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SERVICE DATE - NOVEMBER 13, 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: November 12, 2003

Toledo, Peoria and Western Railway Corporation (TP&W), a Class III railroad controlled by RailAmerica, Inc., a noncarrier holding company, filed a motion to compel discovery responses on September 5, 2003. Keokuk Junction Railway Company (KJRY), a Class III railroad controlled by Pioneer RailCorp (Pioneer), a noncarrier holding company, filed a reply on September 15, 2003. TP&W's motion to compel will be denied.

BACKGROUND

On April 9, 2003, KJRY filed a feeder line application (Application)¹ for authority to acquire TP&W's 76-mile rail line between milepost 194.5 near La Harpe and milepost 118.5 at Hollis, IL (the La Harpe-Hollis Line or the Line) and the Mapleton Industrial Spur and Wye Facilities (the Mapleton Spur), a 2.5-mile line that connects with the La Harpe-Hollis Line at milepost 121.5 at Kolbe, IL. In a decision served on May 9, 2003, the Application was found deficient.² KJRY was given the

¹ The Feeder Railroad Development Program 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 shall require the sale of a rail line to a financially responsible person at a price not less than its constitutional minimum if the Board finds that 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 KJRY estimated that the La Harpe-Hollis Line and Mapleton Spur have an NLV of \$3,393,363. The applicant did not submit a GCV estimate. KJRY estimated that the 71.5-mile

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opportunity to file an amended application (Amended Application). On June 9, 2003, KJRY filed an Amended Application in which it offered to purchase either the La Harpe-Hollis Line and Mapleton Spur for an estimated going concern value (GCV) of \$3,461,434 or only the La Harpe-Hollis Line for an estimated net liquidation value (NLV) of \$3,284,605. Under the latter offer, TP&W would retain exclusive access to, and all the revenues from, the Mapleton Spur, and would receive without charge trackage rights between Hollis and the Mapleton Spur. TP&W and the United Transportation Union-Illinois Legislative Board (UTU-IL) oppose the Application.

KJRY's Amended Application was accepted subject to the filing of an environmental report, 49 CFR 1105.7, and the Board adopted a procedural schedule for filing competing applications, verified statements, comments, and verified replies in a decision served on July 9, 2003.³ TP&W and UTU-IL appealed the July 9 decision and in the alternative requested that the Board reject, or require KJRY to clarify, the Amended Application. TP&W also filed discovery requests on August 13, 2003, and in a petition filed on September 2, 2003, requested that the procedural schedule be held in abeyance until the Board rules on its motion to compel discovery responses.⁴ The appeals, requests to reject or require clarification, and motion to stay the procedural schedule were denied in a decision served on September 26, 2003. That decision adopted a new procedural schedule and stated that a request to supplement the record would be considered if TP&W's motion to compel were to be granted in whole or in part.

In the motion to compel, TP&W claims that KJRY and Pioneer failed to provide meaningful responses to 16 interrogatories and 21 production requests. In the reply, KJRY claims that it responded fully to all of the interrogatories and produced all of the evidence available and necessary for

²(...continued)

portion of the La Harpe-Hollis Line between La Harpe and Mapleton, IL, milepost 123 (the line segment termed the West End 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)) has an NLV of \$3,088,833 and claimed that it has a negative GCV.

³ 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.

⁴ TP&W's petition was granted in part. The procedural schedule was extended in a decision served on September 5, 2003, to allow the Board to rule on TP&W's appeal and alternative requests to reject or require clarification.

TP&W to challenge the Application as amended. KJRY states that further information or additional documents are either in TP&W's possession, custody, and control or have no relevance at this time.

DISCUSSION AND CONCLUSIONS

TP&W's motion to compel discovery responses can be broken down into four areas:

Constitutional minimum value. Interrogatory No. 3 seeks information on the track and other components of KJRY's Valuation Study (KJRY Application at 180-187), and Production Request Nos. 2, 6, 13, and 40 seek all documents relied on and used to prepare the Valuation Study. Production Request No. 4 seeks the historic documents KJRY used to establish land values or, in the alternative, a stipulation that no historic documents were used. Production Request No. 28 seeks a book, Toledo, Peoria & Western—Tried, Proven & Willing, by Paul H. Stringham, Deller Archive, Inc. 1993, cited by KJRY in its Amended Application. Production Request Nos. 35-36 seek all documents concerning KJRY's marketing plan and analysis that the Line can be self-sustaining or, in the alternative, a stipulation that no such documents exist.

KJRY states that, with one exception, all of the information and documents responsive to Interrogatory No. 3 and Production Request Nos. 2, 6, 13, and 40 were provided in its Application. The exception concerns TP&W track charts that KJRY located after its August 28 response. KJRY claims that the track charts are also in TP&W's possession and as a result need not be produced. KJRY also states that it need not comply with the book request (Production Request No. 28), because the book is otherwise available to TP&W. In response to Production Request Nos. 4 and 35-36, KJRY states that it sought discovery, but never received copies, of historic documents, and that there is neither a written marketing plan nor a strategic plan, but that all documents relating to the self-sustaining nature of the Line were provided in the highly confidential version of the Amended Application at 85-96.

TP&W attempts to justify Interrogatory No. 3 on the ground that, in testing KJRY's valuation, "it is important to know the assets that were valued." But in its Application, KJRY explicitly states that its valuation is based on the 1998 track chart. KJRY performed no on-site inspection, asserting it could not get permission to do so. Thus there does not seem to be much doubt as to the source of KJRY's information. If an asset is on the track chart, presumably it was valued.

With respect to its refusal to comply with Production Request No. 28, KJRY produced a copy of the on-line catalogue of the Library of Congress, which shows that the book is available at that location. In view of the availability of the book and its accessibility to TP&W's Washington, D.C. counsel, there is no reason to require KJRY's compliance.

Financial responsibility. Interrogatory No. 4 seeks information on whether Pioneer is affiliated with Class II railroads; Interrogatory No. 5 seeks information on the Line's anticipated rehabilitation costs; Interrogatory No. 7 seeks information on the costs incurred by Pioneer to acquire each of its railroad subsidiaries; and Interrogatory Nos. 52-53 seek information on the Line's anticipated car repair revenues. Production Request No. 1 seeks Pioneer's articles of incorporation and by-laws; Production Request No. 11 seeks all documents used by Mr. Guy L. Brenkman, Pioneer's Chairman, CEO, President, and largest shareholder, to decide whether to file the Application or a stipulation that no such documents exist; and Production Request No. 20 seeks Pioneer's strategic growth plan and all related documents or a stipulation that no such documents exist. Production Request No. 30 seeks all income statements and balance sheets for Pioneer and its affiliates, and Production Request Nos. 3 and 8 (loan agreements), 31-32 (agreements for affiliates to provide services to KJRY), and 34 (equipment financing) seek all documents identifying KJRY's and Pioneer's additional costs.

KJRY states that Pioneer's Form 10-KSB (Application at 78) is fully responsive to Interrogatory No. 4 and Production Request No. 30, both of which go to whether Pioneer is affiliated with Class II railroads. KJRY says that the Amended Application (at 85-96) and the verified statement (in the Application at 164) are fully responsive to Interrogatory No. 5, which seeks information on anticipated rehabilitation costs. The applicant asserts that there are no other relevant documents, that the Application is fully responsive to Production Request No. 11 (concerning Mr. Brenkman), and that all other relevant documents are already in TP&W's possession.

KJRY refuses to comply with Interrogatory No. 7 and Production Request Nos. 3, 8, 31-32, and 34, which concern financial and other agreements between KJRY, Pioneer, and their affiliates and subsidiaries because of the proprietary nature of these agreements. Applicant also refuses to comply with Interrogatory Nos. 52-53 and Production Request No. 20, which concern car repair revenues and a strategic growth plan, for the same reason. In reply to Production Request No. 1, KJRY states that Pioneer's articles of incorporation are publicly available from the State of Iowa and that Pioneer's by-laws are neither relevant nor necessary, because Pioneer's corporate secretary attested to its corporate actions. Nevertheless, KJRY states that to avoid further delay it enclosed a copy of the articles of incorporation and amendments in Exhibit D of its reply to the motion to compel and served a copy under seal of the non-public by-laws on TP&W's counsel.

TP&W contends that responses to Interrogatory No. 7 and Production Request Nos. 3, 8, 31-32, and 34 are necessary to ascertain whether KJRY and Pioneer have incurred additional financial obligations that could jeopardize their ability to operate the Line or whether there are covenants that might prohibit the proposed feeder line acquisition. TP&W does not justify so broad a disclosure of sensitive corporate records, however. Comparable information on Pioneer's finances is already available in Pioneer's Form 10-KSB. TP&W contends that compliance with Interrogatory Nos. 52-53 is necessary to evaluate KJRY's assertion that additional revenue will be generated by KJRY's

operation of the Line. But the burden will be on KJRY to support this claim; TP&W thus does not need this information.

Public convenience and necessity. Interrogatory No. 20 seeks information on which conditions KJRY may request as part of its feeder line application, see 49 U.S.C. 10907(d) and (g)(1), or a binding stipulation that it will not request conditions. Interrogatory Nos. 32-37 and 49-51 and Production Request No. 27 seek information on KJRY's and Pioneer's safety practices. Production Request Nos. 15-16 seek all written communications between KJRY and Pioneer, on the one hand, and shippers, on the other, concerning both the service TP&W provided and the instant proceeding. Alternatively, TP&W requests a stipulation that no written communications exist other than those already identified in the Application (at 116).

KJRY explains that its response to Interrogatory No. 20, which states that no conditions are anticipated at this time, is intended to mean that preconditions to receive rail service, outside of those ordinarily established by common carriers, would not be imposed on shippers. KJRY states that there is no need to repeat this response. On grounds of relevance, KJRY refuses to comply with Interrogatory Nos. 32-37 and 49-51 and Production Request No. 27, seeking information on KJRY's and Pioneer's safety practices, and in reply to Production Request Nos. 15-16, KJRY states that there are no written communications other than those already provided.

Compliance with KJRY's Production Request No. 20 will not be required because KJRY's explanation about preconditions is sufficient. Furthermore, Pioneer's strategic growth plan is a sensitive corporate record, and TP&W has not shown that it needs the information to challenge KJRY's argument that its Application meets the statutory standard.

There is no reason why the Board should require KJRY's compliance with Interrogatory Nos. 32-37 and 49-51 and Production Request No. 27. Operational safety has not been an issue in prior feeder line applications, is not part of the public convenience and necessity standard, see 49 U.S.C. 10907(c), and in any event is more properly within the purview of the Federal Railroad Administration.

Burden of proof. Production Request No. 5 seeks all documents relating to any requests KJRY and Pioneer made, between February 1 and April 8, 2003, to inspect the Line. Alternatively, TP&W requests a stipulation that no requests were made. KJRY states that any written requests are already in TP&W's possession and need not be produced. KJRY denies stating that the only requests were in writing.

If KJRY made any written requests to inspect the Line, they would be in TP&W's possession. There is no apparent justification for granting this discovery request.

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 compel discovery responses is denied.
2. This decision is effective on its service date.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary