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A T T O R N E Y S

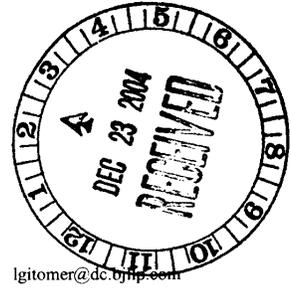
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December 23, 2004

212855

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

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

Dear Secretary Williams:

Enclosed for filing are the original and ten copies of the Toledo, Peoria and Western
Railway Corporation Opposition to Motion to Strike and three diskettes.

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

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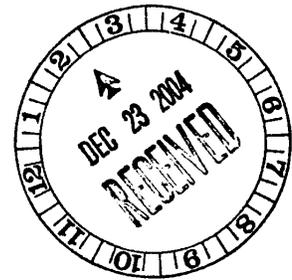
Respectfully submitted,

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

Enclosures



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

TOLEDO, PEORIA & WESTERN RAILWAY CORPORATION OPPOSITION TO MOTION
TO STRIKE

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Attorneys for: TOLEDO, PEORIA AND
WESTERN RAILWAY CORPORATION

Dated: December 23, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD



Finance Docket No. 34335

KEOKUK JUNCTION RAILWAY COMPANY—FEEDER RAILROAD DEVELOPMENT
APPLICATION—LINE OF TOLEDO, PEORIA & WESTERN RAILWAY CORPORATION
BETWEEN LA HARPE AND HOLLIS, IL

TOLEDO, PEORIA & WESTERN RAILWAY CORPORATION OPPOSITION TO MOTION
TO STRIKE

The Toledo, Peoria and Western Railway Corporation (“TP&W”) opposes the Keokuk Junction Railway Company’s (“KJRY”) Motion to Strike (the “Motion”) that was filed by the on December 3, 2004, seeking to strike portions of TP&W’s Petition for Reconsideration (the “Petition”). KJRY’s Motion relates solely to evidence concerning the determination by the Surface Transportation Board (the “Board”) of the constitutional minimum value of the rail line that it has ordered TP&W to sell to KJRY. The Board has been granted extraordinary powers to require one railroad to sell an active rail line to another railroad. However, to avoid violation of takings provision of the Fifth Amendment of the United States constitution, the Board must require the purchase price to be no less than the constitutional minimum value of the line, which the Board had determined to be the net liquidation value (the “NLV”) of the line in its October 28, 2004 decision.

The Board has developed procedures for introducing evidence to determine NLV and standards for judging that evidence. *CSX Transportation, Inc.—Abandonment Exemption—in LaPorte, Porter and Starke Counties, IN*, STB Docket No. AB-55 (Sub-No. 643X) (STB served

April 30, 2004) (“*LaPorte*”). The Board requires the party (in this proceeding KJRY) seeking the taking to present all of its evidence supporting its NLV and then provides the party (in this proceeding TP&W) that stands to lose its property involuntarily a chance to respond. 49 C.F.R. § 1151.3(a)(4). In this proceeding, KJRY also had the opportunity to submit rebuttal.

The Board has also established that real estate is to be valued based on an appraisal based on an across the fence methodology (*LaPorte*, at 5) and that scrap steel is to be valued at its most recent value (*LaPorte* at 8). In addition, the burden of proof is on the proponent of the requested relief (here KJRY). *Chicago and North Western Transp. Co.—Abandonment*, 363 I.C.C. 956, 958 (1981) (“*Lake Geneva Line*”), *aff’d sub nom. Chicago and North Western Transp. Co. v. U.S.*, 678 F.2d 665 (7th Cir. 1982). “Placing the burden of proof on the offeror is particularly appropriate in these proceedings because the offeror may withdraw its offer at any time prior to its acceptance of terms and conditions that the Board establishes pursuant to a party’s request. The rail carrier, on the other hand, is required to sell its line to the offeror at the price the Board sets, even if the railroad views the price as too low.” *LaPorte* at 3.

Had KJRY followed the Board’s well established procedures and introduced its real estate appraisal evidence as part of its opening evidence, TP&W would have had an opportunity to respond, instead of now.

The Board can only require the sale of a railroad line “at a price not less than the constitutional minimum value.” 49 U.S.C. § 10907(b)(1).

The true issue raised by KJRY in the Motion is its concern that the Board will increase the valuation of the line to the constitutional minimum value, as demonstrated by TP&W in the Petition. Under the regulations governing feeder line applications, applicants are required to

submit with their application verified statements in support of “an estimate of the NLV.” 49 C.F.R. 1151.3(a)(4).

KJRY submitted such evidence on the value of the non-real estate assets on the line (data on the quantity and quality of the material as well as per unit valuation). TP&W responded and KJRY filed rebuttal. Although TP&W disagrees with the per unit valuation adopted by the Board (and has sought reconsideration of that issue), the parties followed the usual procedure before the Board in the development of valuation of the non-real estate assets.

That is not the case in the valuation of the real estate underlying the line. With regard to the real estate, it is TP&W’s claim that KJRY did not submit an appraisal as part of its Application, but waited for rebuttal to submit the evidence it should have filed with its Application, at a time when TP&W did not have a right to respond.¹ TP&W has submitted evidence with the Petition to demonstrate to the Board that the Board erred in adopting the real estate evidence that TP&W did not have an opportunity to rebut. TP&W urges the Board to fulfill its duty of setting the value of the line at the constitutional minimum value by permitting TP&W to file the evidence that it was prevented from filing by KJRY’s tactics and give full weight to that evidence. The Board must keep in mind its own statements from *LaPorte* that TP&W is an unwilling seller and therefore KJRY must carry the burden of proof.

KJRY claims that Mr. Gohmann and Mr. Brown “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

¹ KJRY continues to argue that TP&W should have responded to or moved to strike KJRY’s evidence after the Rebuttal had been filed. However, TP&W had no right to respond and no assurance that a motion to strike would have been granted. Indeed, TP&W was confident that based on precedent, burden of proof, and the poor quality of KJRY’s rebuttal, that the Board would reject KJRY’s real estate evidence. Nonetheless, TP&W is certain that KJRY would have opposed either approach.

Application.” Motion at 11. However, Mr. Gohmann’s verified statement in the Application contradicts KJRY’s argument in the Motion. Mr. Gohmann “assumed a total of just over 864 acres” and assumed “fee title to approximately 432 acres.” Application at 186. Mr. Gohmann then recommended “a complete title review of this land for quality and type of title.” Application at 187.² Mr. Gohmann then assigned a value to the line “for the sake of valuation absent this information.” Hence, Mr. Gohmann admits that he did not perform any of the steps necessary for a real estate appraisal.

In the Motion, KJRY admits that Mr. Brown did not have any information on the “quantity of right-of-way real estate...or the quality of TP&W’s title to the land.” Motion at 11. But, KJRY wants the Board to accept that this lack of information is the equivalent of an appraisal. TP&W urges the Board to reject KJRY’s argument that nothing is something.

KJRY then claims that it could not submit an appraisal because TP&W refused a discovery request for deeds. Motion at 12. TP&W would like to set the record straight on this issue.

KJRY did not seek discovery before it filed the Application, it filed discovery on the same day it filed the Application. Nor did KJRY make use of the Board’s rules at 49 C.F.R. § 1151.2(d)(1) to indicate that it would complete the Application after obtaining discovery. KJRY sought discovery on April 9, 2003, and defined the term “Rail Line.” However, as KJRY admits, it sought discovery of real estate information for a “Line,” an undefined term. Motion at 12. TP&W objected to Document Request No. 2, in part for the following reasons: “TP&W objects

² Because of the Supplement and numerous other pleadings filed by KJRY amending and supplementing the Application, the Board provided KJRY multiple opportunities to fulfill Mr. Gohmann’s request. KJRY deferred until it filed rebuttal knowing that TP&W would not be provided an opportunity to respond.

to Discovery Request No. 2 in that it is impossible from KJRY's Definitions and Discovery Request No. 2 for TP&W to determine the location, in that KJRY did not define the term 'Line' in the Definitions. TP&W further objects to Discovery Request No. 2 in that any valuation maps, real estate records, and deeds are matters of public record and readily available to KJRY." TP&W expected that KJRY would either contact TP&W to correct KJRY's less than precise discovery request, file a motion to compel with the Board, or spend the money and time to obtain the information from the public records. KJRY did nothing. KJRY was not forced to stand on its testimony. Instead, KJRY elected to stand on the testimony in its Application so that TP&W would not have the opportunity to respond to an appraisal and obtain the NLV for the line. All that TP&W seeks is an opportunity to obtain the constitutional minimum value for the line.³

It was not TP&W that denied KJRY the information necessary to prepare a proper valuation of real estate or appraisal. KJRY could have tried to informally resolve the discovery issue. KJRY could have asked the Board to compel discovery. Finally, KJRY could have used self-help to obtain this public information. But KJRY did none of this. KJRY is solely to blame for its failure to file an appraisal or other acceptable real estate valuation with its Application. Indeed, KJRY never filed an appraisal before the Board served its October 28, 2004 decision (See KJRY Reply dated November 7, 2003, Higgs VS at 2), another reason that TP&W submitted its real estate evidence with the Petition.

With regard to the value of scrap steel, TP&W submitted additional evidence because the Board had ignored its own precedent in *LaPorte*. Because the sale was not scheduled to take place until January 26, 2005, TP&W provided the Board with evidence of the constitutional

³ TP&W would also like this issue resolved before the closing date of January 26, 2005.

minimum value of the scrap steel and the date that TP&W would have sold that scrap steel if this had been a transaction involving a willing seller and a willing buyer.

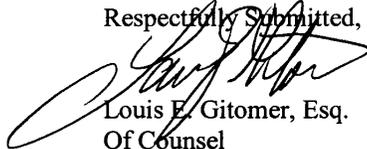
TP&W submitted the evidence in the Petition for Reconsideration on November 29, 2004 to demonstrate to the Board that it had erred in its evaluation of the evidence in setting the net liquidation value of the line below the constitutional minimum value. Even though KJRY has obtained a commitment of \$ 7 million from National City Bank of Michigan/Illinois, it still insists on paying less than \$ 4 million for the line.⁴

CONCLUSION

TP&W respectfully requests that the Board deny KJRY's Motion to Strike in its entirety so that the Board can evaluate the new evidence and fulfill its obligation to determine the constitutional minimum value of the line.

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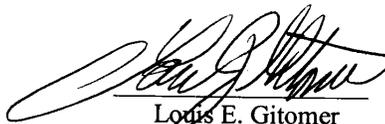
Attorneys for: TOLEDO, PEORIA AND
WESTERN RAILWAY CORPORATION

Dated: December 23, 2004

⁴ It is interesting to note that KJRY is complaining about filings made by TP&W, when it was KJRY that filed about 13 pleadings in this proceeding after the close of the record on November 7, 2003 and before the Board served the October 28, 2004 decision.

CERTIFICATE OF SERVICE

I certify that I have this day served copies of this pleading upon all parties of record in this proceeding, by hand or overnight delivery.

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

Louis E. Gitomer
December 23, 2004