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SERVICE DATE – SEPTEMBER 26, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34335

KEOKUK JUNCTION RAILWAY COMPANY–FEEDER LINE ACQUISITION–
LINE OF TOLEDO PEORIA AND WESTERN RAILWAY CORPORATION BETWEEN
LA HARPE AND HOLLIS, IL

Decided: September 25, 2003

In a decision served on July 9, 2003, the Acting Director of the Office of Proceedings (Acting Director) accepted the amended feeder line application¹ filed by Keokuk Junction Railway Company (KJRY) and adopted a procedural schedule for filing competing applications, verified statements, comments, and verified replies.² Toledo, Peoria and Western Railway Corporation (TP&W), the owner of the line subject to the feeder line application, filed an administrative appeal under 49 CFR 1115.1(c) on July 18, 2003, and United Transportation Union-Illinois Legislative Board (UTU-IL) filed an appeal under 49 CFR 1115.3 on July 21, 2003. In the alternative, TP&W and UTU-IL both ask the Board to require KJRY to clarify its application. KJRY filed a reply on August 1, 2003. The appeals and requests that the Board order clarification will be denied.

¹ The Feeder Railroad Development Program, entitled “Railroad development,” was enacted as 49 U.S.C. 10910 in section 401 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, and reenacted as 49 U.S.C. 10907 in section 102 of the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. Under section 10907(b)(1)(A)(i), the Board is directed to require the sale of a rail line to a financially responsible person at a price not less than its constitutional minimum value if the public convenience and necessity require or permit the sale. Constitutional minimum value is defined as the greater of net liquidation value or going concern value, section 10907(b)(2), and a financially responsible person is defined as a person able to pay the constitutional minimum value and assure adequate rail transportation service for at least the first 3 years of operation, section 10907(a).

² Due to circumstances beyond the Board’s control, notice of the decision was not published in the Federal Register until July 15, 2003, at 68 FR 41858. As a consequence, the procedural schedule was revised in a notice served on July 9, 2003. Under the revised procedural schedule, verified statements and comments were due by September 15, 2003, and verified replies were due by October 6, 2003. This decision alters these dates.

BACKGROUND

In its original feeder line application, filed on April 9, 2003, KJRY sought to acquire TP&W's La Harpe-Hollis Line (the Line), a 76-mile rail line between milepost 194.5 near La Harpe and milepost 118.5 at Hollis, IL, and the Mapleton Industrial Spur and Wye Facilities (the Mapleton Spur or Spur), a 2.5-mile line that connects with the Line at milepost 121.5 at Kolbe, IL. KJRY offered to pay \$3,393,363, its estimate of the net liquidation value (NLV) of the La Harpe-Hollis Line and the Mapleton Spur, and to grant nonexclusive trackage rights (at \$2.50 per loaded or empty car) to permit TP&W to continue serving existing shippers on the Mapleton Spur.

KJRY's application was found deficient in a decision served on May 9, 2003. KJRY was given an additional 30 days to submit: (1) an estimated going concern value (GCV) and supporting data; and (2) evidence of financial responsibility, more detailed operating plans and pro forma financial statements to support the acquisition of either TP&W's La Harpe-Hollis Line and the Mapleton Spur or TP&W's "West End."³

On June 9, 2003, KJRY filed a supplement to its application offering to purchase the La Harpe-Hollis Line and the Mapleton Spur for an estimated GCV of \$3,461,434. Alternatively, KJRY offered to purchase only the La Harpe-Hollis Line for an estimated NLV of \$3,284,605. Under the latter offer, TP&W would retain ownership of, exclusive access to, and all the revenues from, the Mapleton Spur and would receive free trackage rights between Hollis and Kolbe to serve the Spur. The amended application was accepted for filing in the Acting Director's July 9 decision, subject to KJRY complying with applicable environmental reporting requirements under 49 CFR 1105.7.

DISCUSSION AND CONCLUSIONS

Preliminary Matters. On August 7, 2003, TP&W filed a motion to strike KJRY's August 1, 2003 reply as untimely under 49 CFR 1115.1(c). KJRY filed a reply to TP&W's motion to strike on August 11, 2003. The authority of the Director to accept or reject feeder line applications was delegated by the Board, see 49 CFR 1011.7(b)(8)(i) and 1151.2(b)(1) and (2), and, as a result, appeals are governed by 49 CFR 1011.2(a)(7). Under section 1011.2(a)(7), appeals "must be filed within 10 days after service of the Director decision or publication of the notice, and replies must be filed within 10 days after the due date for appeals or any extension thereof." Because Federal Register notice was published on July 15, 2003, see supra note 2, appeals were not due until July 25, 2003, and

³ The West End (referred to as the La Harpe Line in SF&L Railway, Inc.—Acquisition and Operation Exemption—Toledo, Peoria and Western Railway Corporation, STB Finance Docket No. 33995 et al. (STB served Oct. 17, 2002, and aff'd with clarification Jan. 31, 2003)) extends 71.5 miles between La Harpe and milepost 123 at Peoria, IL.

replies were not due until August 4, 2003. Thus, KJRY's August 1, 2003 reply was filed timely. TP&W's motion to strike will be denied.

The appeals. TP&W argues that the Acting Director's July 9 decision erred in accepting KJRY's amended application and that manifest injustice will result if it is not rejected. According to TP&W, the May 9 decision directed KJRY to submit a GCV estimate for the portion of the Line between milepost 123 at Peoria and milepost 118.5 at Hollis and the Mapleton Spur (the Mapleton Segment) if it seeks to acquire more than the West End. Instead, TP&W contends that the GCV estimate KJRY submitted was for the entire La Harpe-Hollis Line and the Mapleton Spur.

The May 9 decision determined that, with respect to the West End, KJRY had complied with the requirement to submit an NLV estimate and that a GCV estimate was not required based on the evidence, which showed that the West End has a negative GCV. With respect to the La Harpe-Hollis Line and the Mapleton Spur, the May 9 decision determined that KJRY had complied with the requirement to submit an NLV estimate, but rejected KJRY's trackage rights offer as "neither the equivalent of, nor a reasonable substitute for, an actual GCV estimate." KJRY was given an additional 30 days to submit a GCV estimate for the Mapleton Segment of the Line. The parties were also cautioned not to read the May 9 decision as taking a position on KJRY's argument that all of the track at issue must be considered an "entire line" within the meaning of Caddo Antoine & Little Missouri R. Co. v. U.S., 95 F.3d 740 (8th Cir. 1996) (Caddo Antoine).

The July 9 decision simply determined that, consistent with the May 9 decision, KJRY had submitted a GCV estimate based on the operation of the Mapleton Spur. The July 9 decision did not rule on the accuracy of this or any of the other estimates or on whether the La Harpe-Hollis Line must be considered an entire line under Caddo Antoine. At this time, the record contains all of the NLV and GCV estimates needed for the proceeding to move forward.

TP&W next argues that the July 9 decision erred by accepting as evidence of KJRY's financial responsibility a letter of commitment from National City Bank of Michigan/Illinois (National City). TP&W contends that the commitment is scheduled to expire before the record closes and that there is no evidence to show that the commitment would be extended. KJRY's reply included a new letter from National City which extends the loan commitment to January 31, 2004. KJRY claims that further extensions will be granted as long as this proceeding continues to move forward. KJRY's original showing was adequate for the proceeding to move forward and, as supplemented, is adequate for that process to continue.

TP&W also argues that the July 9, 2003 decision erred in accepting KJRY's operating plan. TP&W contends that KJRY's operating plan was insufficient to support its claim that the La Harpe-Hollis Line, which operates at 10 miles per hour as a Federal Railroad Administration class 1 line, can

compete for overhead traffic with the lines of two competing Class I railroads that operate at speeds up to 79 miles per hour.

It was not incumbent on KJRY to establish that its operation of the La Harpe-Hollis Line will allow the Line to compete on an equal footing with the lines of Class I railroads. KJRY submitted two sets of pro forma financial statements supported by lists of anticipated shipments and corresponding revenues for the first 3 years of operation. One set was based on the proposed GCV estimate (which includes the Mapleton Spur) and contemplates 5 employees providing rail service 6 days a week. The other set was based on the proposed NLV estimate and contemplates 2 employees providing rail service 5 days a week. The financial statements showed that KJRY's operation of the La Harpe-Hollis Line, with or without the Mapleton Spur, would generate a profit in each of the first 3 years of operation. KJRY's showing was adequate for the proceeding to move forward.

Finally, TP&W argues that the July 9 decision erred by allowing KJRY to supplement its original application. TP&W contends that the Board's policy of encouraging feeder line applications is at odds with its policy of favoring private sector solutions and will result in manifest injustice.

It has long been the policy of the Board and its predecessor, the Interstate Commerce Commission (ICC), to encourage feeder line applications. See, e.g., Kansas Southern Railway Company–Feeder Line Application–Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 31823 (ICC served July 9, 1991). Indeed, the Feeder Railroad Development Program was enacted by Congress “to encourage financially responsible persons to acquire and preserve feeder lines prior to their substantial deterioration or abandonment.”⁴ See Indiana Hi-Rail Corporation–Feeder Line Acquisition–Conrail Lines Between Beesons and Connersville, IN, Finance Docket No. 29601 (ICC served Aug. 6, 1981). Under 49 U.S.C. 10907, the Board must accept feeder line applications that are complete and must order forced sales if the statutory requirements are satisfied. See Sandusky County, et al.–Feeder Line Appl.–Conrail, 6 I.C.C.2d 568, 570 (1990). As the statute does not set a time limit for filing initial feeder line applications, there is no reason the agency should not allow supplements to initial applications. Indeed, in this case the May 9 decision requested that KJRY supplement its original filing.

⁴ For example, the Feeder Railroad Development Program includes statutory incentives not available to purchasers under any other acquisition procedure (e.g., forced mandatory trackage rights, prescribed joint rates and divisions with the selling carrier, and the right to elect exemption from all ICC regulation other than joint rates). Revision of Feeder Railroad Development Rules 7 I.C.C.2d 902, 903 (1991). See also H.R. Rep. No. 96-1430, 96th Cong., 2d Sess., at 124-125 (Sept. 29, 1980); Feeder Railroad Development Program, 365 I.C.C. 93, 94 (1981).

The requests that the Board order clarification. Contending that KJRY has now advanced not just one, but three different acquisition proposals, TP&W requests that KJRY's application be rejected under 49 CFR 1151.3(a)(1)(ii) or, in the alternative, that KJRY be required to clarify what it seeks to acquire. Similarly, UTU-IL requests that KJRY give greater specification and supporting information as to the actual property and franchise sought to be acquired. In its supplement, KJRY stated that it seeks to purchase the La Harpe-Hollis Line with or without the Mapleton Spur. KJRY offered to pay its estimate of the GCV if the Spur is included or its estimate of the NLV if the Spur is not included. KJRY made it clear that it did not wish to purchase only the West End, which it asserted "cannot be self-supporting." KJRY Supplement at 4-5. The July 9 decision found KJRY's offer sufficiently clear, and neither TP&W nor UTU-IL has shown otherwise. TP&W's and UTU-IL's requests for rejection or requirement of clarification will be denied.

The procedural schedule. In a decision served on September 5, 2003, the procedural schedule was extended at TP&W's request until the Board rules on the instant appeals and requests regarding clarification. TP&W had also moved to hold the procedural schedule in abeyance until the Board rules on the motion to compel discovery, which TP&W subsequently filed on September 5, 2003.⁵ On September 9, 2003, KJRY filed a letter objecting to the September 5, 2003 decision extending the procedural schedule and opposing any stay of the procedural schedule while TP&W's motion to compel discovery is pending. On September 12, 2003, TP&W filed a letter in reply to KJRY's September 9 letter.

This decision resolves the appeals and the requests that the Board order clarification. The timely processing of this proceeding and the lack of specificity in TP&W's motion do not support holding this proceeding in abeyance while discovery proceeds. For example, in its September 2, 2003 motion to hold in abeyance, TP&W cites the failure to produce documentation that Mr. Brenkman used to make his investigation of the project notwithstanding that KJRY had replied that Mr. Brenkman's testimony was based primarily on his personal experience as a TP&W crew member and on his personal inspection of the Line. TP&W also cites KJRY's failure to respond to Document Request No. 2, but KJRY agreed to respond as soon as it finishes collecting the material. These examples do not support TP&W's contention that it needs further information to reply to KJRY's application.

KJRY has the burden of proof and the burden of developing a record to support the relief it seeks. TP&W need only point out the deficiencies in KJRY's presentation. That being the case, and given the need to decide cases, including this case, as promptly as possible, TP&W's motion will be denied, and a revised procedural schedule will be adopted.

⁵ TP&W filed a discovery request with KJRY on August 13, 2003, and KJRY filed a reply on August 28, 2003.

Verified statements and comments addressing the merits of the amended application will be due 20 days from the service date of this decision. Verified replies will be due 20 days later. In the event TP&W's motion to compel discovery is granted in whole or in part, the Board will consider a request by TP&W to supplement the record.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. TP&W's motion to strike KJRY's reply and TP&W's motion to stay the procedural schedule until a ruling is made on its motion to compel discovery are denied.
2. TP&W's and UTU-IL's appeals and requests for rejection or an order requiring clarification are denied.
3. Verified statements and comments addressing the merits of the amended application are due on October 16, 2003, and verified replies are due on November 5, 2003.
4. This decision is effective on its service date.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary