authorities omitted.]

Petitions for reconsideration premised on evidence that was previously available but was merely not submitted are routinely denied by the Board. *See, e.g., B. Willis, C.P.A., Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34013 (served July 26, 2002) (“*B. Willis Decision*”), slip op. at 3-4 (denying petition to reopen partly because the petitioner's filings showed that it had long known what its petition to reopen claimed that it did not know and thus there were no changed circumstances or new evidence);³ *Idaho Northern & Pacific Railroad Company-Abandonment Exemption – In Wallowa and Union Counties, OR*, Docket No. AB-433X (served Dec. 13, 2001), slip op. at 5 (holding that state agency was not entitled

to pass upon the opportunity to submit environmental comments and then years later seek reopening based on a change in environmental issues that existed but were not raised at the time of the decision); *CSX Corporation, et al.-Control and Operating Leases/Agreements-Conrail, Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33388, Decision No. 96 (served Oct. 19, 1998), slip op. at 19 (denying petitioner's reopening request that the Board reverse its general override of contract anti-assignment clauses with respect to a contract that the petitioner failed to mention until after the Board issued its decision); *Burlington Northern Railroad Company-Abandonment Exemption-In Skagit County, WA*, Docket No. AB-6 (Sub-No. 299X) (served Sept. 30, 1997), slip op. at 4 (refusing to accept as grounds for reopening newly-offered evidence of state statutes that existed at time of initial decision); and *Denver Terminal Railroad Company-Adverse Discontinuance-In Denver, CO*, Docket No. AB-446 (Sub-No. 2) (served Jan. 9, 1997), slip op. at 4 (evidence arising between the close of the record and issuance of a decision is not "new" evidence).

The principle and the law are clear: for the Board to accept evidence as the basis of a petition for reconsideration, such evidence must be truly new – *i.e.*, not having been reasonably available to the party when the record was developed - not merely be newly-raised evidence. Review of TP&W's Petition with the foregoing principle and precedents in mind plainly demonstrates that TP&W's evidence with respect to the quality of its real estate title, the value of scrap and relay steel, and the appropriate valuation methodology is not "new"

³ "A party should not withhold evidence it considers to be relevant until after it has obtained a result not to its liking, and then seek to have the proceeding reopened so that it may introduce the evidence." *Id.*

evidence. That evidence and argument should therefore be stricken and should not be considered by the Board in passing on TP&W's Petition.

II. TP&W'S "NEW" EVIDENCE WITH RESPECT TO THE REAL ESTATE ISSUES DOES NOT MEET THIS TEST AND SHOULD BE STRICKEN FROM THE RECORD

A. TP&W Has Failed To Demonstrate That Its Due Process Rights Would Be Violated If The Evidence Is Stricken

As an initial matter, TP&W doesn't really claim that its evidence is "new" evidence; indeed, it admits that it would have submitted such evidence before, but thought it unnecessary. Instead, TP&W claims a right to submit the evidence on grounds that it would be denied due process if not allowed to do so. This argument was first raised in TP&W's stay petition:

[I]n 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 November 5, 2004 Stay Petition at 8 (emphasis supplied). In the same Stay Petition, TP&W also claimed that it would:

[D]emonstrate [in its petition for reconsideration] 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 an opportunity to respond.

Stay Petition at 9 (emphasis supplied). Of course, one need merely give a cursory review of the record to determine that TP&W's statements are simply false and that TP&W has made no such demonstration of a violation of its due process rights.

KJRY's rebuttal was not its first evidence on the real estate issues. Through the testimony of its valuation experts John W. Gohmann and B. Allen Brown, KJRY put the best evidence available to it regarding the quality and quantity of TP&W's title to the right of way in its April 9, 2003 Application. Indeed, KJRY's application included a valuation of the property based on both real estate and track values. *See* KJRY's Application at 10-16, 160-196.⁴ With respect to real estate, KJRY's witness John Gohmann estimated that TP&W's right-of-way consisted of approximately 864 acres.⁵ He further estimated, based on his experience and on historical trends, that at best TP&W would own half of the right-of-way in fee. He valued those 432 acres of right-of-way at \$100,000, based on information and assumptions then available to him. KJRY's Application at 176, 186-187. Thus, Mr. Gohmann put directly in issue the quality of TP&W's title to the right-of-way.

Mr. Brown's testimony also challenged TP&W's title. Mr. Brown, who presented a separate NLV calculation that generally supported Mr. Gohmann's overall valuation, stated,

Also, I did not have any information on the quantity of right-of-way real estate owned by TP&W or the quality of TP&W's title to that land. *Based on discussions with TP&W, it has been my impression that TP&W does not have a significant amount of fee ownership of real estate in the line* because they never offered to sell to KJRY nor asked KJRY to pay for real property, but only track materials. (Emphasis added.)

KJRY Application at 164. One can squabble on whether or not KJRY's evidence was definitive, but it is patently false to claim that KJRY did not present "any" evidence regarding

⁴ In relation to real estate values in particular, *see* pages 15, 164, 175-177, 186-187.

⁵ In fact, totaling the acreage shown on Exhibit D to the October 2003 statement of TP&W's real estate witness (TP&W Comments in Opposition at 149-152) shows that Mr. Gohmann's estimate of the total acreage involved was within 7.3% of the amount calculated by TP&W from its review of the deeds and valuation maps (that it refused to produce in discovery).

the real estate issues in its application or that KJRY presented its real estate evidence for the “first time” in its rebuttal.⁶

TP&W knew from KJRY’s Application that the quality and quantity of TP&W’s right-of-way was in issue and replied to that evidence in its October 16, 2003 filing. TP&W’s real estate witness was Todd Cecil, RailAmerica’s Vice President for Real Estate, who said that his statement would “critique the valuation included in the Application.” (TP&W Comments in Opposition, Vol. 1 at 108). This is a clear acknowledgement that KJRY had filed real estate valuation testimony. Mr. Cecil further criticized KJRY’s valuation of the real estate by stating, “in KJRY’s estimate of land value there was apparently absolutely no title review undertaken, another reason that their estimate of value is completely without foundation.” *Id.*, at 118. Notwithstanding TP&W’s Stay Petition which said “In the application, KJRY did not submit any [real estate] evidence,” Mr. Cecil’s two statements quoted above clearly recognize that KJRY did in fact present evidence on the quantity of real estate in the right-of-way and the quality of TP&W’s title. Mr. Cecil then went on to put in his own evidence regarding the quality and quantity of the real estate and put into evidence for the first time the right-of-way deeds that KJRY had requested in discovery but that TP&W had refused to produce.⁷

⁶ Indeed, in its Petition for Reconsideration, TP&W backs away from the assertion that KJRY presented no evidence on real estate title or value in KJRY’s Application, arguing instead that TP&W was in a “difficult position” because KJRY’s real estate evidence was not “traditional.” *See* TP&W Petition at 13.

⁷ KJRY’s Document Request No. 2 specifically sought “All valuation maps, real estate records, deeds, track charts, maintenance records, hi-rail and other inspection records with respect to the Line.” TP&W refused this request. Had these records been produced, they would have enabled KJRY to submit more specific real estate valuation information with its application. Because they were not produced, KJRY was forced to stand on the testimony of

Under the procedural schedule and as the party with the burden of proof, KJRY had every right once TP&W replied to the Application on October 16, 2003, to rebut the TP&W's reply evidence. *Keokuk Junction Railway Co.--Feeder Railroad Development Application -- Line Of Toledo, Peoria & Western Railway Corporation Between LaHarpe And Hollis, IL*, Finance Docket No. 34335 (served July 9, 2003), slip op. at 6 (decision setting the procedural schedule and authorizing KJRY to reply to TP&W's opposition to the Application). To rebut Mr. Cecil's claims concerning the net liquidation value ("NLV") of the real estate at issue, KJRY hired Mr. Mooty and Mr. Higgs. These experts did not present evidence regarding a new issue, but thoroughly analyzed Mr. Cecil's claims, the deeds, and other exhibits, in order to rebut Mr. Cecil's estimations of the proper NLV of the real estate. The Board then reviewed the initial evidence in the application, the evidence in reply, and KJRY's rebuttal evidence and issued a well-reasoned decision based upon the evidence of record.

There is nothing arbitrary, capricious or contrary to law in the Board's approach of following its own regulations and procedural schedule. KJRY had every right to file rebuttal evidence. It is not a violation of TP&W's due process rights to deny TP&W an opportunity to reply to KJRY's rebuttal. This is particularly true here, where TP&W waited over a year, until long after the record closed and after the Board found TP&W's evidence unconvincing, to reply to KJRY's rebuttal. *See generally the B. Willis Decision*, slip op. at 3-4; *Application Of The National Railroad Passenger Corp. Under 49 U.S.C. 24308(a)—Springfield Terminal Railway Company, Boston And Maine Corporation, And Portland Terminal Company*, F.D. No. 33381, 1997 STB LEXIS 134 (STB served Jun. 25, 1997)(Denying Amtrak the right to Messrs. Gohmann and Brown that TP&W's title was suspect and then to submit rebuttal to

file a rebuttal when it knew the issues in the proceeding); and *Bituminous Coal—Hiawatha Utah, To Moapa, Nevada Aggregate Volume Rate On Coal—ACCO, Utah To Moapa, Nevada*, Nos. 37038 and 37409, 1990 ICC LEXIS 416 (ICC served Dec. 19, 1990)(granting a motion to strike new evidence presented in a petition to reopen as going beyond the scope of a reopening petition and notwithstanding the fact that the other side would have had an opportunity to respond to the new evidence).

Furthermore, notwithstanding TP&W's claim that it would "demonstrate" in its Petition that its due process rights would be violated if it were not allowed to present this new evidence, one can search TP&W's Petition from one end to the other to find such a demonstration. There is not even one citation to a rule, regulation, case, or precedent that suggests that KJRY's submission of evidence to rebut TP&W's reply to KJRY's initial evidence on real estate valuation deprived TP&W of its due process rights. The most one can find are two unsubstantiated references.

The first reference says that "by waiting until rebuttal to file its first evidence on the value of real estate, KJRY denied TP&W the opportunity to reply to that evidence." As noted, however, KJRY did not wait until rebuttal to file its first evidence and TP&W was not denied its right to reply to KJRY's evidence. In fact, as noted, TP&W did reply to KJRY's evidence presented in the application. As TP&W says, "TP&W responded with substantial evidence of title and valuation." Petition at 13 (emphasis supplied). It is simply not accurate to say that TP&W was denied an opportunity to reply to KJRY's evidence.⁸

TP&W's evidence; which TP&W first produced in TP&W's October 16 filing.

⁸ It is true that TP&W was not given an opportunity to reply to KJRY's rebuttal evidence, but TP&W has no legal right to file a "reply" to properly filed rebuttal evidence. *American*

The second attempt to “demonstrate” that its due process rights were violated is found at page 14 of the Petition, where TP&W states that the Board is required to “provide due process to TP&W” and that “TP&W must be given the opportunity to demonstrate the NLV since the Board cannot order the sale at less than the NLV.” Yet, TP&W was given the opportunity “to demonstrate NLV” and in fact took advantage of that opportunity. TP&W presented, in its own words, “substantial” evidence of title and valuation in its October 16, 2003 reply. Indeed, TP&W’s October 16 filing was almost entirely devoted to demonstrating the NLV of the line. What TP&W doesn’t like is that the Board did not agree with their NLV evidence, but to claim that TP&W was never given the opportunity to demonstrate the NLV of the line is simply wrong.

In the end, if TP&W believed that KJRY’s rebuttal evidence deprived it of its due process rights it could have sought permission to supplement the record. It did not do so. It could have moved to strike the testimony of Mr. Mooty or Mr. Higgs as improper rebuttal evidence. It did not do so. Finally, as it has consistently demonstrated throughout this proceeding (TP&W has not been shy about filing unscheduled pleadings or new evidence), TP&W could have filed additional evidence on the real estate issues before the Board issued its decision. It did not do so.

Standard, Inc. – Petition for Declaratory Order – Certain Rates and Practices Of Transcon Lines, No. 40933 1993 MCC LEXIS 170, at * 6, (ICC served Oct. 12, 1993)(“The Commission’s rules provide that ‘a statement responding to an opening statement is referred to as a ‘reply’, and a statement responding to a reply is referred to as a ‘rebuttal.’ Replies to rebuttal material are not permitted.”) Yet, that is precisely what TP&W claims it has a due process right to do – respond to KJRY’s previously submitted rebuttal material. TP&W does not have this right and it is not a violation of due process to deny them the right to respond to KJRY’s rebuttal evidence.

Having failed to pursue any of these remedies and having learned that the Board found its October 16 evidence unconvincing, TP&W wants another opportunity to demonstrate NLV and attack KJRY's evidence, virtually starting the proceeding over again. The Board should not now bail them out of their slowly sinking ship by allowing them to present evidence that they should have presented long ago. In fact, it was only after the Board concluded that TP&W's real estate evidence was unconvincing in granting KJRY's Application that TP&W raised its due process argument. Indeed, TP&W's due process argument could hardly be further from the mark, seeking to blame KJRY and the Board for TP&W's own decisions about what evidence to present. The Board should not be fearful of doing what its precedents and rules allow – and, indeed, require - it to do; namely, to strike TP&W's evidence as “newly-raised” evidence, not “new” evidence.⁹

B. TP&W's “New Evidence” Is Merely “Old Evidence” That Is Newly-Raised

As noted, the legal standard for acceptance of new evidence in the context of a petition for reconsideration is that the evidence must be truly “new;” that is, unavailable during the course of the proceeding. If evidence and arguments in a reconsideration petition are not “new” but are merely “newly-raised,” the Board's long-standing precedent has been to strike such evidence. Clearly, TP&W's evidence with respect to the real estate issues fails that test.

⁹ In fact, Chairman Nober's decision denying the stay specifically found that TP&W's due process claim “lacks merit as well.” Stay Decision at 3. Unfortunately, the Stay Decision then muddled the issue by stating that the Board's decision to grant additional time for TP&W to complete a review of the quality of TP&W's title in the right-of-way satisfied the due process claims. This statement could be interpreted to mean that the Board has pre-judged the issue and pre-determined to let TP&W present its newly raised evidence. If such, it would be KJRY's due process rights that were violated, not TP&W's. In the end, however, there is no valid due process claim by TP&W and the Board would not be in error in striking TP&W's newly presented evidence regarding the quality of TP&W's title in the right-of-way.

TP&W was fully on notice that the quality of its title to the right-of-way was in issue. TP&W filed evidence on that issue in the form of the testimony of Mr. Cecil. His testimony addressed the extent to which the title was held in fee, the language of the deeds, the amount of acreage involved, and presented two different methodologies to determine valuation of the real estate. KJRY's rebuttal presented evidence addressing precisely those same issues.

Now, on reconsideration, TP&W has submitted the Opinion of Wildman, Harrold, Allen & Dixon and the Verified Statements of Messrs. Charles W. (Sandy) Rex III and Douglas S. Golden addressing the extent to which the title was held in fee, the language of the deeds, the amount of acreage involved, and the methodology to determine valuation of the real estate. None of this is truly new evidence; rather, it is just newly-raised, cumulative argument addressing (again) the very same points that Mr. Cecil's testimony addressed. There is not a single piece of evidence in the Petition that could not have been presented by TP&W in its October 2003 filing or in TP&W's late-filed claims about increased steel values.

TP&W could have presented these very same witnesses in its October 2003 filing, but chose not to do so. Instead, as noted, TP&W relied upon RailAmerica's Texas-based corporate officer in charge of real estate. That was TP&W's choice. TP&W should not now be allowed to undo that deliberate choice simply because the Board found TP&W's real estate title evidence unconvincing any more than KJRY should be allowed to submit additional evidence by outside parties supporting the statement of KJRY's General Counsel that the Board found unconvincing.

Should the Board accept TP&W's evidence as a basis for reconsideration of the Board's decision, it will merely encourage serial litigation of issues before the Board. As the Board has stated, "[a] party should not withhold evidence it considers to be relevant until after

it has obtained a result not to its liking, and then seek to have the proceeding reopened so that it may introduce the evidence.”¹⁰ Yet, that is precisely what TP&W is attempting to do here. The Board should follow its long-standing precedent and strike those portions of the Petition dealing with real estate title and valuation. Those portions of the Petition are simply not evidence that “could not have been foreseen or planned for at the time of the original proceeding,” *CNIC*, slip op. at 6, but instead are old issues newly raised.

III. OTHER PORTIONS OF TP&W’S PETITION ALSO SHOULD BE STRICKEN AS IMPROPERLY FILED EVIDENCE

A. TP&W’s Evidence Regarding Higher Steel Prices Did Not Comply With The Board’s Order And Is Not Properly The Subject Of A Petition For Reconsideration

The track valuation evidence contained in TP&W’s Petition for Reconsideration is not new evidence, and goes far beyond the Board’s limited invitation to TP&W to submit specific information on reroll rail values. The Board’s October 28 decision specifically stated that the Board would consider increasing the purchase price of the Line if TP&W submitted evidence on or before November 29, 2004 establishing a higher salvage value for the Line’s reroll rail. *See* October 28 Decision at 15. As the Board stated, reroll rail is rail that is one grade better than scrap but lesser quality than relay rail, and is mainly used for making fence posts or “rebar.” *Id.* The Board provided TP&W with this opportunity because the Board had properly determined to apply an average of steel prices in order to determine the value of scrap, relay, and reroll rail. The average was to be calculated from April 2003 to May 2004.

¹⁰ *See, B. Willis Decision*, slip op. at 3-4; *S.R. Investors, Ltd., d/b/a/ Sierra Railroad Company – Abandonment – In Tuolumne County, CA*, AB-239X 1988 ICC LEXIS 17 at * 7 (ICC served Jan. 20, 1988)(“A party should not be able to withhold available evidence until after it has obtained a result not to its liking, and then introduce that evidence on appeal.”).

While prices during that period were available for relay and scrap rail so that an average could be determined, prices for reroll rail were not available to the STB. Accordingly, the STB provided TP&W with an opportunity to supplement the record with specific information on reroll prices.

TP&W addressed the Board's directive in one sentence in the Verified Statement of Mr. Mark Garvin – *i.e.*, the last sentence at pg. 27 of the Petition - and the information in the right-hand column of Mr. Garvin's Exhibit E. Of course, even this evidence does not comply with the Board's directive as Exhibit E contains unsubstantiated scrap and reroll rail values for the past six months.

In fact, virtually all of Mr. Garvin's statement deals with the prices of scrap and relay steel, not reroll. The main thrust of his statement is that the price that the Board should use to determine net salvage value ("NSV") should be the price of steel on November 1, 2004, not an average price. Likewise, TP&W's counsel claims that the "Board erred in averaging the price of scrap steel, and that TP&W was entitled to the value of scrap steel on the date the *Sale Decision* was served." TP&W Petition at 17. Curiously, he then cites four cases in support of his statement, all of which involve the Board averaging the price of steel over a period of time in order arrive at a proper valuation. TP&W Petition at 17-18 (citations omitted).

No attempt is made to show why Mr. Garvin's evidence and the new arguments of TP&W's counsel should be accepted in the context of a petition for reconsideration. Should this statement and evidence be accepted because it represents new evidence, changed circumstances, or somehow shows that the Board committed material error? TP&W makes no effort to answer that question.

Mr. Garvin's statement is nothing more than an attempt to reargue the Board's findings by submitting evidence of steel prices for the past six months, up to and including November 1, 2004, the Monday following the date on which the Decision was served. As such, this is not "new" evidence and should be stricken. *See, e.g., Denver Terminal Railroad Company—Adverse Discontinuance—In Denver, CO*, Docket No. AB-446 (Sub-No. 2) (served Jan. 9, 1997), slip op. at 4 (evidence occurring between the close of the record and issuance of a decision is not new evidence); and *Connecticut Trust for Historic Preservation v. ICC*, 841 F.2d 479, 484 (2d Cir. 1988)(noting that the Board does not have to accept new evidence whenever a party wishes to try out a new theory or finds new information at a late stage in the process). Likewise, because TP&W ignored the Board's directive and submitted different evidence than what the Board asked for, Mr. Garvin's statement and the legal references to that statement should be stricken from the record, with the exception of the evidence regarding reroll rail. *Associated Traffic Services, Inc.--Petition For Declaratory Order--Certain Rates And Practices Of Saia Motor Freight Line, Inc.*, STB Docket No. 41996 (served May 8, 1998), slip op. at 2, n. 3 (striking as irrelevant arguments concerning contract interpretation in light of the Board's policy of not interpreting contracts and the Board's application of tariff principles to the case).

B. TP&W's Settlement Offer Is Irrelevant To The Board's Decision And Should Be Stricken

TP&W's argument in Section III of the Petition that, rather than complying with the Board's Decision, TP&W is willing to sell KJRY a part of the Line that KJRY has been fighting throughout this proceeding to preserve is irrelevant and should be stricken. KJRY applied to the Board to acquire the entire line from La Harpe to Hollis, not to some

intermediate point chosen by TP&W, and KJRY fought hard against TP&W's efforts to truncate the sale. Ultimately, the Board agreed with KJRY in authorizing KJRY to purchase the line it applied to acquire, not just some part of it that TP&W did not want.

TP&W's argument that instead of selling KJRY the Line as directed by the Board, it will sell KJRY part of that line and grant it trackage rights over the rest, can best be characterized as a settlement offer. Such an offer is irrelevant, has no place in a petition for reconsideration filed before the Board, and should be stricken pursuant to 49 C.F.R. § 1104.8. If TP&W were indeed interested in a compromise, it should have accepted KJRY's numerous offers to purchase the line which KJRY proffered throughout this proceeding, but it did not do so. Now, faced with the prospect of a Board imposed sale, TP&W wants to compromise, but it should have approached KJRY a long time ago, which it did not do.

In any event, KJRY is not interested in TP&W's offer. KJRY has often said in this proceeding that it seeks to preserve an historic through route. A proposal to sell KJRY only part of that route and to grant trackage rights over the remainder is not satisfactory. Indeed, in the very same pleading where it offers KJRY such trackage rights, TP&W states, "[A] railroad that owns its line has much more control over its ability to move its traffic and adequately serve its shippers than a tenant railroad that is subject to the priorities of the owning railroad." TP&W Petition at 9. Apparently, even TP&W recognizes that an offer to grant KJRY trackage rights is inadequate.

IV. ACCEPTING TP&W'S "NEW" EVIDENCE WOULD REPRESENT BAD POLICY AND SET SEVERAL BAD PRECEDENTS FOR FUTURE BOARD PROCEEDINGS.

Allowing TP&W to recast its entire evidentiary presentation in this case now, over a year after the scheduled close of the record, would be particularly egregious for three reasons.

First, with respect to the real estate evidence, TP&W is now supplementing evidence that it previously withheld from discovery. KJRY served discovery with its application that asked TP&W to produce real estate information. TP&W refused to do so. Then, in its own evidentiary presentation, TP&W used the evidence that it had withheld from discovery as part of its affirmative case. To allow TP&W now to rely on and expand upon evidence that it refused to produce in response to discovery would be egregiously unfair, and would set a precedent that will damage the Board's ability to develop a complete record in future cases.

Second, TP&W has now only sought to present additional evidence after the Board found TP&W's evidentiary showing unconvincing. Despite making a number of supplemental evidentiary filings after the scheduled close of the record, TP&W did not allege any unfairness in the Board's acceptance of KJRY's rebuttal real estate title evidence until after the Board found TP&W's evidence unconvincing. If TP&W actually perceived any unfairness in the procedures in this case (other than perceiving it unfair that TP&W's view did not prevail), it was obligated to object to that unfairness in a timely fashion, not to wait until the Board ruled against it and then object. The numerous unscheduled filings that TP&W submitted in this case show that, despite the Board's procedural rules, TP&W did not consider itself limited with respect to submitting arguments and evidence to the Board at virtually any point. In light of that unique pattern of behavior by TP&W in this case, TP&W's failure to object promptly to the alleged unfairness of KJRY's real estate rebuttal evidence should be considered a waiver of any such objection.

Third, allowing TP&W to wait more than a year to present its evidence facilitates TP&W's pattern of foot-dragging and delaying this case, preventing prompt restoration of service that TP&W has directly or indirectly cut off for nearly four years. TP&W sold

virtually this entire Line to SF&L in December 2000 to facilitate abandonment and scrapping of the Line. Since that date, SF&L and TP&W published rates that effectively precluded rail service over the Line. They also failed to respond to rate and service requests and in other respects failed to meet their common carrier responsibilities. The Board recognized this in the Decision by finding that the public convenience and necessity required sale of the Line to KJRY. In light of this prolonged pattern of service inadequacy, it would be unconscionable to allow this case to be prolonged by TP&W's untimely submission of evidence that it could have presented in a timely manner but did not.

CONCLUSION

TP&W's claim that its due process rights would somehow be violated if it is not allowed to present yet another round of evidence and argument regarding the quality and quantity of the real estate right-of-way is not legally or factually correct. TP&W has known since KJRY filed its application in this matter nearly 20 months ago that KJRY contended that TP&W did not have fee title to much of the Line's right of way. KJRY pursued discovery on that issue, discovery that TP&W refused to answer, and lacking the specific information that was in the custody and control of TP&W, submitted its best evidence of record in its application.

TP&W, as it had a right to do, filed a reply to KJRY's application, which TP&W entitled "Comments." But in submitting its evidentiary filing, TP&W produced and relied upon the very same evidence that it had refused to produce in discovery. It also relied upon the testimony and expertise of an officer from its parent corporation. As it had a right to do, given that it had the burden of proof and is entitled to close the record, KJRY filed a convincing rebuttal to TP&W's evidence. TP&W did not, at the time, contest that filing,

move to strike it, or seek to supplement the record because it felt its due process rights were violated.

The Board then issued its decision, rejecting in large part the evidence submitted by TP&W and accepting KJRY's initial evidence and KJRY's rebuttal evidence. Now that the Board has ruled in KJRY's favor, however, TP&W claims that it would be unfair to deny it the opportunity to present a raft of new real estate evidence in order to rebut the evidence and issues raised in KJRY's rebuttal. As it had done in the past and as it is legally entitled to do, the Board should strike TP&W's new evidence for what it is—an unlawful rebuttal to a rebuttal.

TP&W also claims that the evidence should be accepted because it is "new" evidence for which TP&W is entitled to file in the context of a petition for reconsideration. KJRY submits that TP&W's real estate evidence supporting its Petition is not "new" evidence, just newly-submitted evidence that the Board has routinely rejected in the past. Sections II.B. and II.C., the Opinion of Wildman, Harrold, Allen & Dixon; and the Verified Statements of Messrs. Rex III and Golden all involve the submission of supplemental real estate title and valuation evidence that was clearly available to TP&W on October 16, 2003 when it filed its initial Comments. The fact that TP&W did not bother to seek out or present this evidence in the first instance, choosing instead to rely on statements from their own in-house witnesses, does not automatically convert such evidence into "new" evidence. Instead, TP&W simply wants another "bite at the apple" to attack both the underlying rationale of the Board's

decision and to attack KJRY's previously submitted evidence. The Board should reject this approach and strike those portions of the Petition that do not represent new evidence or are irrelevant.

Respectfully submitted,



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December 3, 2004

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2004, I have caused the foregoing Motion To Strike
be served by courier on:

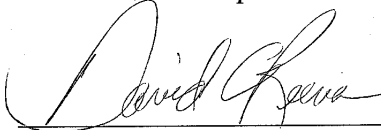
Louis E. Gitomer
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and by first class mail or more expeditious service on other parties of record.

A handwritten signature in cursive script, appearing to read "David C. Reeves", is written over a horizontal line.

David C. Reeves
Attorney for Keokuk Junction Railway Co.