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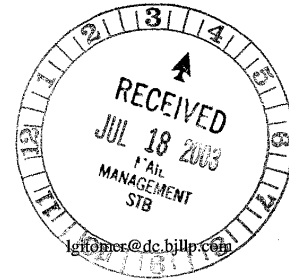
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July 18, 2003

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

FEE RECEIVED

JUL 18 2003

**SURFACE
TRANSPORTATION BOARD**

208445

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 Appeal of the Toledo, Peoria and Western Railway Corporation, a check for the \$150 filing fee, and three diskettes with the file Appeal.doc.

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

Respectfully submitted,

Louis E. Gitomer

Enclosures

FILED
JUL 18 2003
**SURFACE
TRANSPORTATION BOARD**

ENTERED
Office of Proceedings

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Part of
Public Record

ORIGINAL

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



APPEAL OF TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION

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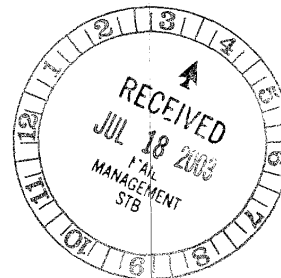
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JUL 18 2003
SURFACE
TRANSPORTATION BOARD
Attorneys for: TOLEDO, PEORIA AND
WESTERN RAILWAY CORPORATION

Dated: July 18, 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

APPEAL OF TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION

Toledo, Peoria and Western Railway Corporation (“TP&W”), pursuant to 49 C.F.R. § 1115.1(c), appeals the decision of the Acting Director of the Office Proceedings in the instant proceeding that was served on June 9, 2003. In that decision, the Acting Director accepted as complete the application under 49 U.S.C. § 10907 and 49 C.F.R. § 1151 of the Keokuk Junction Railway Company (“KJRY”) to force the sale of TP&W’s 76-mile line of railroad between La Harpe, IL, milepost 194.5, and Hollis, IL, milepost 118.5 (the “Line”). *Keokuk Junction Railway Company—Feeder Railroad Development Application—Line of Toledo, Peoria & Western Railway Corporation Between La Harpe and Hollis, IL*, Finance Docket No. 34335 (STB served July 9, 2003) (the “*July 9 Decision*”).

TP&W urges the Surface Transportation Board (the “Board”) to conclude that the *July 9 Decision* is a clear error of judgment and will result in manifest injustice. If the Board does not reject the application, TP&W respectfully requests clarification of the exact extent of the application.

BACKGROUND

At the end of March 2003, TP&W began to negotiate the sale of the 39.5-mile segment between Smithfield and La Harpe, IL to KJRY. TP&W offered to sell this segment to KJRY for \$3.95 million. Instead of negotiating, KJRY began the instant proceeding.

KJRY filed a Feeder Line Application on April 9, 2003 (the "Application"), seeking to adversely seize TP&W's 76-mile line of railroad between La Harpe, IL, milepost 194.5, and Hollis, IL, milepost 118.5 (the "Line").¹ TP&W filed a Petition to Reject on April 24, 2003 (the "Petition"). The United Transportation Union-Illinois Legislative Board filed a comment on May 5, 2003 supporting the Petition (the "Comment"). KJRY replied to TP&W's Petition on May 7, 2003 (the "Reply"). The Director of the Office of Proceedings neither accepted nor rejected the Application. Instead, he gave KJRY a third bite at the apple.

KJRY's offer can only be viewed as a novel attempt to circumvent the statutory requirement intended to ensure that rail carriers receive nothing less than constitutional minimum value for rail lines acquired under the feeder line procedures. The failure to submit a GCV estimate and evidence on a line that clearly has a GCV makes it impossible to ensure compliance with 49 U.S.C. 10907(b)(1). KJRY's trackage rights offer is neither the equivalent of, nor a reasonable substitute for, an actual GCV estimate. As a result, KJRY's offer to purchase the Line for its NLV is deficient and subject to rejection to the extent it includes the Mapleton Segment.

¹ The portion of the Line between milepost 194.5 and milepost 123.0 will be referred to as the "Western Line" and has been the subject of proceedings before the Board. See e.g. *Keokuk Junction Railway Co.-Acquisition and Operation Exemption-West End of Toledo, Peoria and Western Railway Corporation*, STB Finance Docket No. 34085 (STB served October 15, 2001); and *SF&L Railway, Inc.-Acquisition and Operation Exemption-Toledo Peoria and Western Railway Corporation between La Harpe and Peoria, IL*, STB Finance Docket No. 33995 (STB served January 31, 2003). There were also sale discussions between TP&W and KJRY for the Western Line, prior to the filing of the Application. The talks failed because KJRY was unwilling to agree on the net liquidation value of the Western Line with TP&W. The portion of the Line between milepost 123.0 and milepost 118.5 will be referred to as the "Eastern Line." TP&W has not offered to sell the Eastern Line to KJRY since TP&W was acquired by RailAmerica, Inc. ("RailAmerica").

In summary, KJRY has failed to establish that it is a financially responsible person able to pay the NLV of either the Line or the West End or to cover the expenses associated with providing rail service over either of them for the first 3 years of operation. As a result, KJRY has not demonstrated that it is financially responsible.

KJRY's application is subject to rejection based on the above deficiencies. Nevertheless, Board policy encourages feeder line applications. Accordingly, it is appropriate for KJRY to submit, within 30 days from the service date of this decision either: (1) a GCV estimate along with supporting data for the Mapleton Segment of the Line, additional evidence of financial responsibility to purchase and operate the entire Line, and more detailed operating plans and pro forma financial statements; or (2) evidence of financial responsibility to purchase and operate only the West End and more detailed operating plans and pro forma financial statements. Alternatively, KJRY may file a revised application correcting the above deficiencies and incorporating portions of the instant application by reference. See 49 CFR 1151.2(b)(2).

Keokuk Junction Railway Company—Feeder Railroad Development Application—Line of Toledo, Peoria & Western Railway Corporation Between La Harpe and Hollis, IL, Finance Docket No. 34335 (STB served May 9, 2003) (the "*May 9 Decision*"), pages 4-6.

Despite finding that KJRY had not filed a complete application, the *May 9 Decision* gave KJRY an opportunity to supplement the record. However, the *May 9 Decision* imposed a strict, but more than fair, penalty on KJRY if it failed to comply.

The application or the portion of the application that includes the Mapleton Segment will be rejected and the proceeding or the portion of the proceeding that includes the Mapleton Segment will be discontinued if KJRY does not submit, within 30 days from the service date of this decision, the information discussed above. *Id.*, at 6.

KJRY filed Supplemental Evidence on June 9, 2003. TP&W replied on June 24, 2003, and KJRY filed a reply to a reply on June 27, 2003.

ARGUMENT

The *July 9 Decision*, at 6, concluded that “Subject to the filing of an environmental report, KJRY has submitted sufficient information in its application as amended to meet the requirements of 49 CFR 1151.3. The Board will rule on the merits of the application when the record is complete.” TP&W contends that this statement is a clear error of judgment and will result in manifest injustice when viewed in conjunction with the information required by the *May 9 Decision* and the contents of the Supplement, which failed to provide that information. In addition, TP&W has been placed in the untenable position of having to respond to all of the alternate KJRY proposals for its acquisition of the Mapleton Spur. To that end, TP&W requests the Board to order KJRY to clarify its intentions with regard to the Eastern Line and the Mapleton Spur.

1. The Application is not complete.

The Board sought information on the Eastern Line, the Western Line, or a revised application. The Supplement did not address the Western Line or contain a revised application. Nor did the Supplement address the Eastern Line, although the *July 9 Decision* treats the Supplement as if it had.

The Supplement rejected the *May 9 Decision*, refused to bifurcate the Line, and refused to submit going concern value (“GCV”) evidence for the Eastern Line. Supplement at 6-21. The Supplement calculated a GCV for the Line, but used 1998 data, instead of the 2001 and 2002 data provided to KJRY by TP&W as the result of discovery.

The *July 9 Decision* accepted a bank commitment of a loan as evidence of KJRY's financial responsibility, even though the commitment expired on September 30, 2003, well before the end of the evidentiary portion of this proceeding, and even though there was no evidence that the commitment would be extended.

No operating plan was submitted. The *July 9 Decision* must have accepted the statement that "5 employees providing rail service 6 days a week" or "2 employees providing rail service 5 days a week" as the operating plan because there is no other evidence of an operating plan. Such a minimalist statement cannot realistically be considered an operating plan, especially since KJRY claims that it will compete with two Class I railroads for overhead traffic using the Line which is an FRA Class I 10-mile per hour line, while the Class I railroads operate over lines with speeds authorized up to 79 miles per hour.

In accepting the above information as a proper response to the *May 9 Decision*, the acceptance of the Application as supplemented by the *July 9 Decision* is a clear error of judgment and will result in manifest injustice. TP&W respectfully urges the Board to reverse the *July 9 Decision* and reject the Application as supplemented.

Further, the predicate of the *May 9 Decision*, at 6, for allowing KJRY to supplement the Application that it is “Board policy encourages feeder line applications” is clearly at odds with the often expressed view of the Board that it favors private sector solutions over regulatory fiat.² Since the predicate for allowing KJRY to supplement the Application and for the acceptance of the Application is completely the opposite of the Board’s view of regulation versus private sector solutions, the results of the *July 9 Decision* are based on a clear error of judgment and will result in manifest injustice.

2. KJRY must clarify its intentions for the Eastern Line and the Mapleton Spur.

KJRY has proposed three different approaches for handling the Eastern Line and Mapleton Spur. TP&W believes that KJRY has an obligation to present an application with its specific plans, not a moving target that is changed with every pleading.

In the Application, KJRY proposed to acquire the Eastern Line and Mapleton Spur without compensating TP&W, but allowing TP&W access to the shippers on the Mapleton Spur via trackage rights at four times the going rate.

The Supplement at 20 proposes that KJRY acquire the Line less the Mapleton Spur for a reduced net liquidation value (“NLV”) granting TP&W “at no trackage rights charge” trackage rights over the Eastern Line to the Mapleton Spur.

The Supplement at page 57 proposes to acquire the Line for the GCV calculated by KJRY including the Eastern Line and the Mapleton Spur without granting TP&W trackage rights to serve the Mapleton shippers.

² *Procedures to Expedite Resolution of Rate Challenges to be Considered under the Stand-Alone Cost Methodology*, STB Ex Parte No. 638 (STB served April 25, 2003), at 3.

KJRY has presented three different acquisition scenarios. KJRY is in direct violation of 49 C.F.R. § 1151.3(a)(1)(ii) which requires “Identification of the line to be purchased including: (ii) The exact location of the line to be purchased including milepost designations, origin and termination points, stations located on the line, and cities, counties and States traversed by the line.”

By presenting ternary options for the acquisition of the Eastern Line and Mapleton Spur, KJRY has not provided the specific information required by section 1151.3(a)(1)(ii). Not only is TP&W disadvantaged by being forced to respond to three options, any or all of which KJRY can disavow, but the Board is placed in the inefficient position of wading through evidence and argument concerning three options when the regulations require one proposal for analysis.

TP&W urges the Board to reject the Application until KJRY decides on the exact property it seeks to acquire. However, at a minimum the Board’s rules and due process require KJRY to clarify the actual acquisition that it proposes, not a confusing smorgasbord.

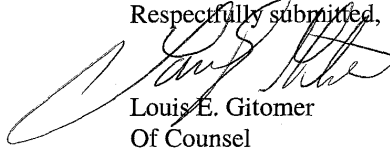
CONCLUSION

The *July 9 Decision* is a clear error of judgment and will result in manifest injustice.

TP&W respectfully requests that the Board reverse the *July 9 Decision* and reject the Application, as supplemented, as incomplete for the reasons stated in this appeal. In the alternative, TP&W requests the Board to require KJRY to identify the actual acquisition that it proposes concerning the Eastern Line and Mapleton Spur instead the alternatives that KJRY has presented.

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Respectfully submitted,



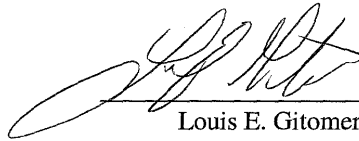
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Attorneys for: TOLEDO, PEORIA AND
WESTERN RAILWAY CORPORATION

Dated: July 18, 2003

CERTIFICATE OF SERVICE

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

A handwritten signature in black ink, appearing to read "L. E. Gitomer", is written over a horizontal line.

Louis E. Gitomer
July 18, 2003