

February 2, 2006

Via Hand Delivery

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

215 728



RE: STB Docket No. 34795, *Roquette America, Inc.* -- *Petition for Exemption from 49 U.S.C. § 10901 to Construct a New Line of Rail in Keokuk, Iowa*

Dear Secretary Williams:

Please find enclosed the original and ten (10) copies of the Reply of Roquette America Railway, Inc. to KJRY Motion to Compel to be filed in the above referenced proceeding. Also enclosed is a diskette with a copy of the filing in Word and PDF format.

An extra copy of this filing is enclosed for stamping and returning to our offices.

Should you have any questions regarding the foregoing, please do not hesitate to contact the undersigned.

Sincerely,

Jeffrey O. Moreno

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34795

ROQUETTE AMERICA, INC.—
PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901
TO CONSTRUCT A NEW LINE OF RAIL IN KEOKUK, IOWA

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REPLY OF ROQUETTE AMERICA RAILWAY, INC. TO
KJRY MOTION TO COMPEL

Pursuant to the Board's January 12, 2006 order in this proceeding, Roquette America Railway, Inc. ("RARI") and Roquette America, Inc. ("RAI") (collectively "Roquette") hereby reply to the "Motion to Compel" filed by the Keokuk Junction Railway Co. ("KJRY") on January 13, 2006. KJRY's discovery requests are largely irrelevant to the standards for granting a Petition for Exemption and its assertions to the contrary are based on gross distortions and erroneous interpretations of Board precedent. These distortions and misinterpretations of the law and facts continue a pattern of misleading and erroneous assertions that began with KJRY's very first response to Roquette's Petition and which Roquette has refuted at every turn.

I. Background

Roquette initiated this proceeding by filing a Petition for Exemption on November 29, 2005. Prior to that date, Roquette engaged in routine communications with the Section of Environmental Analysis ("SEA") on preliminary matters related to compliance with the National Environmental Policy Act ("NEPA").

The first contact with SEA occurred on June 20, 2005, when Roquette met with SEA to describe the proposed project. The SEA typically requires this meeting before it will grant a

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request for waiver of the six-month pre-filing notice requirement at 49 C.F.R. 1105.10(a)(1). On July 6, 2005, Roquette followed this meeting with a formal request, pursuant to 49 C.F.R. 1105.10(c), for waiver of the pre-filing notice requirement.

On July 7, 2005, Roquette requested, pursuant to 49 C.F.R. 1105.10(d), that SEA approve Burns & McDonnell ("B&M") as a third-party consultant to assist SEA with the environmental analysis. SEA encourages petitioners to engage third-party consultants to work under the direction of SEA "because they expedite and facilitate environmental analysis." *Implementation of Environmental Laws*, 7 I.C.C. 2d 807, 817 (1991). If the petitioner hires a third-party consultant, SEA waives the environmental report otherwise required by 49 C.F.R. 1105.7.

In separate letters to Roquette dated July 11, 2005, SEA granted Roquette's request for waiver of the pre-filing notice requirement and for approval of B&M as the third party consultant. SEA noted that Roquette, B&M and the Board must execute a Memorandum of Understanding ("MOU"), which outlines the responsibilities of each party. In addition, SEA noted that B&M must complete a disclosure statement and return it to SEA.

On July 18, 2005, Roquette formally advised SEA of an unrelated project in which B&M already was engaged on behalf of RAI that pertained to the development of a steam generation boiler for a cogeneration project at RAI's Keokuk facility. Roquette, however, had first notified SEA of this project informally by e-mail on July 8, 2005, prior to SEA's approval of B&M. Roquette advised SEA that it did not believe that this project posed an impermissible conflict-of-interest for B&M, but offered to erect a "firewall" between the B&M project teams as an added safeguard.

On August 12, 2005, Roquette submitted copies of a proposed MOU to SEA for its approval. Roquette noted that it had been working with SEA staff on the final language of the

MOU. In addition, Roquette referred to a separate letter of the same date setting forth B&M's proposal to erect a "firewall" between the B&M teams working on the cogeneration project and the environmental review.

On August 25, 2005, SEA returned a fully executed copy of the MOU to Roquette. SEA also responded to Roquette's July 18 and August 12, 2005 letters concerning B&M's work on the cogeneration project. SEA concluded that B&M's work did not pose a conflict of interest and that B&M's role as a third-party consultant would not be undermined while working under SEA's control, direction, and supervision. Although no conflict was apparent, SEA accepted B&M's "firewall" proposal in order to allay any concerns regarding the appearance of a conflict.

Ultimately, however, the potential even for the appearance of a conflict of interest was very short-lived, because B&M concluded its work on the cogeneration project on August 31, 2005. Since then, B&M has had no further projects with Roquette. Indeed, SEA would have to approve any further projects under Paragraph II.D.2 of the MOU.

Shortly after Roquette filed its Petition on November 29, 2005, KJRY initiated a campaign to harass Roquette and to delay a Board decision on the Petition.

Specifically, on December 6, 2005, KJRY submitted a letter to SEA asking it to defer action on the Petition by alleging that Roquette had not complied with NEPA because it had not filed an Environmental Report in compliance with 49 C.F.R. 1105.7. Of course, the Board's environmental regulations do not require an Environmental Report when a third party consultant has been engaged. KJRY either was unfamiliar with the Board's rules, or it chose not to inquire whether SEA had engaged a third-party consultant, a fact that did not require much inquiry since it was clearly stated in Roquette's Petition.

Forced to retreat from its December 6th letter, KJRY submitted a second letter to SEA on December 9, 2005, in which KJRY characterized the SEA's environmental review process up to that point as "secretive" and stopped just short of blaming SEA for KJRY's failure to inquire into the existence of a third-party consultant in this proceeding. This seemed particularly disingenuous since this fact was clearly stated in Roquette's Petition and because KJRY's counsel had telephoned Roquette counsel to ask whether an Environmental Report had been submitted and easily could have inquired about a third party consultant at that same time. Nevertheless, KJRY's letter attempted to engage in further delay by alleging a conflict of interest for B&M.

In a December 21, 2005 letter, SEA firmly rejected the allegations in KJRY's December 6th and 9th letters. In so doing, SEA noted Roquette's voluntary disclosure of the cogeneration project and SEA's prior conclusion that no conflict of interest existed. In addition, SEA rejected KJRY's characterization of its process in this case as "secretive," noting that the process is the same in all Board cases and that the public has ample opportunity to raise any environmental concerns in the public comment phase of the environmental review.

Apparently dissatisfied with SEA's response, KJRY submitted another letter on January 9, 2006, claiming to have uncovered a "smoking gun" among documents produced by Roquette in discovery that demonstrate a conflict of interest for B&M. Roquette responded in a January 12, 2006 letter to SEA, noting that KJRY was using an incorrect legal standard for identifying a conflict of interest, and furthermore, that KJRY had engaged in supposition and innuendo based on a highly selective and inaccurate use of Roquette's e-mail communications.

In the midst of the above exchange of correspondence with SEA, KJRY filed its Reply to Roquette's Petition on December 19, 2005. Although styled a "Reply," KJRY actually sought to dismiss Roquette's Petition for an alleged lack of jurisdiction. Because of this procedural "shell

game" played by KJRY, Roquette was forced to ask the Board for permission to reply to KJRY's Reply, which the Board granted in a January 12, 2006 decision.

Even before Roquette could submit its reply, KJRY filed a "First Supplemental Reply" on January 17, 2006, a title suggesting that KJRY intends to file many more supplements, which KJRY confirmed in the text of its filing. Once again, KJRY made allegations about Roquette that turned out to be inaccurate. Specifically, KJRY charged that Roquette was engaging in unauthorized construction of its rail project prior to Board approval. Two days later, faced with indisputable facts to the contrary, KJRY retracted its accusation, but nevertheless argued that this construction somehow supported KJRY's request to dismiss Roquette's Petition.

On January 23, 2006, Roquette submitted its reply to KJRY's Reply. Roquette demonstrated that, just as KJRY either erroneously or intentionally argued that Roquette must submit an environmental report, followed by erroneous allegations of unauthorized construction, KJRY had made comparably egregious legal and factual errors and omissions in its arguments to dismiss Roquette's Petition.

Indeed, a clear pattern of gross distortions of both fact and law by KJRY has emerged, a pattern that can only be explained as a deliberate intent to harass and delay, without regard for the actual facts or correct legal standards. These distortions are once again evident in KJRY's Motion to Compel.

II. Specific Discovery Requests

Request No. 2. In Request No. 2, KJRY seeks all information exchanged between Roquette and B&M in connection with this proceeding. Although Roquette objected to the relevance of this request, Roquette agreed to produce all documents that pertained to KJRY's conflict of interest allegations against B&M, in order to place those allegations to rest. KJRY

claims, however, that it requires a complete response to this request in order for its participation in the environmental process to be meaningful. Otherwise, KJRY asserts that it will be "shut out" of the environmental process. KJRY has presented no rational basis for this conclusion.

The relevance of this discovery request is governed by the Board's decision in *Illinois Central R.R. Co.—Construction and Operation Exemption—In East Baton Rouge Parish, LA*, STB Finance Docket No. 33877, 2001 STB Lexis 683 (served Aug. 21, 2001) ("*IC-Baton Rouge*"). In that decision, the Board denied a motion to compel discovery relating primarily to environmental issues because:

[U]nlike our consideration of substantive transportation issues, where litigants use discovery to develop an adequate evidentiary record and we render a decision based on the parties' presentations – SEA prepares an independent environmental review of those construction proposals for which an environmental review is required by NEPA. In accordance with NEPA, SEA conducts extensive public outreach to ensure public awareness of construction proposals before the Board and of the opportunity to participate in the Board's process. Also, SEA issues every EA or Environmental Impact Statement in draft form first for public review and comment, and, throughout the process, SEA consults with appropriate Federal, state, and local agencies. SEA then prepares a final environmental document responding to the comments and setting forth SEA's ultimate environmental recommendations to the Board. We then consider the entire environmental record in deciding whether to approve a construction as proposed, deny the construction, or approve the construction with conditions, including environmental conditions KCS, like any other interested party, will have the opportunity to raise any environmental concerns it might have during the comment period. There is nothing before us to suggest that, without discovery, KCS somehow has been shut out of the process or that SEA will not be able to adequately analyze the potential environmental impacts in order to satisfy the necessary "hard look" required by NEPA.

Id. at *5 [emphasis added]. KJRY concedes the relevance of this decision, but argues that Roquette's case is an exception because KJRY will be "shut out" of the environmental review process without discovery. KJRY Motion at 6-7.

KJRY does not clearly explain how it will be "shut out" of the environmental review process if discovery is not granted. KJRY seems to bootstrap this argument to its conflict of interest allegations against B&M. KJRY claims that, merely because B&M was concurrently working for Roquette (only until August 31, 2005) and was seeking additional work from Roquette (which Roquette has not awarded and which the MOU permits only with the consent of SEA), this somehow has shut KJRY out of the process. But, as the *IC-Baton Rouge* decision clearly states, KJRY's opportunity to participate in the process comes at the public comment stage, which lies in the future. Thus, there hasn't yet been any role in the process for KJRY to be shut out of.

KJRY's logic also would create an anomaly in the Board's rules. Much of B&M's role as a third party consultant is to develop the information that Roquette itself would have presented in the environmental report required by 49 C.F.R. 1105.7. Clearly, KJRY would have no basis to contend that it had been "shut out" of the environmental review process because Roquette prepared this information, in accordance with the Board's own rules. Thus, how can KJRY allege that it has been "shut out" when a third party performs this work?

In the final analysis, however, SEA already has resolved this issue. SEA's rejection of KJRY's conflict allegations in its December 21, 2005 letter to KJRY, along with its affirmative declaration that "B&M's role as a third-party contractor working on behalf of SEA on this project will [not] in any way be undermined," clearly demonstrates that SEA is confident in its ability to adequately analyze the potential environmental impacts in order to satisfy the "hard look"

required by NEPA. Thus, KJRY's mere allegations of a conflict of interest are insufficient to warrant an exception to the Board's precedent against environmental discovery.

Request No. 3. In Request No. 3, KJRY continues its fishing expedition for evidence to support its conflict of interest allegations against B&M. Specifically, KJRY seeks information regarding the co-generation project and all other existing contracts between Roquette and B&M. Roquette responded that the cogeneration project concluded on August 31, 2005 and that there were no other projects responsive to KJRY's request. Roquette objected to the relevance of providing any additional information on the cogeneration project because that project could not possibly constitute a conflict of interest under the relevant standards.

Because this matter was resolved by SEA in its December 21, 2005 letter to KJRY, if not before then in SEA's August 25, 2005 correspondence with Roquette, this is not a relevant subject matter for discovery. KJRY nevertheless casts itself as the defender of the integrity of the Board's environmental review process, and claims an entitlement to discovery on that basis.

KJRY's "defense" of the environmental review process, however, is predicated on an overly broad interpretation of the CEQ regulations defining third party contractor conflicts of interest that has been rejected by the courts. Those regulations state that third party contractors may not have a "financial or other interest in the outcome of the project." 40 C.F.R. § 1506.5(c). The courts, however, have observed that this phrase has not in fact been applied as broadly as KJRY suggests:

Whether the Contractor had a conflict of interest or not rests on the definition of "financial or other interest" under § 1506.5(c). That phrase, however has eluded precise definition. In 1981, the CEQ interpreted the conflict provision "broadly to cover any known benefits other than general enhancement of professional reputation." Forty Questions, 46 Fed. Reg. at 18,031. Even then, however, the CEQ conceded that a contractor may "later bid in

competition with others for future work on the project" if that contractor "has no promise of future work or other interest in the outcome of the proposal." Id. After discovering that many agencies had "been interpreting the conflicts provision in an overly burdensome manner," the CEQ instructed that, absent an agreement to perform construction on the proposed project or actual ownership of the construction site, it is "doubtful that an inherent conflict of interest will exist" unless "the contract for EIS preparation...contains...incentive clauses or guarantees of any future work on the project." Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34,263 34,266 (Council on Env'tl. Quality 1983).

Associations Working for Aurora's Residential Environment v. Colorado Dept. of Transportation, 153 F. 3d 1122, 1127 (10th Cir. 1998) [emphasis added] ("*AWARE*").

In this proceeding, B&M has no agreement to perform any construction on Roquette's proposed rail project and it has no ownership interest in the construction site. Neither has Roquette provided B&M with any incentives or guarantees of future work on this, or any other, project. Indeed, the only project that KJRY alleges creates a conflict of interest is a contract that B&M was awarded before Roquette requested approval of B&M as the third party consultant on this project, and which ended on August 31, 2005. KJRY has not cited to any CEQ regulations, or any other law, that would render a pre-existing contractual relationship a conflict of interest. As the *AWARE* decision indicates, conflict of interest concerns arise predominantly in the context of a promise of future work, and usually future work on the very same project under environmental review. Because that factual scenario does not exist in this case, Request No. 3 simply is not relevant to any subject matter before the Board.

Request Nos. 6, 8 and 9. In Request Nos. 6, 8, and 9, KJRY requests all documents that would support Roquette's ownership of three segments of track that would be connected by Roquette's proposed rail construction. Roquette has objected to these requests as irrelevant because the Board has neither the jurisdiction nor expertise to determine the ownership of this

property. Furthermore, Board precedent dictates that, when there is a dispute over the ownership of rail assets, the Board still will grant the requested authority, subject to a subsequent determination of ownership rights in the proper forum. Thus, this is not a subject matter that merits discovery in this proceeding.

In *MVC Transportation, LLC—Acquisition Exemption—P&LE Properties, Inc.*, STB Finance Docket No. 34462, 2004 STB LEXIS 666, *11-12 (served Oct. 20, 2004), the Board observed:

It is a longstanding principle that the Board's grant of a notice of exemption to acquire gives the applicant permission to acquire, but does not mandate such. Thus, the authority the Board granted to MVC was permissive, not mandatory, and MVC's acquisition exemption could not confer on MVC any ownership rights to the Yard track assets it did not possess under Pennsylvania law. The Board's authorization cannot be viewed as conveying property rights to MVC or as a declaration by the Board that MVC actually owns particular assets within the Yard.

See also, Central Kansas Ry., LLC—Abandonment Exemption—In Marion and McPherson Counties, KS, STB Docket No. AB-406(Sub-No. 6X), 2001 STB LEXIS 472, *5 (served May 8, 2001) ("[T]he interpretation of deeds and the determination of who owns good title to property are issues of state law that are outside of the expertise of the Board."). Similarly, the Board's authorization to construct a new rail line also is permissive, not mandatory, and thus will not determine the property ownership rights of either Roquette or KJRY.

In STB Finance Docket No. 34267, *Morristown & Erie Ry., Inc.—Operation Exemption—Somerset Terminal R.R. Corp.*, (served Nov. 27, 2002), the Board denied a request by a third party, STRR, to stay a Notice of Exemption on the grounds that ownership of the rail property to be conveyed was in dispute:

The exemption permits M&E and STRC to consummate the described transaction if and when they, in fact, have the legal

capacity to do so. The exemption, therefore, will have no immediate or demonstrated adverse effect on [STRR].

Similarly, if there truly is a genuine dispute over ownership of any of the tracks encompassed by Roquette's proposal, the Board's authorization would allow construction to begin only if and when Roquette has the legal capacity to do so. If KJRY's ownership claims are based on any substantive facts, KJRY should pursue an appropriate action in Iowa state court, rather than attempt to delay this proceeding.

Indeed, KJRY does not explain what it would ask the Board to do with this information, if the Board did grant discovery. Clearly, the Board cannot determine the validity of either party's ownership claims. Instead, KJRY appears to contend that undisputed ownership of the property is essential to project feasibility because, without ownership of the property, Roquette's project cannot be constructed. In other words, if anyone disputes the ownership of property needed to complete a proposed rail construction project, KJRY would require the Board to dismiss the case until the applicant comes back to the Board with a court order affirming its ownership rights. That is both bad policy and bad law, which the Board rejected in the *Somerset Terminal* decision discussed above.

Nevertheless, KJRY cites to three Board decisions in support of its claims, all of which are inapposite to Roquette's situation. KJRY first cites *Holrail LLC—Construction and Operation Exemption—In Orangeburg and Dorchester Counties, SC*, STB Finance Docket No. 34421 (served Oct. 20, 2004) for the proposition that Roquette must produce detailed information regarding its proposal to allow assessment of the project's feasibility. But, as the Board is well aware, the feasibility referred to in *HolRail* was an engineering question as to whether HolRail could construct a rail line across a swamp immediately adjacent to an existing

rail line without destabilizing the existing line. Because the feasibility issue in *HolRail* did not turn on property ownership, that decision is simply inapposite.

KJRY also claims that the Board, in *The Cincinnati, New Orleans and Texas Pac. Ry. Co.—Abandonment Exemption—In Roane County, TN*, STB Docket No. AB-290 (Sub-No. 236X), 2005 STB LEXIS 587 (served Dec. 2, 2005), denied an abandonment exemption as merely hypothetical. That was not in fact the basis for the Board's denial. Rather, because abandonment proceedings are subject to statutory deadlines, the Board rejected a carrier's request for a conditional abandonment in order to allow the carrier more time to negotiate an agreement for continued rail service to a shipper on the line. *Id.* at *6-7.

KJRY's reliance upon *Trans-Ontario Ry Co.—Exemption—49 U.S.C. 10901*, Finance Docket No. 30566, 1985 ICC LEXIS 599 (Feb. 5, 1985), for the same proposition is even less relevant. In that case, the ICC denied an acquisition exemption as premature because it sought to acquire rail property that the owner was unwilling to sell. The ICC viewed the exemption as an end-run around the ICC's denial of an inconsistent application in another docket in which the same property was to be conveyed to a third party who did in fact have an agreement with the property owner. *Id.* at *4. The more recent *Somerset Terminal* decision discussed above clearly demonstrates how KJRY has stretched the holding of this decision.

As a matter of public policy, the Board should not allow entities, such as KJRY, to delay rail construction cases simply by disputing ownership of the property needed for the proposed construction. Otherwise, any entity could bring the Board's process to a grinding halt until the proper forum has issued a ruling, simply by asserting hollow ownership claims. Nor should the Board place itself in the position of evaluating the parties' ownership evidence, since this would entangle the Board in evidence on a subject that is beyond its expertise.

The issue of property ownership in this proceeding would be a particularly undesirable entanglement for the STB in light of KJRY's halfhearted assertion of ownership:

Given the change in ownership of KJRY, the passage of a quarter of a century, and the lack of adequate records related to the Rock Island bankruptcy, it is premature to make any definitive statements regarding ownership of the Hub Track.

KJRY Dec. 19th Reply at 18-19. This statement stops short of actually claiming KJRY ownership. KJRY's claims are particularly suspect because it has presented almost no evidence to support its ownership claims and it has not even pursued its ownership claims in a forum with jurisdiction to decide them.

KJRY's objective is to cloud Roquette's title to these tracks with hollow ownership claims in the hope that the Board will dismiss this proceeding until the title issue is resolved. KJRY has presented no evidence of ownership over the Hub Track other than an inconclusive sketch and an allegation that it believes Roquette once paid rent for the Hub Track.¹ In addition, KJRY has presented absolutely no evidence at all to support its ownership claims over any of the other tracks at issue. By failing to submit any significant ownership evidence in its Reply, which was the appropriate time under the Board's rules to present whatever evidence it possessed, KJRY has been able to keep this issue alive for purposes of delaying this proceeding through a purported need for additional rounds of discovery and evidence. But, KJRY should not need discovery of Roquette to determine whether it, KJRY, has any ownership claim over the property. Moreover, this is not the forum for such discovery. The Board should not sanction this manipulation of its procedures to the detriment of Roquette.

¹ RAI has determined that this sketch does not even accurately reflect the track that existed in the Keokuk facility on the date listed on the drawing.

Request Nos. 11, 12, 15, 16, 18, 19, 21 and 29. KJRY seeks discovery of facts behind several statements that Roquette has made in its Petition for Exemption. Roquette has objected to these discovery requests because the statements are irrelevant to the statutory criteria for granting Roquette's Petition.

As an initial matter, KJRY wrongly contends that these requests are relevant solely because they relate to statements made in Roquette's Petition. This argument is defective because relevance is defined by the statutory criteria for granting an exemption, not simply by whatever statements a party may make about a particular subject in its pleading. If the Board were to follow KJRY's argument to its logical conclusion, KJRY could obtain discovery, for example, of Roquette's production of carbohydrate derivatives merely because the Petition states that Roquette produces carbohydrate derivatives at the Keokuk facility. But clearly such discovery would not be permissible unless KJRY also could establish that the production process for carbohydrate derivatives has any bearing on whether the Board should grant Roquette's Petition.

The Board squarely rejected KJRY's position in *Midwest Generation LLC—Exemption from 49 U.S.C. 10901—For Construction in Will county, IL*, STB Finance Docket No. 34060 slip op. at 4-5 (served March 21, 2002) ("*Midwest*"):

IC argues that its discovery on service issues should nonetheless be allowed because Midwest claims in its petition that IC's service has been inadequate. As explained below, however, inadequacy of existing service is not a necessary showing under the statutory criteria for licensing of new lines. Accordingly, we will deny IC's motion to compel responses....

The factual statements covered by these KJRY discovery requests were merely provided as background by Roquette to explain its reasons for pursuing this rail construction project. The facts behind the statements themselves, while providing helpful context for the Petition, have

absolutely no bearing on whether the Board should grant Roquette's Petition, and thus their subject matter is not discoverable.

The two cases cited by KJRY at page 11 of its Motion do not contravene this precedent. In both of those cases, the statements upon which the Board granted discovery also pertained to matters that were relevant to the Board's determination on the merits. Neither case stands for the proposition that the statement by itself makes the subject matter relevant.

In a begrudging acknowledgement to this reality, KJRY subsequently alleges that Roquette's statements also relate to the national rail transportation policies ("NRTP") cited in Roquette's Petition. But even then, KJRY uses the wrong standard. KJRY has focused on whether Roquette's project is consistent with the NRTP. However, the standard for granting an exemption under 49 U.S.C. 10502(a) is whether regulation is necessary to carry out the NRTP. Furthermore, the standard for new rail construction under 49 U.S.C. 10901 is whether the project is inconsistent with the public convenience and necessity, whereas KJRY's interpretation would require Roquette to demonstrate consistency with the public convenience and necessity.

KJRY's requests and its motion to compel appear to be based on a belief that Roquette bears a burden of proving a "public need" for its proposed construction. For example, Request Nos. 11 and 12 focus on whether and under what conditions KJRY has offered to upgrade its track to handle 286,000 pound cars for Roquette, which clearly goes to the adequacy of KJRY's service. Because Request Nos. 15, 16, 18 and 19 concern statements about the efficiency of RAI's internal operations at the Keokuk facility, it is unclear how they implicate the NRTP at all. At best, they relate to the adequacy of KJRY's service, in that Roquette has alleged that its internal operations are inefficient due to current rail service limitations. Request Nos. 21 and 29 are merely the converse of the preceding requests in that Roquette has expressed its expectation

that it will receive more efficient rail service at lower cost as a result of competition created by its rail construction project. However, the adequacy of KJRY's service, which is at the heart of each of these requests, has no bearing on whether the Board should grant Roquette's Petition.

The Board squarely rejected similar discovery requests on the adequacy of the incumbent carrier's rail service in *Illinois Central R.R. Co.—Construction and Operation Exemption—In East Baton Rouge Parish, LA*, STB Finance Docket No. 33877, 2001 STB LEXIS 510, *4-5 (served May 25, 2001) [footnote omitted]:

Many of KCS's informational requests, as well as a justification for its motion to compel appear to be based on a belief that IC bears a burden of proving a "public need" for its proposed construction and operation... Neither under the exemption criteria of section 10502 nor under the prior approval requirements of section 10901 is there a requirement of a showing of public need for the facilities proposed to be constructed. *See, e.g., Kansas City Southern Railroad Company—Construction and Operation Exemption—Geismar Industrial Area Near Gonzales and Sorrento, LA*, Finance Docket No. 32530 (ICC served June 30, 1995), at pp. 5-6. IC need not demonstrate insufficient service capacity, service failures, a shortage of storage capacity, or multiple industries' support for its proposal. KCS's requests for information pertaining to public need are irrelevant to our review under the statute.

See also, Midwest, slip op. at 4. KJRY's discovery requests are indistinguishable from the discovery denied by the Board in these decisions. Thus, the Board should deny KJRY's motion to compel responses to these requests.

Request No. 13. KJRY's Request No. 13 asks for the identity of all shippers who will be located on the proposed line. KJRY purports to need this information to support its claim that this is industrial track under 49 U.S.C. 10906, rather than under Section 10901. Roquette already has refuted the legal basis for KJRY's claim that this is Section 10906 track in Roquette's January 23, 2006 Reply to KJRY's Reply.

Consistent with the precedent cited in Roquette's Reply, the Board previously has denied discovery of this very same information because it is irrelevant to determining whether a construction project is Section 10901 or Section 10906 track. In *Midwest*, slip op. at 4, note 7, the Board stated that "whether or not there are existing shippers waiting for service over the proposed line is not dispositive of whether the track would be private track or a line of railroad. The determinative factor as to that issue is whether Midwest would make the line available as a common carrier line to any shippers that might request service."

In any event, Roquette does not understand why Request No. 13 is included in KJRY's Motion to Compel. Although Roquette objected to the relevance of this request, Roquette nevertheless provided a full and accurate response. Thus, there is no further information to compel.

Request Nos. 32 and 33. In Request Nos. 32 and 33, KJRY seeks information concerning derailments and accidental releases of lading at RAI's Keokuk facility. KJRY claims this subject is relevant because three of the NRTP, namely 49 U.S.C. 10101 (3, 8 and 11), address the safety of rail operations. Roquette objects to these requests as irrelevant.

First of all, RARI, not RAI, is the petitioner in this proceeding. RARI has no safety record to produce, since it does not currently operate or maintain any of the track within RAI's Keokuk facility. This fact, however, clearly cannot disqualify RARI, since non-carriers, which often have no safety record at all, are eligible for a Section 10901 class exemption to acquire rail lines. Indeed, if applicants' prior safety records were relevant, the STB could not grant any class exemptions under either 49 U.S.C. 10901, 10902 or 11323, since the Board could not be sure of the safety records of anyone who would invoke those exemptions. It would create an anomaly to

require safety data from RAI's intra-plant operations, but not from these other entities which qualify for a class exemption.

Even if RAI's safety record were at issue, KJRY's argument would convert the role of the Board into an arbiter of safety issues, which it is not. *Accord Granite State Concrete Co., Inc. et al. v. Boston and Maine Corp. et al.*, STB Docket No. 42083 (served Sept. 24, 2004) ("The [FRA] has primary responsibility over rail safety matters, and therefore, it is not the Board's role to be the final arbiter of safety issues."). The safety-related NRTPs merely instruct the Board to exercise its economic regulatory authority in a manner that promotes the safe operation of transportation facilities and equipment. They do not require the Board to evaluate individual carrier safety records. Indeed, if RAI's safety record is relevant, then KJRY's safety record also would be relevant in order to determine who is the safer operator. But, clearly this is not a comparison of which entity is safer and therefore should be able to serve the Keokuk facility.

Furthermore, the Board has no jurisdiction over railroad safety. That subject matter lies with the Federal Railroad Administration ("FRA"). *Id.* The FRA does not assert jurisdiction over intra-plant operations, like those of RAI's Keokuk facility. 49 C.F.R. Part 209, App. A. However, the FRA would exercise jurisdiction over RARI's track, as a common carrier. Thus, overall rail safety would be enhanced by the more stringent regulations that would apply to RARI's operations.

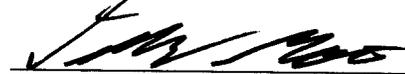
Request No. 34. In Request No. 34, KJRY requests all information concerning discussions with BNSF involving rates or service to be provided by BNSF over the proposed construction. KJRY asserts that this information is relevant to whether BNSF operation of the track would foster or impede competition. This argument should be rejected on the same grounds as KJRY's Request Nos. 11, 12, 15, 16, 18, 19, 21 and 29, in that KJRY's request is

based on the erroneous perception that Roquette must demonstrate a "public need" for its project and that Roquette's proposal must be "consistent" with the NRTP.

Furthermore, competition is established by the presence of two carriers. That is the only relevant fact. KJRY, however, has the erroneous notion that the Board's role is to compare the proposed rates and service of a potential competitor and make a determination as to whether the proposed project would promote competition. That has not been the Board's role since at least the Staggers Act.

WHEREFORE, for the foregoing reasons, Roquette respectfully requests that the Board deny KJRY's Motion to Compel in its entirety.

Respectfully submitted,

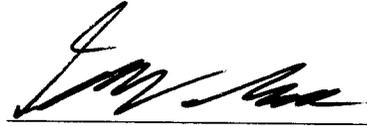


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February 2, 2006

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2nd day of February, 2006, a copy of the foregoing "Reply of Roquette America Railway, Inc. to KJRY Motion to Compel" was served by hand delivery upon counsel for Keokuk Junction Railway Co



Jeffrey O. Moreno