

211347

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS

2401 PENNSYLVANIA AVENUE, NW
WASHINGTON, DC 20037
MAIN TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

William A. Mullins
wmullins@bakerandmiller.com

DIRECT DIAL: (202) 663-7823

June 15, 2004

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings

JUN 15 2004

FILED
Office of Proceedings

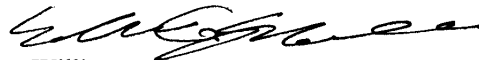
RE: Finance Docket No. 34335
Keokuk Junction Railway Co.--Feeder Railroad Development Application
--Line Of Toledo, Peoria & Western Railway Corporation Between
LaHarpe And Hollis, IL
Clarification Of The Record Regarding Removal of the Crossing Diamond

Dear Secretary Williams:

Enclosed herewith are an original and eleven copies of Keokuk Junction Railway Co.'s "Clarification Of The Record Regarding The Removal Of The Crossing Diamond." A complete copy of this filing has been served on all required parties of record.

Please acknowledge receipt of the enclosed pleading by date stamping the extra copy of the filing and returning it to the individual making this filing for return to me. If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: wmullins@bakerandmiller.com.

Sincerely,


William A. Mullins

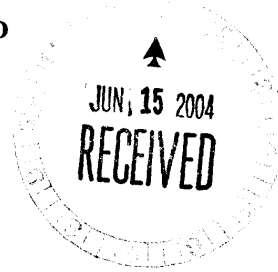
Enclosure

CONTAINS COLOR MATERIALS

cc: All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34335



**KEOKUK JUNCTION RAILWAY CO.
--FEEDER RAILROAD DEVELOPMENT APPLICATION--
LINE OF TOLEDO, PEORIA & WESTERN RAILWAY CORPORATION
BETWEEN LA HARPE AND HOLLIS, IL**

**CLARIFICATION OF THE RECORD REGARDING THE REMOVAL
OF THE CROSSING DIAMOND**

ENTERED
Office of Proceedings

JUN 15 2004

By: [Signature]
[Name]

**William A. Mullins
David C. Reeves
BAKER & MILLER PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849**

**Attorneys for Keokuk Junction
Railway Co.**

DATED: June 15, 2004

CONTAINS COLOR MATERIALS

ARGUMENT

I. THE ADM DETOUR ARRANGEMENT DOES NOT ALLOW TP&W TO CONTINUE TO PROVIDE SERVICE OVER ITS LA HARPE TO PEORIA LINE IN AN EFFICIENT AND SAFE MANNER

While admitting that the La Harpe to Peoria line has been severed, TP&W claims that it can continue to connect operations on the western and eastern segments of its line, and thereby continue the historic nature of a route that has existed for over 130 years, through the use of a detour arrangement over industry track owned by Archer Daniels Midland ("ADM"). According to TP&W, the use of the ADM industry track allows "[s]hippers on the TP&W west of Bushnell [to] have a direct connection to the east, though the use of the ADM detour." TP&W's June 4, 2004 Response at 5. TP&W also claims that "TP&W can access the Line west of Bushnell through use of the ADM detour." *Id.* In fact, TP&W went so far as to say that the detour arrangement means "there is no circuitry, no less efficiency, and no fewer options for shippers." *Id.* As with many statements and assertions by TP&W throughout this proceeding, there are numerous fallacies and inaccuracies in these TP&W statements that require clarification.

As an initial matter, the evidentiary statement by TP&W's witness, Mr. Hulstrom, does not actually support the sweeping claims made by TP&W's counsel in the argument section of TP&W's response. In fact, other than bold assertions made by TP&W's counsel, TP&W makes no effort to demonstrate specifically how it can actually bridge the gap created by the removal of the diamonds or whether operation on BNSF's line is required to accomplish it. TP&W did not attach a map to its filing to show how the detour operation works, and neither the letter by BNSF nor the abbreviated agreement with ADM explain it.

Therefore, to investigate TP&W's claims, KJRY's witness Dan LaKemper physically inspected the site and has prepared a verified statement of his observations, which is attached

hereto as Appendix 1 ("V.S. LaKemper"). A map of Bushnell drawn by Mr. LaKemper (V.S. LaKemper, Exhibit A) and various photos of the site (V.S. LaKemper, Exhibit B) are also attached and are discussed and described in his statement. Exhibit A, pg. 2 also contains a copy of the map drawn by Mr. LaKemper with numbers corresponding to the photographs in order to indicate where and from what direction the photographs were taken. As Mr. LaKemper's investigation establishes, the statements by TP&W's counsel are misleading at best and simply wrong in most instances. V.S. LaKemper at 1.

The TP&W line is an east/west line that crosses two parallel north/south BNSF tracks in Bushnell. V.S. LaKemper at 2. These two tracks are used by BNSF for directional running, with the eastern line used for primarily northbound movements while the western line is used primarily for southbound traffic. *Id.* The ADM track referenced in TP&W's filing connects the TP&W track east of where the Bushnell diamond was removed (V.S. LaKemper, Exhibit B, Photos Nos. 1 and 11) to the BNSF northbound main, *i.e.* the easternmost track of BNSF's two tracks (V.S. LaKemper, Exhibit B, Photos Nos. 13, 14a and 14b). Meanwhile, the TP&W line west of the removed diamond connects to BNSF's southbound main line via a wye connection that is slightly south of where the diamond was removed. (V.S. LaKemper, Exhibit A and Exhibit B, Photo No. 4.)

If there were a connection between BNSF's northbound and southbound lines anywhere close to the ADM detour track, then the statements made by TP&W in its June 4 response would have merit. However, as Mr. LaKemper's investigation has concluded, the ADM detour track only connects with the BNSF northbound line and there is no cross-over from that line to the BNSF southbound line anywhere within a mile of the former location of the diamond crossing. V.S. LaKemper at 3. Without a cross-over and without the diamond, there is no physical

connection to enable a TP&W train moving west from Peoria toward La Harpe on TP&W's track to get over to the BNSF southbound main. Without the ability to cross-over to the BNSF southbound main, there is no ability to access the western portion of TP&W's east/west line. *Id.* This is completely contrary to what TP&W's Response claimed.

Witness LaKemper assumes that at some point along the BNSF northbound line, there is a cross-over to the southbound line, but no such cross-over exists within a mile north or south of where the ADM industry track connects with the BNSF northbound track. *Id.*, and Exhibit B, Photos No. 2 and 3. Furthermore, even if one assumes that a TP&W train that used the ADM detour to access the BNSF northbound line could eventually cross-over to the BNSF southbound line, it would then need to travel backwards down the BNSF southbound main to a point south of where the diamond crossing existed. At that point, the train would then need to reverse course again and go back north across the wye track that eventually, almost a mile west of where the diamond existed, connects with the TP&W western segment. V.S. LaKemper at 3 and Exhibit B, Photos Nos. 4, 5 and 6. Such a routing is certainly not "efficient" as TP&W told this Board.

There are further problems with TP&W's alleged "cross-over" as well. From Mr. LaKemper's photographs (V.S. LaKemper, Exhibit B, Photos Nos. 4, 5 and 6), it is clear that the wye track that connects the BNSF southbound mainline to the TP&W western line is overgrown, and apparently, part of the rail is covered by gravel, making it appear as if the line consists of only one rail, not two. V.S. LaKemper, Exhibit B, Photo No. 5. While it cannot be known from the photographs when any of the involved TP&W track was last inspected, given the physical condition of the track and the lack of service over the line for almost three years, it is likely that TP&W has not maintained or inspected its own track for some months.

Given these facts, there are substantial safety concerns which exist if TP&W were to attempt to actually use the ADM detour arrangement. As pointed out in TP&W's June 4 Response, BNSF's lines are heavily used, including by two daily Amtrak trains. (For example, V.S. LaKemper, Exhibit B, Photos Nos. 6 and 11, taken on Mr. LaKemper's visits the evening of June 7 and the afternoon of June 10, respectively, both show a passing BNSF train.) The type of operation described above that would be required for a TP&W train to connect its line east and west of Bushnell through the use of the ADM detour, assuming it is even possible, would tie up both the northbound and southbound BNSF mains for a considerable period, interfering with BNSF's train operations. Moreover, operating TP&W's train southward on the southbound main track with the locomotive at the rear, rather than at the lead, generally allows the engineer less visibility, presenting a safety issue at grade crossings.

Besides safety issues, there is also no mention by TP&W of any permission to use BNSF's track. There appears to be no agreement with BNSF, like there is with ADM, for TP&W to use BNSF's tracks, and there has not been a trackage rights notice of exemption filed by TP&W for use of BNSF's line under the Board's regulations at 49 C.F.R. §1180.2(d)(8). Thus, absent such an agreement and/or an exemption from the Board, TP&W is likely not legally entitled to use BNSF's track for its roundabout "crossing" operation, nor can the Board and the shippers be assured that TP&W can even use BNSF's tracks.

In the end, TP&W's June 4th Response provides no comfort at all to the shipping public, the Board, or to KJRY that TP&W can continue to serve both TP&W's western and eastern segments in order to continue TP&W's historic through route between Peoria and La Harpe. Those shippers on the western segment appear to remain cut off from the rest of the TP&W, and TP&W's assertions that the ADM detour arrangement provides an adequate substitute to the

diamond crossing is not backed up by any evidence. In fact, the evidence establishes that the "crossing" - assuming it can occur at all - is extremely circuitous, inefficient, and unsafe; precisely the opposite of what TP&W claims it to be.

II. KJRY'S MAY 25, 2004 LETTER WAS HIGHLY RELEVANT AND MATERIAL

TP&W's Response disparaged the materiality and importance of KJRY's May 25 letter. This ignores the fact that KJRY had no available information from either BNSF or TP&W as to the reason for the removal of the diamond prior to receipt of TP&W's June 4 pleading. Given TP&W's prior history and conduct in this proceeding, including its complete lack of maintenance on the line and lack of service over the line, it was not unreasonable for KJRY to come to the conclusions that it did, for indeed, as noted, the fundamental point of KJRY's letter was true and correct: the TP&W line has been severed and TP&W cannot provide adequate service to the shippers who have historically used the Peoria to La Harpe line.

It was entirely appropriate for KJRY to inform the Board of the removal of the crossing diamond, and it is just as appropriate to file this Clarification with respect to TP&W's Response. Indeed, in the context of a feeder line application, the existence or non-existence of a crossing diamond that connects two segments of an historic through route is entirely relevant and material to the value, nature and utility of the property, the proposed operating plan submitted by KJRY, and the ability of shippers to receive service from TP&W or KJRY in an efficient manner. Just as in the *Railroad Ventures* decision,¹ where the Board found improper the OFA seller's actions of eliminating essential parts of the property that the OFA buyer sought to purchase, actions here that apparently severed the line are completely relevant.

¹ *Railroad Ventures, Inc. -- Abandonment Exemption -- Between Youngstown, OH, and Darlington, PA, In Mahoning And Columbiana Counties, OH, And Beaver County, PA*, STB Docket No. AB-556 (Sub-No. 2X) (served Oct. 4, 2000).

CONCLUSION

KJRY appreciates having the record set straight as to the reason for the removal of the crossing diamond, and accepts BNSF's commitment that it will restore the crossing diamond rapidly in the event of an emergency. KJRY also accepts TP&W's and BNSF's representations that the removal is only temporary. However, to argue that the existence of the ADM detour provides an adequate substitute for the crossing diamond is simply not borne out by the facts. The facts show otherwise.

Respectfully submitted,



William A. Mullins
David C. Reeves
BAKER & MILLER PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849

Attorneys for Keokuk Junction Railway Co.

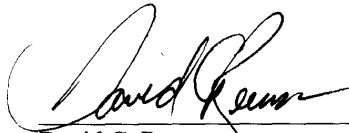
June 15, 2004

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2004, I have caused the foregoing Clarification Of The
Record Regarding The Removal Of The Crossing Diamond to be served by courier on:

Louis E. Gitomer
BALL JANIK LLP
1455 F Street, NW
Suite 225
Washington, DC 20005

and by first class mail or more expeditious service on other parties of record.

A handwritten signature in black ink, appearing to read "David C. Reeves", is written over a horizontal line.

David C. Reeves
Attorney for Keokuk Junction Railway Co.

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.**

FINANCE DOCKET NO. 34335

**KEOKUK JUNCTION RAILWAY CO.
--FEEDER RAILROAD DEVELOPMENT APPLICATION--
LINE OF TOLEDO, PEORIA & WESTERN RAILWAY CORPORATION
BETWEEN LaHARPE AND HOLLIS, ILLINOIS**

VERIFIED STATEMENT OF DANIEL A. LaKEMPER

My name is Daniel A. LaKemper. I am the General Counsel of Keokuk Junction Railway Co. ("KJRY"), applicant herein. I have approximately 18 years experience representing KJRY and numerous other Class III railroads. I previously appeared as a witness in this proceeding when I provided a verified statement in KJRY's November 7, 2003 evidentiary filing.

Upon reviewing the June 4, 2004 "Response" filed by Toledo, Peoria and Western Railway Corporation ("TPW") and the verified statement by Scott Hulstrom, it became imperative to provide this verified statement in order to give the Board a complete and accurate factual record, including photographs, of the track structure that exists at Bushnell, IL, and to provide comment on the ability of TPW to use an alleged detour over the tracks of ADM in order to access TPW's line west of where the diamond crossing formerly existed. My investigation establishes that the statements provided in TPW's June 4 Response are misleading and inaccurate. The ADM detour does not provide TPW with the ability to access its western line in an efficient, safe, and non-circuitous manner. As a result, the historic through route that has

existed for over 130 years between Peoria and La Harpe has been severed and shippers have lost their ability to receive common carrier service from TPW in a reasonable and timely fashion.

On the evening of June 7, 2004, and the afternoon of June 10, 2004, I visited Bushnell, Illinois, to observe the proposed detour whereby TPW claims it can move trains across the Burlington Northern Santa Fe ("BNSF"), using the ADM detour, in order to provide an efficient and safe route for shippers located on the TPW line between Peoria and La Harpe. I have drawn a map of the existing track structure and have attached that as page 1 of Exhibit A hereto. I have also taken numerous photographs of my findings and they are attached hereto as Exhibit B. Numbers on page 2 of Exhibit A (which is an enlarged section of Exhibit A, page 1) correspond to the photo numbers, while the arrows indicate the direction in which the photo was taken.

The TPW track through Bushnell is a single track, running generally east-west. BNSF operates a double track line, running generally north-south, with the easterly track appearing to be used primarily for northbound trains and the westernmost track used primarily for southbound trains. The diamond which allowed the TPW to cross the BNSF tracks has been removed and the BNSF tracks have been "straight-railed" (Photos Nos. 8, 9, & 10). The TPW crossing of West Main Street, just west of the former diamond, was also black-topped over by the Bushnell City Street Department (Photo No. 7).

The ADM industry track does connect with the TPW main a short distance east of the former diamond location (Photos Nos. 1 and 11). The ADM track goes through the ADM facility, which is fenced and gated on both the TPW and BNSF sides (Photos Nos. 11 and 13). The ADM facility is approximately two square blocks. It was formerly bisected by East Main Street, but that Street has been closed to public traffic south of Davis Street, and is now part of the ADM facility (Photo No. 12).

Assuming TPW can use the ADM track, once it leaves the TPW track, a train using the ADM detour would be routed to BNSF's northbound (or easterly) track because the ADM track goes into the northbound main just north of the Davis Street Crossing (Photos Nos. 14a and 14b). Once having accessed the BNSF northbound line, there is no crossover to the southbound main observable from the Davis Street Crossing so as to allow a train to "cross-over" to the BNSF southbound track in order to eventually access the TPW line west of where the diamond crossing used to exist. To determine if there were any "cross-overs" remotely nearby, I also observed north from the Hurst Street Crossing (Photo No. 2), and south from the Illinois Route 9 Crossing (south of the former diamond location)(Photo No. 3). No crossovers were observable for as far as one could see, which is at least a mile, as the ground is almost level and the track almost straight. Accordingly, it is physically impossible for a TPW train to use the ADM detour as a means of efficiently and directly connecting the two TPW lines that have been severed due to the removal of the crossing diamond.

Once a train uses the ADM detour and begins to travel on BNSF's northbound line, I believe there is a crossover approximately two to three miles north of Bushnell, but I did not actually see it. Assuming it exists, the TPW would have to travel the two to three miles north on the northbound BNSF main, then cross-over to the southbound main, and then back up two to three miles to a point south of where the former diamond existed. Once south of the former diamond, there is wye-track remaining, which travels in a northwesterly direction (Photo No. 4) and then turns parallel to the TPW main for approximately a mile, before a train could switch back to the TPW mainline at a location substantially west of where the diamond crossing

previously existed. This wye-track is overgrown with weeds and brush, covered in places with gravel, and generally in poor condition (Photos 5 & 6).¹

TPW claims that the use of the ADM detour means that shippers west of Bushnell can still use TPW and that "there is no more circuitry, no less efficiency, and no fewer options for shippers." Response at 5. However, the facts, as evidenced by my investigation, the map, and my photographs, prove exactly the opposite. If the ADM detour movement could even be accomplished at all to effectuate a "cross-over" of BNSF's tracks, it would take excessive amounts of time, in my opinion, to get permission to go through the ADM facility, get clearance to foul both BNSF main tracks for such a long period of time, and get back to the TPW main. Such an operation would be terribly inefficient, and given the physical condition of the tracks, highly unsafe as well. (See Photos Nos. 5 and 6, for example.)

There are significant other problems as well that would prohibit TPW from providing shippers with common carrier service over the entire line from Peoria to La Harpe. For example, while my inspection was limited to public roads and crossings in the general vicinity of Bushnell, it would appear that no brush or weed control has been done this season, and large segments of the mainline are overgrown with brush and weeds. The tracks are missing or buried in some locations, and in at least two locations, the tracks have been paved over.²

In the end, TPW's claims that the line has not been severed and that TPW is ready, willing, and able to provide service over the line through the use of the ADM detour, are simply inaccurate and misleading. The physical evidence establishes otherwise and only provides

¹ The line that appears on the left side of Photo No. 6 is actually the TPW east/west mainline, west of where the diamond previously existed. The BNSF wye track that comes off of the BNSF southbound main and then parallels the TPW line cannot actually be seen as it is covered by the weeds. If it were visible, it would be approximately in the center of the photograph.

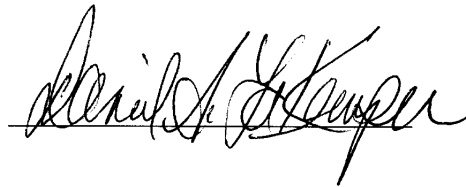
further evidence of what KJRY has been saying all along: TPW has no desire to operate its Peoria to La Harpe line. On the other hand, KJRY has offered to buy it, has filed a feeder line application to acquire it, and has presented a detailed operating and business plan for KJRY's operations over the line. As such, KJRY has established that the public interest lies in selling the line to KJRY and the Board should so order.

² Once on the TPW main, I discovered that approximately two miles west of Bushnell, the Walnut Grove Road crossing has been paved over and is currently impassable by rail equipment.

VERIFICATION

I, Daniel A. LaKemper, verify under penalty of perjury that the foregoing is true and correct. I further certify that I am qualified and authorized to file this Verified Statement.

Dated: June 14, 2004

A handwritten signature in black ink, appearing to read "Daniel A. LaKemper", written over a horizontal line.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34335

**KEOKUK JUNCTION RAILWAY CO.
--FEEDER RAILROAD DEVELOPMENT APPLICATION--
LINE OF TOLEDO, PEORIA & WESTERN RAILWAY CORPORATION
BETWEEN LA HARPE AND HOLLIS, IL**

**CLARIFICATION OF THE RECORD REGARDING THE REMOVAL
OF THE CROSSING DIAMOND**

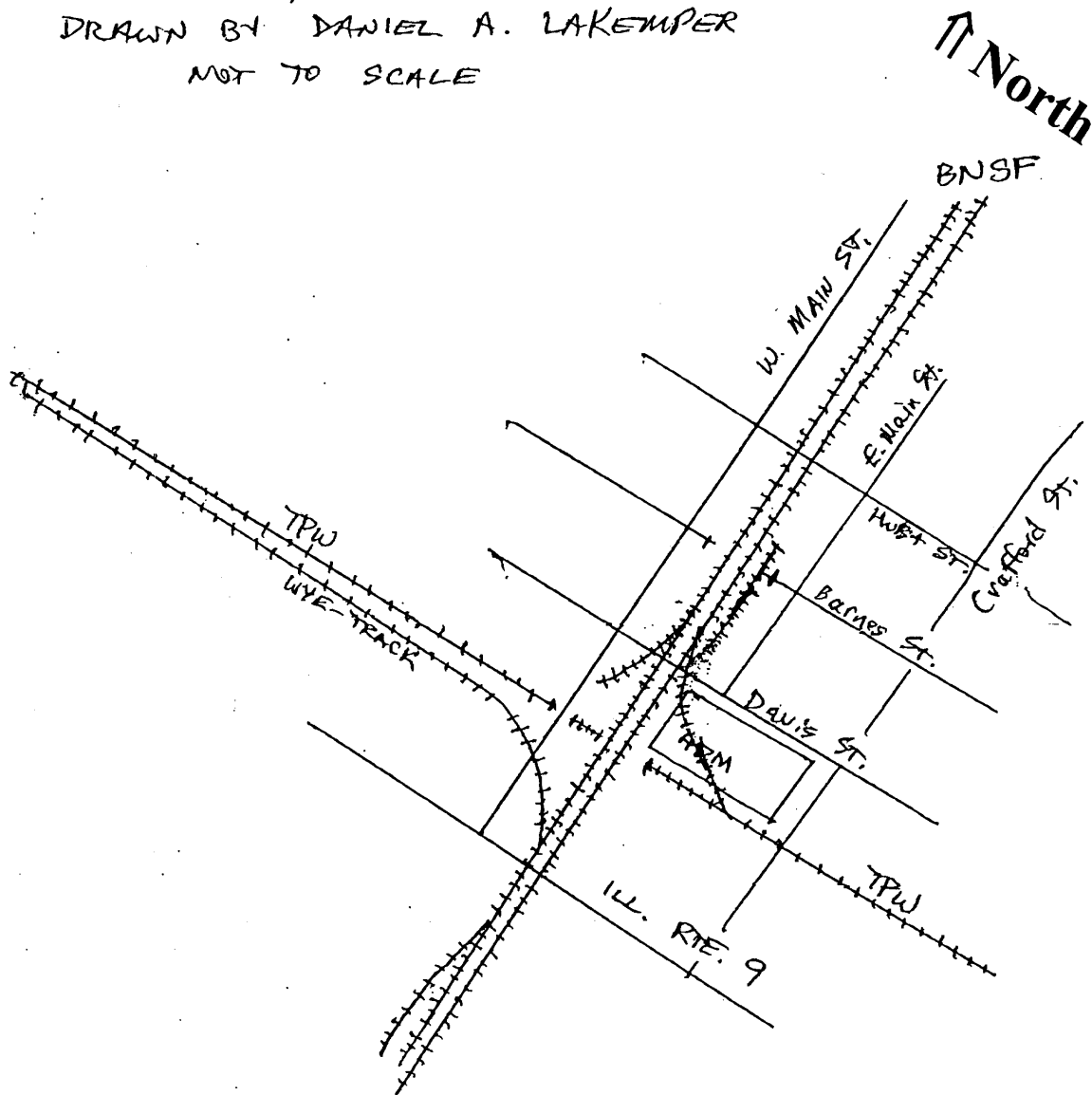
**EXHIBIT A
PAGE 1**

**William A. Mullins
David C. Reeves
BAKER & MILLER PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849**

**Attorneys for Keokuk Junction
Railway Co.**

June 15, 2004

TRACK CONFIGURATION
BUSHWELL, ILL.
DRAWN BY DANIEL A. LAKEMPER
NOT TO SCALE



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34335

**KEOKUK JUNCTION RAILWAY CO.
--FEEDER RAILROAD DEVELOPMENT APPLICATION--
LINE OF TOLEDO, PEORIA & WESTERN RAILWAY CORPORATION
BETWEEN LA HARPE AND HOLLIS, IL**

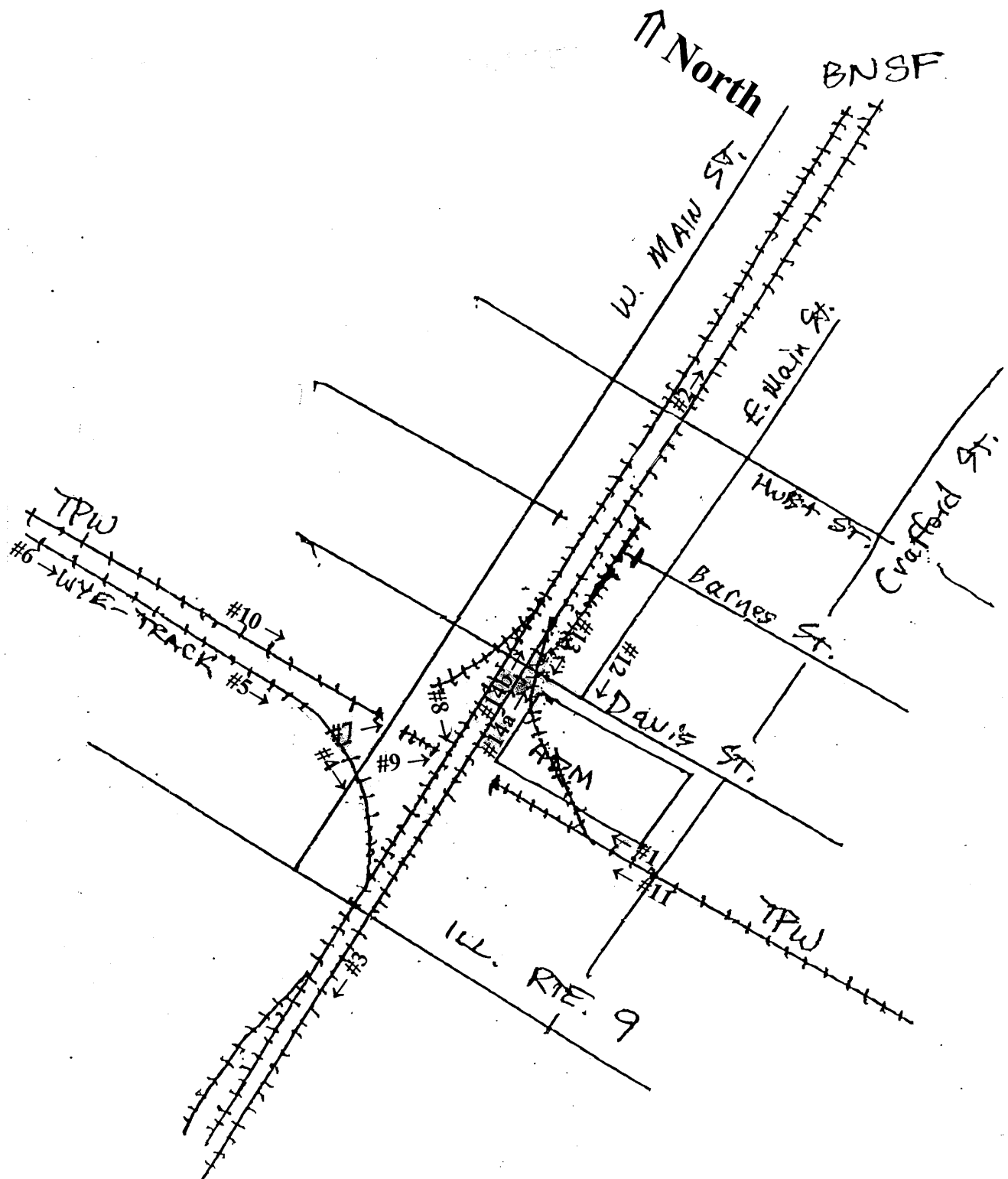
**CLARIFICATION OF THE RECORD REGARDING THE REMOVAL
OF THE CROSSING DIAMOND**

**EXHIBIT A
PAGE 2**

**William A. Mullins
David C. Reeves
BAKER & MILLER PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849**

**Attorneys for Keokuk Junction
Railway Co.**

June 15, 2004



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34335

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

**CLARIFICATION OF THE RECORD REGARDING THE REMOVAL
OF THE CROSSING DIAMOND**

**EXHIBIT B
PHOTOGRAPHS**

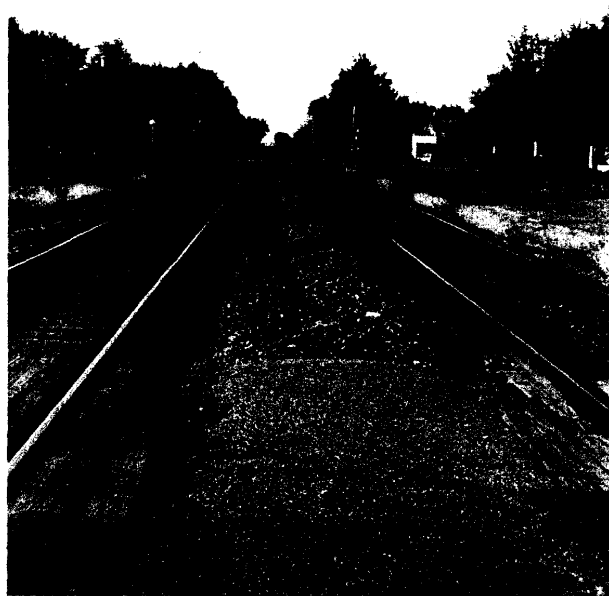
**William A. Mullins
David C. Reeves
BAKER & MILLER PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849**

**Attorneys for Keokuk Junction
Railway Co.**

June 15, 2004



**PHOTO 01-
TRACK OFF TPW TO ADM**



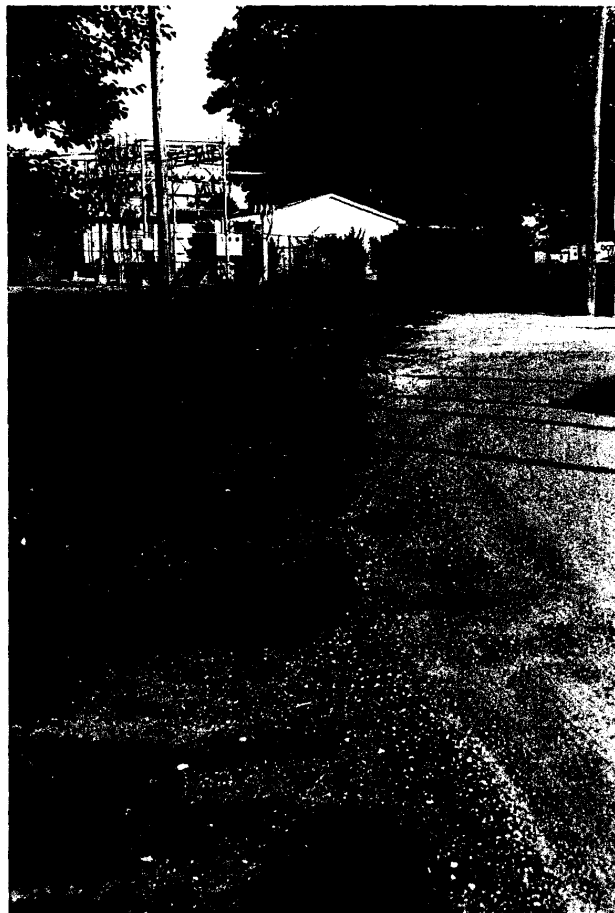
**PHOTO 02-
BNSF MAIN LOOKING NORTH**



**PHOTO 03-
BNSF MAIN LOOKING SOUTH**



**PHOTO 04-
Y-TRACK TO TPW AS IT COMES OFF
BNSF SOUTHBOUND MAIN AND
ACROSS E. MAIN ST**



**PHOTO 05-
Y-TRACK BETWEEN TPW AND BSNF --
FROM TPW TOWARD BNSF**



**PHOTO 06-
Y-TRACK GOES INTO LONG SIDING
TRACK -- LOOKING BACK TOWARD
DIAMOND, ALONG THAT SIDING**

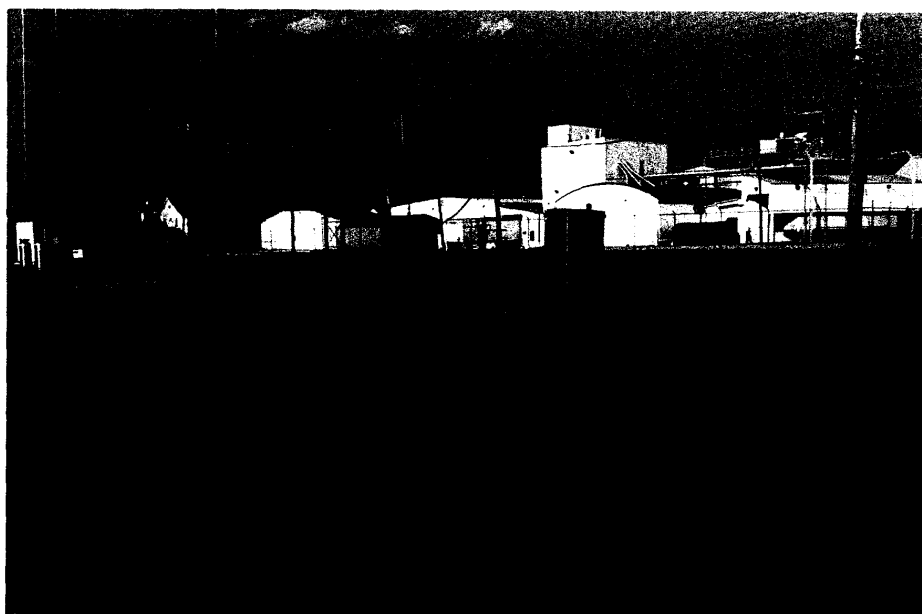


PHOTO- 07
TPW MAIN JUST WEST OF DIAMOND
BLACK-TOPPED OVER AT E. MAIN ST --
OCCURRED BETWEEN AFTERNOON OF
05/27/04 AND EVENING OF 06/07/04



PHOTO 08



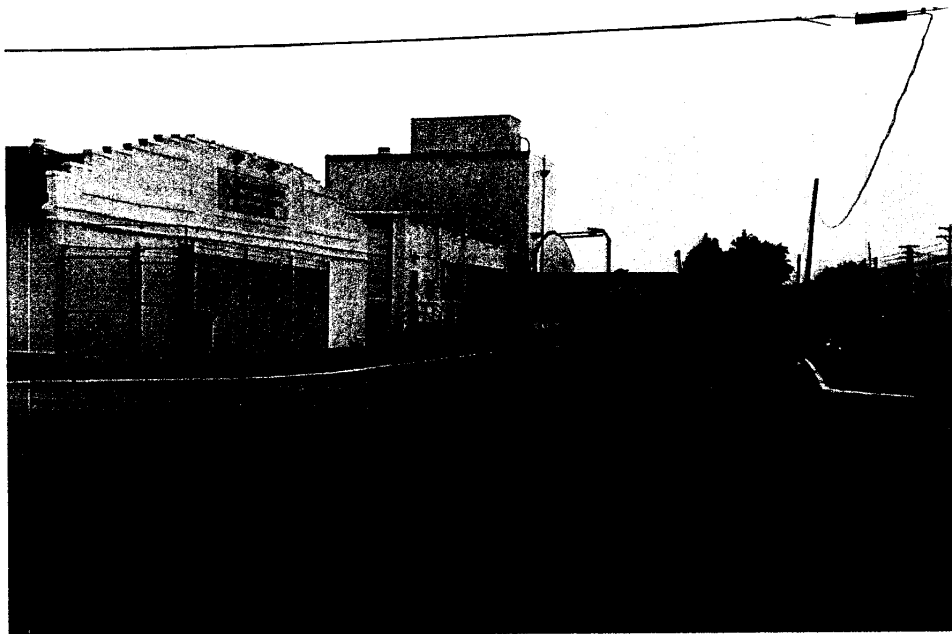
PHOTO 09



PHOTO 10



**PHOTO 11- THIS IS THE ADM TRACK COMING OFF OF THE TPW
MAIN EAST OF THE DIAMOND LOCATION**



**PHOTO 12- EAST MAIN STREET LOOKING SOUTH, GOING INTO
ADM PLANT**



**PHOTO 13- TRACK COMING OFF OF BNSF NORTHBOUND MAIN
GOING INTO ADM (LOOKING SOUTH).**



**PHOTO 14a- LOOKING NORTH FROM DAVIS ST. CROSSING
ADM TRACK IS ON THE RIGHT, COMING INTO
NORTHBOUND MAIN.**



**PHOTO 14b- THE CENTER OF THE CROSSING, CLEARLY SHOWING
NO CROSSOVER.**
