

212814

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS

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

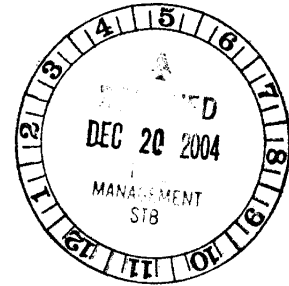
William A. Mullins
wmullins@bakerandmiller.com

DIRECT DIAL: (202) 663-7823

December 20, 2004

BY HAND DELIVERY

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



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

Dear Secretary Williams:

Enclosed herewith are an original and eleven copies of the Public Version of the Keokuk Junction Railway Co.'s Reply to Toledo, Peoria and Western Railway Corporation's Petition for Reconsideration filed November 29, 2004. A copy of this filing on disk is also enclosed for the Board's internal use.

Accompanying in a separate, appropriately-labeled envelope, are an original and eleven copies of the Highly Confidential version of this filing. A copy of that version of the filing on disk is also enclosed in that envelope for the Board's internal use.

Please acknowledge receipt of the enclosed pleading by date stamping the extra copy of each version of the filing and returning them 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

CONTAINS COLOR COPY

Enclosure

cc: All Parties of Record

ENTERED
Office of Proceedings

DEC 21 2004

Part of
Public Record

212814

PUBLIC VERSION
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

KEOKUK JUNCTION RAILWAY CO.'S REPLY TO
TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION'S
PETITION FOR RECONSIDERATION

ENTERED
Office of Proceedings
DEC 20 2004
Part of
Public Record

CONTAINS COLOR COPY

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: December 20, 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**

**KEOKUK JUNCTION RAILWAY CO.'S REPLY TO
TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION'S
PETITION FOR RECONSIDERATION**

PREFACE

Keokuk Junction Railway Co. ("KJRY") hereby replies to the Petition for Reconsideration ("Petition") filed November 29, 2004 by Toledo, Peoria and Western Railway Corporation ("TP&W"). As shown in KJRY's December 3, 2004, Motion to Strike, TP&W's Petition is premised largely on pre-existing evidence that should have been filed previously with the Board but was not and thus should be stricken from the record. Because the Board has not yet ruled on the Motion to Strike, KJRY is hereby required to reply to the newly raised evidence. Viewed on its merits, TP&W's Petition should be denied. TP&W has not shown that the Board's October 28, 2004 decision ("Decision") was in error or that new facts or changed circumstances require the Board to change its Decision.¹

¹ It is not clear whether TP&W paid the requisite filing fee for its appeal. See 49 C.F.R. §§1002.2(f)(61) (fee amount) and 1115.3(a) (a petition for reconsideration is a discretionary appeal). If not, TP&W's Petition should not be considered by the Board.

SUMMARY OF ARGUMENT²

Almost four years ago to the day, TP&W sold virtually the entire Line³ to a scrap dealer under the guise that the sale was for continued rail service. After that sale was undone due to its misuse of Board procedures, TP&W sought to abandon that portion of the Line. Having failed at both actions, TP&W simply undertook deliberate efforts to ensure that service over the Line never occurred again. To date, they have been quite successful at accomplishing that. Now that KJRY has established, and the Board has agreed, that the public interest would best be served by having the Line sold to a railroad that actually wants to provide service and has a plan to do so, TP&W is once again doing all that it can do to prevent that sale and the restoration of service. Its latest effort is its petition for reconsideration of the Decision. In essence, TP&W's Petition seeks to retry this entire proceeding under the guise of "new evidence." The Board should reject TP&W's arguments.

TP&W attacks the Board's public convenience and necessity ("PC&N") findings contained in the Decision, but these attacks are misleading and misguided. The Board was more than justified in finding that service to shippers was inadequate. The shippers, both local and overhead (except those on the Mapleton Spur), have not had service over the Line for four years. The majority of the shippers on the Line support KJRY's Application. This is true whether or not the Mapleton shippers are counted in the overall number of shippers. Likewise, TP&W's efforts to fault the Board by attempting to import into this matter procedures or evidentiary standards from other statutory provisions, such as rate complaints or requests for alternative

² KJRY presents this separate Summary of Argument as required by 49 C.F.R. §1115.3(d).

³ Capitalized terms have the same meaning as those in the Board's October 28, 2004 decision ("Decision").

service or competitive access, has no basis in law or fact. This is not a rate or service complaint case or a competitive access case. The Board does not have to undertake an analysis for each of the PC&N factors found at 49 U.S.C. § 10907(c) as if each factor represents a separate proceeding and apply the different statutory standards contained within the separate statutory provisions for each factor. Instead, the Board had full authority, after balancing all of the factors, to make the requisite findings. Finally, TP&W's renewed call for bifurcation of the Line should be rejected as it is inconsistent with the law and the historic nature of the Line.

TP&W's challenges to the Board's valuation conclusions are equally ill-founded. There is no Going Concern Value ("GCV") for the Canton to Hollis segment of the Line. As KJRY showed in response to TP&W's November 5 stay petition, TP&W does not have an agreement to move new traffic on the Line. The information in Exhibit B attached hereto confirms this point. Likewise, TP&W's arguments with respect to having fee title to the real estate, while appearing plausible upon first glance, crumble under scrutiny. Even if TP&W does own more property in fee simple, TP&W's supplemental real estate valuation evidence is not consistent with the actual sales of comparable properties. Finally, Mr. Garvin's revised testimony concerning materials values is unpersuasive. The Board's valuation of the Line using an average scrap value in a period of price volatility provides TP&W with the constitutional value of its asset and Mr. Garvin's arguments have no basis in law.

As for some of the other newly raised arguments, the newly-enacted American Jobs Creation Act ("AJCA") tax credit does not increase the NLV of the Line as argued by TP&W. Principal among the many deficiencies of this argument is the fact that TP&W would have to spend \$7000 for every track mile in order to obtain a \$3500 tax credit. The argument that KJRY should compensate it for not having to spend money is ridiculous. Finally, there is no need for

oral argument in this matter. Oral argument is typically held to sort out complex factual issues or to summarize huge records. This case involves neither of those situations.

In the end, TP&W has failed to establish material error or substantially changed circumstances or to present new evidence showing that the Board's Decision was arbitrary or capricious. In finding that the public interest required the Line to be sold, the Board carefully balanced all of the statutory factors. The newly raised arguments do not change that analysis. The valuation set by the Board was proper. The newly raised evidence does not change that valuation, or even if it does, the changes should be minimal at best. TP&W has simply failed to meet its heavy burden. The Board should deny the Petition and allow the sale to go forward.

PROCEDURAL BACKGROUND

On April 9, 2003, KJRY applied to the Board under 49 U.S.C. §10907 to acquire a 76-mile rail line that extends between Milepost 118.5 at Hollis, IL, where it intersects the line of Union Pacific Railroad Co., and Milepost 194.5, where it joins KJRY's line at La Harpe, IL. The Board accepted the Application by decision served July 9, 2003. Evidentiary submissions followed, and the record closed on November 7, 2003.

As the Board considered the application, KJRY updated the Board with extensions of its loan commitment to purchase the Line. TP&W began filing revised valuation evidence in March, to which KJRY responded. In May, KJRY notified the Board that the crossing diamonds at Bushnell that allow trains on the Line to cross BNSF's line had been removed. Several filings on that issue followed.

The Board issued its Decision on October 28, 2004, holding that the public convenience and necessity require sale of the Line to KJRY. The Board's decision set the purchase price based on NLV of the Line at \$3,940,756, and called for closing on the sale by January 26, 2005.

TP&W on November 5 sought a stay of the Decision. The United Transportation Union-Illinois Legislative Board ("UTU-IL") joined in, requesting a stay on November 8. KJRY replied to both stay petitions on November 12. The Board granted TP&W and UTU-IL a 12-day extension to petition for reconsideration by order served November 16. Chairman Nober denied both stay requests on November 24. TP&W filed its Petition on November 29. UTU-IL did not pursue reconsideration. KJRY filed evidence of the value of reroll steel on December 9 and hereby replies to the remaining arguments and newly raised evidence contained in the Petition.⁴

LEGAL STANDARD APPLICABLE TO TP&W'S PETITION

The Board's regulations specify that a party seeking reconsideration of a decision rendered by the entire Board must demonstrate that the prior action would be materially affected because of new evidence or substantially changed circumstances, or that the decision involves material error. 49 C.F.R. §1115.3(b). The petitioning party has the burden to establish these assertions. *See, e.g., Owensville Terminal Company, Inc.--Abandonment Exemption--In Edwards and White Counties, IL, and Gibson and Posey Counties, IN*, STB Docket No. AB-477 (Sub-No. 3X) (served Dec. 2, 1998), slip op at 5.

A party cannot seek reconsideration simply based on evidence that it could have previously presented, but did not. "[T]he term 'new evidence' refers to evidence that was not reasonably available to the party when the record was developed, and not simply newly raised." *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company*,

⁴ TP&W's Petition seeks waiver of the 20-page limit for reconsideration petitions and asks the Board to accept TP&W's 123-page filing. While KJRY opposes the acceptance of the bulk of TP&W's Petition on grounds that it does not present changed circumstances or new evidence, KJRY respectfully submits that TP&W should not be granted relief from the 20-page limit unless KJRY is accorded the same relief for acceptance of this filing.

STB Docket No. 42056 (served Sept. 27, 2004), slip op. at 3, citing *Friends of Sierra R.R., Inc. v. ICC*, 881 F.2d 663, 667 (9th Cir. 1989). “Nothing in the statute or the Board’s regulations obliges the agency to rethink its decisions whenever a party wishes to try out a new theory or finds new information at a late stage in the process.” *Id.*, citing *Connecticut Trust for Historic Preservation v. ICC*, 841 F.2d 479, 484 (2d Cir. 1988). In other words, reconsideration is neither appropriate for mere rehashing of previous arguments or for fabrication of entirely new issues and contentions that could have been raised previously.

Under these standards, it is clear that TP&W’s Petition should be denied. The bulk of TP&W’s Petition consists either of rehashed arguments, evidentiary or procedural contentions that could and should have been made previously but were not, or supposed new evidence that likewise could and should have been submitted previously. To the extent that the Petition discusses facts that are truly new or challenges the Board’s conclusions as material error, the Petition is ill-founded and unpersuasive. The Petition accordingly should be denied.

ARGUMENT

I. THE BOARD CORRECTLY FOUND THAT THE PUBLIC CONVENIENCE AND NECESSITY REQUIRED THE SALE OF THE LINE TO KJRY

TP&W raises several procedural challenges not heretofore argued against the Board’s finding that the public convenience and necessity supported granting KJRY’s application. Upon examination, it is clear that TP&W does not contest the fundamental merits of the evidence presented by KJRY, which was that the majority of shippers using the Line had not received adequate service and were dissatisfied with TP&W’s service. Instead, TP&W’s Petition raises a number of procedural and extraneous arguments, which have no basis in the law and should be rejected.

TP&W's first attack on the Board's findings is that the numerous shipper letters stating their dissatisfaction with TP&W's service, and supporting the sale of the Line to KJRY, were not instead submitted as verified statements. TP&W's argument is based on an attempted analogy of this case to a formal complaint where damages are sought, such as where a shipper alleges a violation of a railroad's common carrier obligation. The fundamental problem with this argument, and its attempted analogy to the *Terminal Warehouse* case,⁵ is that this is not a complaint case where shippers are seeking damages based on a violation of the common carrier obligation. While such a showing, through the use of verified statements, may arguably be required if this were a complaint seeking damages, *see* 49 C.F.R. Section 1104.4(b)(3) (requiring that a complaint be verified), it is not required under Section 10907. Rather, under Section 10907, the focus is on whether or not, in its totality, the railroad is providing "adequate service." If it is not, the line is sold to the applicant.

Though letters such as those by United Paving & Construction and Roquette America supporting KJRY's application show specific denials of service (see footnote 7 below), there is no requirement in 49 U.S.C. § 10907 that an applicant establish through verified statements that a specific shipper requested service and that such service was denied, resulting in damages. Rather, the focus is on inadequate service, not whether there has or has not been *any* service. Furthermore, pursuant to Section 10907 and the regulations implementing that statute, there is no requirement that an applicant or a shipper must file a "verified statement" to demonstrate inadequate service.⁶ Indeed, TP&W has not pointed to one case or regulation saying otherwise.

⁵ *Terminal Warehouse, Inc. v. CSX Transportation Inc.*, STB Docket No. 42086 (STB served May 12, 2004).

⁶ Indeed, inasmuch as Ms. Busch, Pioneer's Director of Marketing, attached the shipper letters to her verified statement and stated that the shipper letters were based on her conversations with

The use then of letters, signed by shippers on shipper letterhead, was thus entirely legal and justified, and the Board was correct in relying upon them for some of its findings.

In this case, the record is replete with numerous instances establishing that shippers were not receiving adequate service, and TP&W's procedural argument aside, TP&W does not dispute these contentions. Despite offering pages and pages of supplemental evidence, TP&W submits nothing refuting shippers' statements that TP&W has failed to offer satisfactory service;⁷ has failed to respond to requests for service;⁸ and has failed to establish rates that would allow shippers to ship by rail.⁹ Neither does TP&W answer for the fact that it is not even shown in the *Official Railway Guide* or its own website as holding out service on the Line. For TP&W to complain that shippers' letters are not verified when TP&W itself, even today, issues maps of its

the shippers and reflected their dissatisfaction with TP&W's failed service, Application at 117, the evidence of shipper dissatisfaction is, in fact, verified if that were required.

⁷ E.g., "Rail service is presently not available due to non competitive rates and service, therefore limiting of closing our access to many markets." Central Iron & Metals, Application at 124; "Not only did TP&W raise rates, they will not guarantee any service. Their reasonings being what grain we had to haul was not enough for them to operate the Line." Farmers Elevator Company, Application at 125-126; "We experienced a reduction in service from TP&W prior to their sale to SF&L. Following the sale to SF&L we experienced an increase in rates and a continuation of less than desirable service." Blandinsville Elevator, Application at 130.

⁸ E.g., "United Paving and Construction is trying to arrange shipments from a quarry in Indiana for the current year. Initial contact with the railroad has been difficult at best. Shipments of stone are usually coordinated though [sic] the stone producer, The Rogers Group. The Rogers Group has indicated to me reluctance by TP&W to quote rates, or provide service." Application at 127. "TPW has not responded in a timely manner to requests for rates and when they have replied, rates have not been competitive." Roquette America, Inc., Application at 132.

⁹ E.g., "Hitchcock Scrap Yard, Inc. used to ship via TPW until the rates made it economically unfeasible to continue." Application at 122; "[T]he rates being quoted for any grain transit east are currently 3-4 times higher than was quoted before the SF&L debacle. In essence the rates have stopped any business we want to do." Colusa Elevator, Application at 123.

service that exclude virtually the entire Line, is preposterous. *See* Exhibit A (current map of TP&W service territory on TP&W's website).

Neither is there any merit to TP&W's attempt to engraft the requirements of a stand-alone cost rate complaint case onto the Board's use of the term "unreasonable" when describing some of TP&W's rates. Nowhere does Section 10907 require an applicant to show that TP&W's rates were unreasonable under the standards of 49 U.S.C. §10701 or that TP&W had market dominance over the traffic of the shippers. In fact, Section 10907 never even uses the term "rates," "unreasonable rates," or "market dominance." Rather, KJRY in its Application and Supplement and the Board in its Decision used the rate evidence and discussion of rates, not to show that the rates in and of themselves were unreasonable, but rather as partial evidence in its analysis showing why the shippers were receiving inadequate service. The Board used the evidence of rate increases, not the rates themselves, as simply one of the factors showing that the shippers were receiving inadequate service; not to make a finding that the rates were unreasonable. *See* Decision, slip op. at 6 (TP&W's rates were "unreasonable *as compared to previous years.*") (Emphasis added.) For TP&W to separate the word "unreasonable" from the context in which it was used and to then seek to attach to that isolated word the enormously complex procedures of a rate complaint case, smacks of complete desperation. The Board's conclusion that the enormous increases in rates "offered" by TP&W were intended to discourage shippers from using the Line and that such increased rates were simply another factor in determining that service was inadequate was entirely reasonable and supported by the record.

TP&W's final argument with respect to the Board's PC&N findings is to once again argue that the Line should be bi-furcated into two sections—the La Harpe to Mapleton section and the Mapleton to Hollis section. The problem with this analysis is that there is no indication

in Section 10907 that the words “particular railroad line” should mean the railroad line chosen by the owning carrier. The statute allows the applicant, not the current owner, to determine what line it will apply to acquire. Specifically, Section 10907(a)(1) defines a financially responsible person as one capable of paying the constitutional minimum value of “the railroad line *proposed to be acquired*.” (Emphasis added.) Also, the statute authorizes the Board to order sale of a particular railroad line if “an application to purchase such line has been filed” by a financially responsible person (*i.e.*, a person that applied to acquire that particular railroad line). 49 U.S.C. §10907(b)(1)(B). These and other provisions using the words “particular railroad line” make clear that it is the applicant, not the current owner, that determines the scope of the application. The statute thus requires the Board to evaluate a feeder line application on the basis of the line selected by the applicant, not some portion thereof chosen by the current owner.

KJRY chose to file an application that governed the complete line from La Harpe to Hollis, *i.e.* the Line. It did so for two principal reasons, including (1) the historic nature of the line between Peoria and Keokuk; and (2) the fact that, from an operating and competitive standpoint, KJRY did not desire to have TP&W interject itself in the middle of a through route between Keokuk and Peoria, which would occur if TP&W continued to own the line between Hollis and Mapleton. There was simply no requirement in the statute that KJRY show PC&N for each and every segment of the “particular railroad line” it had chosen, and it would have been entirely inconsistent with precedent for the Board to bifurcate its analysis and the application into two different segments.

In fact, by treating the Line as one “particular railroad line,” the Board was simply following the precedent in the *Caddo Antoine* case. In that case, as here, the owning railroad

sought to bifurcate the line into two different segments. This approach was rejected by the Eight Circuit:

[I]n light of CALM's application to provide service over the entire length of the Norman Branch, a line that had historically been operated as a unitary operation, the Commission should have treated the entirety of the Norman Branch as 'a particular railroad line' and thus have reviewed CALM's application under the PN&C [sic] standard . . .

Caddo Antoine and Little Missouri Railroad Co. v. Surface Transportation Board, 95 F.3d 740, 747 (8th Cir. 1996). The Board was thus entirely correct to treat the entire Line as the "particular railroad line" for which the Application applied.

TP&W makes much of its assertion that the shippers on the Mapleton Spur, which is a spur line that comes off of the Line near Mapleton, were receiving adequate service and had not supported KJRY's Application, but that argument misses the point. After initially filing to acquire both the Line and the Mapleton Spur, KJRY later withdrew its request to include the Mapleton Spur as part of its Application, allowing TP&W to continue to serve those shippers. In the end, the Mapleton Spur was simply not part of the "particular railroad line" that KJRY was seeking to acquire, and its shippers were not shippers "on" the Line.¹⁰

Having bifurcated the Line into two pieces, TP&W then asserts that PC&N was not established for sale of the Mapleton to Hollis portion of the Line, but since bifurcation is inappropriate and inconsistent with precedent, the analysis of the Mapleton to Hollis segment is

¹⁰ KJRY agrees with the Board's conclusion that shippers on the Mapleton Spur are overhead shippers with respect to the Line because their traffic neither originates nor terminates at a point on the Line and because they will continue to have direct service from TP&W and none from KJRY. See *generally Reasonably Expected Costs*, 1 I.C.C.2d 293 (1984) (amending regulations under light density line surcharge provisions, 49 C.F.R. §1140.2, to read in pertinent part, "Overhead traffic shall include all shipments that are not originated or terminated at any point on the surcharged line segment.") To treat the Mapleton shippers as shippers on the Line, as advocated by TP&W, would be entirely inconsistent with KJRY not having the ability to serve them.

only relevant insofar as it affects evaluation of whether the sale of the entire Line sought by KJRY was required. When one considers the totality of the evidence and proceeding, it is clear that the Board correctly determined that the PC&N required the sale of the entire Line, notwithstanding TP&W's assertions about shippers on the Mapleton Spur. As shown in KJRY's Application, the majority of the shippers using the Line had been inadequately served by TP&W and supported KJRY's purchase. This remains true even if the shippers on the Mapleton Spur are counted in the total number of shippers. As set forth in the table in the Application at page 116, no matter how the tally is taken, KJRY has shown that service is inadequate for a majority of shippers who transport traffic over the Line. Moreover, it would be improper for the Board to make any inference about the preferences of the shippers on the Mapleton Spur inasmuch as, despite its assertions about them, TP&W has not provided a statement or a letter by any shipper on the Mapleton Spur opposing KJRY's purchase of the Line.

TP&W's final point is to criticize KJRY's actions in certain other non-related cases. Apparently this desperate mud-slinging is an effort to show that KJRY will not treat TP&W fairly with respect to the trackage rights operation that KJRY has offered to allow TP&W to operate between Hollis and Mapleton in order to allow TP&W to continue to serve the Mapleton Spur shippers.¹¹ In raising these issues, however, TP&W points to no provision of Section 10907 as to why these unrelated issues are even relevant. Nor do these allegations show any instance in which KJRY refused to comply with any trackage rights agreement. The sole purpose seems to be to attack KJRY. KJRY will honor its agreement and will treat TP&W fairly and

¹¹ TP&W also claims that such trackage rights would be insufficient because trackage rights allegedly do not provide enough service guarantee. Of course TP&W's complaints about the sufficiency of trackage rights to access the Mapleton Spur rings hollow in light of TP&W's

notes that it submitted all terms of its proposed agreement to the Board for its review.

Furthermore, the Board always retains oversight jurisdiction to step in and remedy any potential future operational problems. The fact that KJRY has been involved in litigation in the past, as has TP&W and its corporate parent, is not grounds for invalidating the Board's conclusions.¹²

TP&W's attacks on the Board's finding that the public convenience and necessity require sale of the Line to KJRY are without merit and do not warrant reconsideration of the Board's decision. The record is abundantly clear that service on the Line has been woefully inadequate for a majority of shippers using the Line, whether or not the overhead shippers on the Mapleton Spur are considered. TP&W's renewed effort to bifurcate the Line should be rejected, just as the Eighth Circuit rejected a similar effort in the *Caddo Antoine* case. Finally, TP&W's assertions about the relations between KJRY or an affiliate and other rail operators are not analogous to this situation, and fail to establish that TP&W's proposed alternative of retaining ownership and granting trackage rights to KJRY would be any better.

II. THE BOARD'S DECISION TO VALUE THE LINE AT \$3,940,756.00 WAS FULLY SUPPORTED IN THE RECORD AND PROVIDES TP&W WITH CONSTITUTIONALLY SUFFICIENT COMPENSATION

A. There Is No Going Concern Value On The Canton To Hollis Segment

TP&W's principal attack on the valuation portion of the Board's decision is TP&W's assertion that it was hopeful it might enter into a contract with a new shipper that would use the

proposal that KJRY should be forced, as part of an alleged settlement offer by TP&W, to accept trackage rights from Canton to Hollis, a distance several times greater than Hollis to Mapleton.

¹² As for the KJRY/BNSF dispute, after KJRY's position was validated by the U.S. Court of Appeals for the District of Columbia Circuit, that matter was settled by the parties to both of their satisfaction. The matter involving Indiana Southwestern Railway ("ISW") remains in litigation.

Canton-Hollis portion of the Line, providing TP&W supposed annual net operating revenue of \$310,000. Because of this alleged new revenue stream, TP&W asserts two things: (1) that it is entitled to a going concern value ("GCV") of \$3,297,872.30 for the Canton to Hollis segment of the Line; and (2) it is entitled to the net liquidation value ("NLV") for the portion of the line between La Harpe and Canton. Neither of these arguments is correct.

TP&W bases its argument on the assertion that a new shipper has decided to locate a large facility near Canton, IL and that this new shipper has agreed to use TP&W's line. As such, TP&W asserts, it has guaranteed revenue from those new movements that will be lost as a result of the sale. Thus, TP&W requests compensation for that alleged lost revenue. In fact, TP&W goes as far as saying that the Highly Confidential exhibit to KJRY's opposition to TP&W's Stay Petition "confirm[ed] everything that TP&W had said." TP&W Petition at 11. As is obvious to the Board from KJRY's opposition to the Stay Petition and from Exhibit B hereto, nothing can be further from the truth. There simply is no going concern value on that portion of the Line.

As an initial matter, the exhibit to KJRY's November 12 filing decisively refuted TP&W's claims. TP&W claimed in its November 5 Stay Petition that it had "expected to have the contract executed this week, until the *Sale Decision* interfered." Stay Petition at 6. By contrast, however, the exhibit to KJRY's November 12 reply to the Stay Petition

Accordingly, TP&W's alleged expectations were unfounded.

Of course the main fault with TP&W's argument is the fact that there were so many contingencies with respect to the alleged new shipper and the alleged new revenue stream that TP&W was not guaranteed one dime from the potential new shipper. Exhibit B hereto makes

clear that TP&W's supposed agreement with the alleged new shipper

In perhaps the ultimate blow to TP&W's argument,

clearly shows that TP&W is completely wrong in its argument that it is entitled to compensation for loss of revenues. TP&W's assertions that the Decision cost it several hundred thousand dollars per year for which it should be compensated by KJRY is a

distortion and exaggeration of the true facts. Accordingly, there is no basis for finding a GCV for the Canton-Hollis segment.

Finally, even assuming, *arguendo*, that TP&W is entitled to a going concern value due to the alleged new revenue stream, the Board cannot legally grant compensation on a going concern basis for one segment of the Line while also granting compensation on a net liquidation value basis for a different segment of the Line. As KJRY has asserted throughout this proceeding, Section 10907 does not allow the Board to value the “particular railroad line” for which an application has been filed by breaking the line into different segments for valuation purposes. The “particular railroad line” has either a going concern value or a net liquidation value, but not both. In this case, even if TP&W were entitled to a going concern value for the entire Line, NLV is higher than GCV. The Board would thus be justified in applying NLV for the entire Line. To apply both a NLV and GCV would subject the Board’s decision to reversal on appeal. *See Caddo Antoine and Little Missouri Railroad Company, et al. v. STB*, 95 F.3d 740 (8th Cir. 1996).

B. The Board Did Not Commit Material Error In Considering KJRY’s Real Estate Evidence Submitted In KJRY’s Rebuttal

As argued more fully in KJRY’s December 3 Motion to Strike, the evidence that TP&W submitted as supposed “new” evidence in its Petition is not new evidence, but merely newly-raised evidence. As such, it cannot form a proper basis for a petition for reconsideration. While KJRY continues to believe this newly-raised evidence should be stricken from the record, nonetheless, it was not material error for the Board to consider KJRY’s real estate evidence submitted as part of KJRY’s rebuttal. Neither was it a denial of TP&W’s due process rights for the Board to consider that evidence.

TP&W argues that it was improper for the Board to consider KJRY’s real estate evidence because such evidence was submitted for the first time on rebuttal, and that the Application did

not contain any real estate evidence. TP&W November 5, 2004 Stay Petition at 8 & 9. This claim is simply false. KJRY filed the best evidence it could of real estate value in its Application through the testimony of its valuation experts John W. Gohmann and B. Allen Brown. *See* KJRY's Application at 10-16, 160-196.¹³ KJRY's witness John Gohmann estimated that TP&W's right-of-way consisted of approximately 864 acres,¹⁴ of which he estimated, based on his experience and on historical trends, that TP&W would own half of the right-of-way in fee. Similarly, Mr. Brown testified in the Application that, "Based on discussions with TP&W, it has been my impression that TP&W does not have a significant amount of fee ownership of real estate in the line because they never offered to sell to KJRY nor asked KJRY to pay for real property, but only track materials."

Mr. Gohmann's testimony also estimated the value of the 432 acres of right-of-way to which TP&W might hold fee title as \$100,000. KJRY's Application at 176, 186-187. KJRY's Application (p. 11, n. 7) also stated:

Because information on the nature and extent of TP&W's interests in real estate underlying the Line is predominantly or exclusively within TP&W's possession and has not been made available to KJRY, KJRY uses the estimated real estate value contained in the valuation study prepared by Gohmann and Associates, Inc., which is appended to the V.S. Gohmann. KJRY has also requested information about the nature and extent of TP&W's interest in real estate underlying the Line in its discovery requests, filed concurrently with this application.^[15]

In short, it is patently false that KJRY did not present "any" evidence in its Application

¹³ In relation to real estate values in particular, see pages 15, 164, 175-177, 186-187.

¹⁴ In fact, totaling the acreage shown on Exhibit D to the October 2003 statement of TP&W's real estate witness Todd Cecil (TP&W Comments in Opposition at 149-152) shows that Mr. Gohmann's estimate of the total acreage involved was within 7.3% of the amount calculated by TP&W from its review of the deeds and valuation maps that it refused to produce in discovery.

¹⁵ TP&W, of course, produced no information in response to KJRY's discovery requests. *See* TP&W Comments in Opposition, Vol. 1 at 192-193.

regarding real estate issues or that KJRY presented its real estate evidence for the “first time” in its rebuttal.¹⁶

In reply to this evidence, TP&W’s own real estate witness, Todd Cecil, RailAmerica’s Vice President for Real Estate, said that his statement would “critique the valuation included in the Application.” (TP&W Comments in Opposition, Vol. 1 at 108). He went on to further criticize KJRY’s valuation of the real estate by stating, “in KJRY’s estimate of land value there was apparently absolutely no title review undertaken, another reason that their estimate of value is completely without foundation.” *Id.*, at 118. Mr. Cecil then put in his own evidence regarding the quality and quantity of the right-of-way real estate, including for the first time the right-of-way deeds that KJRY had requested in discovery but that TP&W had refused to produce.¹⁷ To rebut Mr. Cecil’s claims concerning NLV of the real estate at issue, KJRY hired Mr. Mooty and Mr. Higgs, who thoroughly analyzed Mr. Cecil’s claims, the deeds, and other exhibits, to rebut Mr. Cecil’s claims about the NLV of the real estate.

Given all of this evidence and argument in the record, and the fact that TP&W did not seek to strike KJRY’s rebuttal evidence as improper rebuttal, it was entirely proper for the Board to consider the record before it and to make the rational decision that it made based upon that

¹⁶ Indeed, in the Petition, TP&W backs away from the assertion that KJRY presented no evidence on real estate title or value in KJRY’s Application, arguing instead that TP&W was in a “difficult position” because KJRY’s real estate evidence was not “traditional.” *See* TP&W Petition at 13.

¹⁷ KJRY’s Document Request No. 2 specifically sought “All valuation maps, real estate records, deeds, track charts, maintenance records, hi-rail and other inspection records with respect to the Line.” TP&W refused this request. *See* TP&W Comments in Opposition, Vol. 1 at 192-193. Had these records been produced, they would have enabled KJRY to submit more specific real estate valuation information with its application. Because they were not produced, KJRY was forced to stand on the testimony of Messrs. Gohmann and Brown that TP&W’s title was suspect and then to submit rebuttal to TP&W’s evidence, which TP&W first produced in TP&W’s October 16 Comments in Opposition.

record. In doing so, the Board did not commit material error nor did it violate TP&W's due process rights. Instead, the acceptance and consideration of all of this evidence, including KJRY's rebuttal evidence, was fully consistent with the ICC's decision in *Cheney Railroad Company-Feeder Railroad Development Application-Between Greens and Ivalee, AL*, 5 I.C.C.2d 250, 1989 ICC LEXIS 19 at *14 (1989)(substantial evidence on real estate issues was submitted during rebuttal and considered, notwithstanding the owning carrier's motion to strike the evidence).

TP&W has not been denied due process nor did the Board commit material error. TP&W clearly thought that Mr. Cecil's testimony concerning title to the right-of-way real estate was sufficient. Though TP&W clearly overestimated the quality of that evidence, that was TP&W's doing, not KJRY's or the Board's. Nothing about the Board's approach of following its own regulations and procedural schedule denied TP&W due process.

C. Although TP&W's Supplemental Real Estate Evidence Should Be Stricken From The Record, Even If Considered, It Is Unpersuasive

1. TP&W's Claims of Fee Title to Most of the Right of Way Are Fatally Flawed¹⁸

After carefully reviewing the evidence submitted by the various real estate witnesses regarding both the quality of the title and the value of the land held under that title (witness Cecil for TP&W, and witnesses Gohmann, Brown, Mooty, and Higgs for KJRY), the Board found that

¹⁸ TP&W implies that KJRY must realize that the real estate was undervalued because it has a loan guarantee of \$7 million and quickly accepted the Board's decision. Neither of these issues actions are suspicious or imply such nefarious intent. The \$7 million was a combination of two factors: (1) Rail America's oral statements that the value of the Line on Rail America's books was approximately \$7 million; and (2) Pioneer's financial ability to pay. Further, KJRY accepted the Board's Decision quickly because shippers have asked KJRY to begin renewed service as quickly as possible. KJRY is in agreement with this request and wants to close as early as possible.

TP&W owned 31.657 acres in fee and the rest in easement. In its Petition, TP&W heavily criticizes the Board's findings and submits the testimony of new witnesses to basically rebut the findings of KJRY's rebuttal witnesses. TP&W submits an opinion letter of the law firm Wildman, Harrold, Allen & Dixon ("Wildman") regarding the quality of TP&W's title to its right-of-way. Wildman agrees with approximately half of Mr. Mooty's rebuttal statement regarding the quality of the title; however, Wildman is of the opinion that the deeds in Rows 1, 2, 6, 13, 14, 16, and 18 grant a fee simply title, rather than an easement as asserted by Mr. Mooty and as agreed to by the Board in the Decision. KJRY has requested Mr. Mooty to review his prior statement, the Board's Decision, and the Wildman opinion and to provide an update to his previously submitted verified statement. Mr. Mooty has done so and his verified statement is attached as Exhibit C.

As done by the Wildman opinion, Mr. Mooty's reply verified statement reviewed the granting and habendum clauses of the deeds, the use of the homestead exemption waivers found on some of the deeds, and the significance, if any, of the federal tax stamps. After thoroughly reviewing and analyzing the Wildman letter, the Board's Decision, his previous statement, and the entirety of all of the relevant deeds, Mr. Mooty states he has "not substantively changed my opinion regarding the type of ownership interests conveyed by the deeds that were discussed in my original opinion letter of October 28, 2003." In other words, his statement reaffirms the Board's findings that 31.657 acres of the right-of-way are held in fee and the rest by easement.

Contrary to the statement by TP&W's counsel, KJRY does not have the "burden of proof" to show why the Board's decision was right. Rather, TP&W has the burden of proof to show that the Board's Decision contained material error. TP&W has not met that burden. With respect to the quality of title issue, the Board's initial decision involved the weighing of the

evidence submitted by Mr. Cecil against the opinion of Mr. Mooty. The Board reasonably and rationally analyzed both statements and came to the conclusion that Mr. Mooty was right. TP&W has now attempted to show through the introduction of the Wildman letter that Mr. Mooty was wrong. Mr. Mooty has reviewed TP&W's evidence and claims and has concluded that they have not shown that his previous evidence and statement was in error. As Mr. Mooty is the author of Chapter 18, Easements and Licenses, in *Residential Real Estate* (IICLE 2003) and Chapter 8, The Illinois Responsible Property Transfer Act, in *Environmental Law for Transactional Attorneys* (IICLE 2001) and is imminently qualified, the Board was entirely justified in relying upon his opinion and would be justified in doing so again.

2. KJRY's Witnesses Demonstrate That TP&W's Valuation Methodology Is Also Fatally Flawed

As shown in KJRY's November 7, 2003 filing, the appraisal evidence previously filed by TP&W considerably overstated the value of the property being valued as compared to other, similar sales of railroad property. *See* Verified Statement of L. Arlen Higgs, Exhibit 11 to KJRY's November 7 rebuttal. KJRY's witness reviewing TP&W's most recent round of evidence reaches a similar conclusion.¹⁹

¹⁹ A family medical emergency in the family of KJRY's appraisal witness prevented the witness from completing his report by the date of this filing. KJRY learned of this problem after noon today. KJRY expects that witness to complete his report later this week. As soon as it is completed, KJRY will file it as Exhibit D to this filing. KJRY hereby requests leave pursuant to 49 C.F.R. 1104.7(b) to late file said exhibit, along with leave to late file this request pursuant to 49 C.F.R. Part 1117. KJRY respectfully submits that due to the unforeseen emergency and the last-minute notice to KJRY, plus the 12-day extension granted to TP&W to prepare the Petition, the requested extension is warranted. No party will be prejudiced by acceptance of the late-filed

D. The Board's Computation Of The Net Salvage Value Of The Line Was Correct

In the Decision, the Board recognized that recent volatility in the scrap steel market could significantly increase or reduce the net salvage value of the assets in the Line were they to be sold. Accordingly, the Board averaged the prices of scrap materials over more than a year and applied that average price to determine a reliable net salvage value for rail and track materials. In its Petition, TP&W demands that the Board, instead of using an average price, apply prices obtained *after* the date the Board served the Decision. As the basis for such an unusual request, TP&W contends that if it were forced to liquidate the Line, it would have done so on November 1, and thus the Board should use the price of steel on that date. There are several problems with TP&W's argument.

First and foremost, TP&W had no authority to salvage the Line, or to sell the Line to anyone other than KJRY on November 1. Second, if not for KJRY's petition to revoke the sale to SF&L, TP&W would not have realized the November 1 price because TP&W would have long ago sold 94% of the Line to SF&L for approximately \$2.18 million, far less than the prices available on November 1 or the price established by the Board. Third, TP&W could not have obtained the November 1 price for the Line because it did not have abandonment authority and could not have delivered the Line to Chicago on November 1, which was a prerequisite for obtaining the November 1 price used by Mr. Garvin. Obviously, TP&W did not know what the November 1 price would be before the Board served its Decision on October 28, and thus selected that price post facto for this proceeding. Finally, it was entirely consistent with precedent for the Board to use an average price for scrap steel. In prior cases, the Board's

exhibit inasmuch as the Board's rules do not grant TP&W a right to reply to KJRY's reply to the Petition. See 49 C.F.R. §1104.13(c).

predecessor used average prices over a period of time in valuing a property, to compensate for fluctuating market conditions.²⁰

As in the previous cases, it was entirely logical to apply an average in the context of a wildly fluctuating market. The parties' evidence has shown substantial fluctuations in the prices of scrap and reroll steel since the time that KJRY filed its application. For example, in March, TP&W claimed that the price of scrap steel had climbed from \$110.00 per gross ton delivered in October to \$230.00 per gross ton delivered in March, a change of over 100%. KJRY subsequently showed, however, that by early June, scrap steel prices had dropped from the March price by nearly 30%. This and other information in the record adequately establish the volatility of the current market for scrap steel, making the averaging methodology used by the Board in this case and by the ICC in the cited precedents wholly appropriate. TP&W's suggested rationale for departing from precedent is wholly unconvincing and the Board's use of an average price was rational and reasonable.²¹

E. TP&W Is Not Entitled To An Increase In NLV Due To The Newly Enacted Shortline Maintenance Tax Credit

Section 245 of The American Jobs Creation Act of 2004,²² establishes a 3-year tax credit of up to \$3,500 per year per mile of track owned by a Class II or III carrier if the carrier's maintenance expenditures equal or exceed \$7,000 per year per mile. A copy of the provision is

²⁰ *Norfolk & Western Railway Company-Abandonment-Between New Castle and Rushville, In Henry and Rush Counties, IN*, Docket No. AB-10 (Sub-No. 11) (ICC served Feb. 11, 1983); *Chicago and North Western Transportation Company-Abandonment Between Marshalltown (Powerville) and Cedar Falls Junction and Between Hicks and Dike-In Marshall, Tama, Grundy and Blackhawk Counties, IA*, Docket No. AB-1 (Sub-No. 211) (ICC served Dec. 14, 1988).

²¹ Pursuant to the Board's Decision, KJRY addressed TP&W's evidence on the value of reroll steel in its December 9, 2004 filing. KJRY incorporates the arguments contained therein.

²² Pub. L. 108-357 (Oct. 22, 2004), Section 245 (copy attached as Exhibit E hereto).

attached as Exhibit E. TP&W claims that KJRY should pay TP&W \$874,650 (\$3,500 per mile per year times 3 years times 83.3 miles of main Line and siding) as compensation for TP&W's supposed lost opportunity to earn this credit with respect to the Line. There are many errors and unproven assumptions behind TP&W's claim that it is owed payment of a tax credit. These errors include the following:

- To obtain the tax credit, TP&W would have to spend twice the amount of the credit on track maintenance. TP&W has not proven that it will do so over each of the next three calendar years, or that doing so would produce a net financial benefit to TP&W.

- To use the tax credit, TP&W (or perhaps its parent under the aggregation rules of the AJCA provision) has to make a profit. TP&W has not shown that it will do so over each of the next three years or after that. Indeed, TP&W's testimony in this proceeding would lead one to the opposite conclusion, at least absent a sale of this Line to KJRY.

- The tax credit is only available with respect to track that is owned by the Class II or III carrier as of the end of each taxable year. Based on TP&W's past behavior with respect to attempting to abandon (directly or indirectly) virtually the entire Line, there is inadequate information contained in the Petition to establish that TP&W would

own the entire Line through December 31, 2007 so as to be able to claim the credit with respect to all of the miles of the Line for each of the next three years.

- TP&W's calculation does not discount the supposed value of the credit over the next three years back to current value.
- There is no assurance this tax credit will not be repealed or modified during the next three years.

In short, TP&W has not shown the facts necessary to establish that it would earn the credit. *See* Verified Statement of J. Michael Carr, Exhibit F hereto.

Finally, even if TP&W had shown that it actually would earn the tax credit in each of the next three years, a tax credit is not a proper part of the calculation of NLV. The Board has historically and repeatedly defined NLV as the value of the physical assets of a line; namely, the sum of the gross salvage value of the rail and track materials, less removal and disposal costs, plus the value of right-of-way real estate held in fee simple. *See Railroad Ventures, Inc. , et al. v. Surface Transportation Board*, 299 F.3d 523, 557 (6th Cir. 2002); *Mississippi Tennessee Holdings, LLC—Abandonment Exemption—In Union, Pontotoc and Chickasaw Counties, MS*, STB Docket No. AB-868X (served Nov. 2, 2004), slip op. at 2 (“NLV includes the value of the underlying real estate plus the net salvage value of track and materials.”); and *Chicago and North Western Transp. Co. -- Abandonment*, 363 I.C.C. 956, 958 (1981), *aff'd sub. nom. Chicago and North Western Transp. Co. v. United States*, 678 F.2d 665 (7th Cir. 1982). A tax credit, which may or may not materialize based on future spending and future profitability of the Line's owner and its affiliates is not akin to the hard assets of track and land. Therefore, a tax credit has no place in calculating the NLV of the Line.

III. OTHER ISSUES RAISED BY TP&W'S PETITION

A. Oral Argument Is Unnecessary

In yet another attempt to delay this proceeding and get another opportunity to provide yet further argument, TP&W has requested oral argument. This request should be denied. TP&W's request is inappropriate at this late stage of this particular proceeding.²³ Oral argument is normally reserved for cases such as coal rate proceedings or major rail mergers where there is a massive record. There, the parties use the argument to summarize the important points of the record. By contrast, this case is like most that come before the Board, presenting a limited set of facts that have been adequately explored on a manageable record. *See, e.g., CSX Transportation, Inc.—Abandonment Exemption—In Summit, County, OH*, STB Docket No. AB-55 (Sub-No. 631X) (served May 12, 2004), and *Brotherhood of Locomotive Engineers v. Union Pacific Railroad Company and Iowa Interstate Railroad*, Finance Docket No. 23294 (served Nov. 6, 1995) (each denying requests for oral argument as unnecessary). Furthermore, oral argument is less necessary than before because the issues are more narrowly focused than at the earlier stage of this proceeding. Most of the issues remaining are legal issues such as the proper valuation date and the quality of TP&W's title to the real estate, not factual issues. The Board is perfectly capable of deciding these legal issues without an oral argument. The request for oral argument should therefore be denied.

²³ It may also be that TP&W's request is untimely, inasmuch as TP&W did not file its request within 20 days of the date of the Decision, *see* 49 C.F.R. §1116.1(c), and did not seek an extension of the deadline to request oral argument.

B. The Board Should Require TP&W To Transfer All Property Held In Fee Simple Via A Warranty Deed

The Board's order required closing within 90-days of the Decision and requires TP&W to transfer "all property by quitclaim deed." Decision at 24. However, TP&W asserts that it has fee simple title to nearly 500 net acres of right-of-way. While KJRY believes this number is vastly overstated, regardless of the exact amount of title held in fee simple, the Board should order TP&W to transfer any property that it claims to be fee simple by warranty deed and not a quitclaim deed. As the Board correctly observed in the Decision, at page 16, "Nor does TP&W warrant the marketability of the title of any of the parcels." This observation pierces to the core a principal flaw in TP&W's title arguments – it seeks payment for fee simple title while seeking to convey merely by quitclaim deed. Allowing TP&W to convey alleged fee simple property only by quitclaim deed would vastly overcompensate TP&W for its interests in the right-of-way.

Under Illinois law, a quitclaim deed conveys an inferior title to that conveyed by warranty deed. Warranty deeds provide that such a deed is deemed to convey "fee simple" to the grantee, and to include three warranties – that the grantor has indefeasible fee simple title and power to convey same; that the premises were free of encumbrances; and that the grantor warrants the grantee's right to quiet and peaceable possession and will defend the grantee's title. These covenants are implied in a warranty deed even if not explicitly stated, and are obligatory upon the grantor. 765 Ill. Comp. Stat. 5/9 (2004).²⁴ Also, a warranty deed conveying fee simple absolute carries with it the right of the grantee to any title to the property subsequently acquired by the grantor. 765 Ill. Comp. Stat. 5/9 (2004). By contrast, quitclaim deeds convey and release

²⁴ Cited Illinois statutory materials are available on the official Illinois website at <http://www.ilga.gov/legislation/ilcs/ilcs2.asp?ChapterID=62>.

to the grantee and its heirs “in fee all the then existing legal or equitable rights of the grantor, but shall not extend to after acquired title unless words are added expressing such intention.” None of the warranties inherent in a statutory form warranty deed are deemed included in a conveyance by a statutory form quitclaim deed. *See* 765 Ill. Comp. Stat. 5/10 (2004). In short, the rights and title evidenced by a quitclaim deed are less, and are consequently less valuable, than those evidenced by a warranty deed.²⁵

TP&W wants the Board to order KJRY to pay values commensurate with fee simple title; however, finding that TP&W should be compensated for fee simple title while ordering TP&W to convey only by a quitclaim deed would result in a windfall to TP&W. A statutory quitclaim deed is not deemed to convey an indefeasible fee simple title. Moreover, a quitclaim deed does not carry with it the various warranties and the right to obtain after-acquired title that inheres in a conveyance by warranty deed.

KJRY respectfully suggests that TP&W should not be unjustly enriched by being paid for the right-of-way as if TP&W owned an indefeasible fee simple title while TP&W is allowed to avoid the responsibilities of a grantor under a warranty deed. If TP&W’s title claims are actually sound, TP&W would lose nothing and, conversely, would not be unjustly enriched, if it is ordered to convey any parcels that the Board finds to be indefeasible fee simple by warranty deed.

²⁵ It is curious to note that TP&W itself did not acquire title to its right-of-way via a warranty deed, but rather through a quitclaim deed. *See* V.S. Mooty, Exhibit C hereto.

C. TP&W Should Be Directed Not to Sell Any Property Valued in Its Evidence To Other Parties Prior to Consummation of This Transaction

KJRY notes with concern TP&W's statement in its Stay Petition that "TP&W . . . has sold parcels along the Line that the Board has concluded are not owned by TP&W in fee simple." Stay Petition at 9, n. 5. This language indicates that TP&W is selling portions of the right-of-way real estate that TP&W's witnesses have described to the Board and which are within the limits of the Line. KJRY also notes that it requested by letter that TP&W give it an assurance that it would not sell any property prior to closing, and TP&W specifically refused to provide those assurances.

KJRY requests that the Board direct TP&W to identify any and all such sales within 10 days, and direct that TP&W not sell property included in its valuation presentation to the Board, lest KJRY find itself compensating TP&W for property that has already been sold so that TP&W, in effect, gets paid twice for the same piece of property.

D. Absent A Court Order Staying The Decision, The Board Needs To Ensure That TP&W Will Close As Scheduled

Finally, KJRY wishes to note to the Board and for the record its concern that TP&W intends not to close on this sale as ordered by the Board. KJRY has twice attempted to secure from TP&W wire transfer instructions for closing. TP&W has insisted that such information is premature. KJRY has asked to hi-rail the Line to assess its condition. TP&W has refused. Perhaps most alarmingly, RailAmerica's Senior Vice President Scott G. Williams wrote KJRY that "TP&W will not be willing to sell any of its property at below the constitutional minimum value and will ask for court review of any STB decision that it feels sets a price below that level." This statement implies that no matter what value the Board establishes, if TP&W does not agree that the Board's value is the same as what it believes the constitutional minimum

value is, it will not close. KJRY strongly urges the Board to admonish TP&W that, absent a court-ordered stay, it is to carry through on the Board's Decision according to the terms thereof accepted by KJRY.

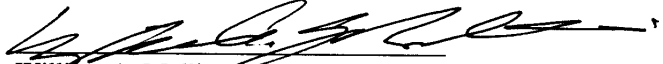
CONCLUSION

TP&W's Petition should be promptly denied. TP&W has the burden to establish material error or substantially changed circumstances or to present new evidence showing that the Board's Decision was wrong. TP&W did not meet that burden. The Board was more than justified in its PC&N findings because service to shippers was inadequate and the majority of the shippers on the Line supported KJRY's Application. This is true whether or not the Mapleton shippers are counted in the overall number of shippers. Likewise, TP&W's challenges to the Board's valuation conclusions are equally ill-founded. There is no GCV for the Canton to Hollis segment of the Line. TP&W's arguments with respect to it having fee title to the real estate are not supported by Illinois law and its valuation evidence is not consistent with the actual sales of comparable properties. Finally, Mr. Garvin's revised testimony concerning materials values is unpersuasive. The Board's valuation of the Line using an average scrap value in a period of price volatility provides TP&W with the constitutional value of its asset.

In finding that the public interest required the Line to be sold, the Board carefully balanced all of the statutory factors. The newly raised arguments do not change that fact.

TP&W has simply failed to meet its heavy burden. The Board should deny the Petition and allow the sale to go forward.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'William A. Mullins', written over a horizontal line.

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.

December 20, 2004

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2004, I have caused copies of the Public Version of the foregoing Keokuk Junction Railway Co.'s Reply to Toledo, Peoria and Western Railway Corporation's Petition for Reconsideration to be served by courier on:

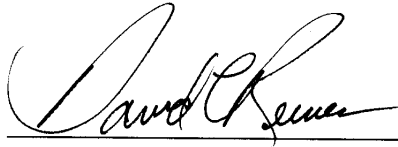
Louis E. Gitomer
BALL JANIK LLP
1455 F Street, NW
Suite 225
Washington, DC 20005

and

Gordon P. MacDougall
1025 Connecticut Ave., NW
Washington, DC 20036

Brooke L. Gaede
Steptoe & Johnson, LLP
1330 Connecticut Ave., NW
Washington, DC 20036-1795,

a copy of the Highly Confidential version to be served on TP&W's counsel by courier, and copies of the Public Version to be served by first class mail or more expeditious service on other parties of record.



David C. Reeves
Attorney for Keokuk Junction Railway Co.

**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**

**KEOKUK JUNCTION RAILWAY CO.'S REPLY TO
TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION'S
PETITION FOR RECONSIDERATION**

Exhibit A



RAIL AMERICA

Choose a Railroad:

TOLEDO, PEORIA & WESTERN RAILWAY

1990 East Washington Street
East Peoria, IL 61611-2961 USA

Phone: 309-698-2600

General Manager: Al Satunas

Marketing & Sales: Mike Klass



Are you interested in
prime industrial
development sites?
[Click here.](#)

Tariffs and Charges:



[TPW 4000 I Naming Local & Proportional Rates on Carloads of Lumber](#)



[TPW 4100 E Naming Local and Proportional Rates on Carloads of Grain](#)



[TPW 4101 West End Grain Rates providing rates on grain for TPW stations west of Maplet](#)



[TPW T 4105 G CN Grain Naming Through Rates on Carloads of Grain Between Stations o](#)



[TPW 4400-F Supp 1 - Naming Local & Proportional Rates on Carloads of Fertilizer](#)



[TPW 5000-A Naming Local & Proportional Rates on Carloads of Iron or Steel Scrap](#)

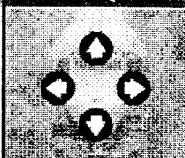


[TPW 8000-F Containing Switching & Accessorial Charges](#)

Zoom Map

Print Map

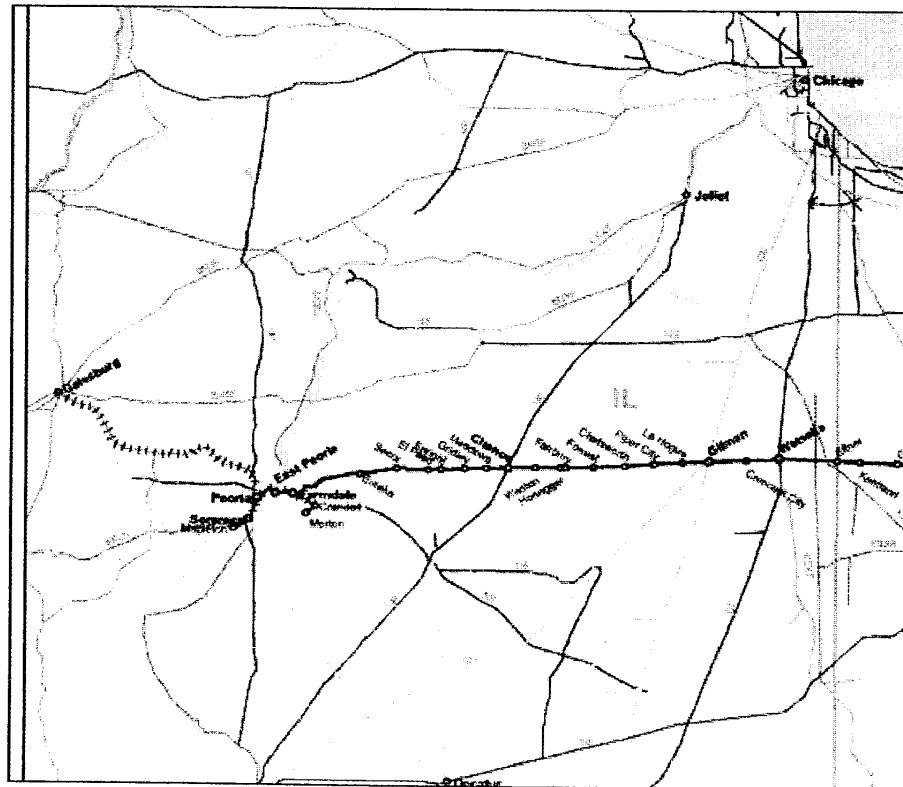
Pan Map



Key

- Interchange Stations
- Intermodal Facilities
- TPW
- Trackage Rights
- Holding Rights

Miles
0 25 50



Rail maps developed by: [Deskmap Systems, Inc.](#) | Interactive element

<http://www.railamerica.com/railmaps/TPW.htm>

12/20/2004

**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**

**KEOKUK JUNCTION RAILWAY CO.'S REPLY TO
TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION'S
PETITION FOR RECONSIDERATION**

Exhibit B

(Redacted from Public Version)

**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**

**KEOKUK JUNCTION RAILWAY CO.'S REPLY TO
TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION'S
PETITION FOR RECONSIDERATION**

Exhibit C

KAVANAGH,
SCULLY,
SUDOW, &
WHITE
FREDERICK, P.C.
Attorneys & Counselors at Law

December 17, 2004

Telephone: 309-676-1381
Fax: 309-676-0324
Web Site:
www.ksswf.com

JOSEPH Z. SUDOW
JULIAN E. CANNELL
DAVID J. WALVOORD
CHARLES G. ROTH
PHILLIP B. LENZINI
KAREN M. STUMPE
BRIAN D. MOOTY
JAMES W. SPRINGER
GARY E. SCHMIDT
DEXTER R. GRUBER
LINDA S. FICHT
BETH M. WELLENRAITER

Founded in 1883 as
Worthington & Page
RICHARD J. KAVANAGH
(1894-1963)
J. CHASE SCULLY, JR.
(1907-1969)
WILLIAM McD. FREDERICK
(1907-1991)
DONALD G. BESTE
(1906-1996)

OF COUNSEL
JORDAN A. FIFIELD
JULIAN B. VENEZKY
EUGENE L. WHITE

Mr. Daniel A. LaKemper
General Counsel
Keokuk Junction Railway Co.
1318 S. Johanson Road
Peoria, IL 61607

Re: Supplementary Opinion Letter Regarding Title Conveyed by Deeds Contained in the Addendum of the Verified Statement of Todd N. Cecil regarding the matter before the Surface Transportation Board, Finance Docket No. 34335, including response to opinion letter by Wildman, Harrold, Allen & Dixon Dated November 24, 2004 attached to Petition for Reconsideration filed by Toledo, Peoria & Western Railway Corporation

Surface Transportation Board Finance Docket No. 34335

Our file No: 16442.1

Dear Mr. LaKemper,

You have requested that I provide you with my response to the statements and opinions contained in the Letter by the law firm of Wildman, Harrold, Allen & Dixon Dated November 24, 2004 (Wildman letter) included in Volume II of the Petition for Reconsideration of the Sale Decision of the Surface Transportation Board by the Toledo, Peoria & Western Railway Corporation Between La Harp and Hollis IL.

The Wildman letter focused primarily on my opinion letter dated October 28, 2003 regarding the type of ownership interest conveyed by the deeds contained in an Addendum to the verified statement of Todd N. Cecil (hereinafter referred to as the Addendum) regarding the above referenced matter.

After reviewing and analyzing the Wildman letter I have not substantively changed my opinion regarding the type of ownership interests conveyed by the deeds that were discussed in my original opinion letter of October 28, 2003. I do, however, wish to address the assumptions and opinions set forth in the Wildman letter that disagree with or attempt to assert a contrary finding regarding the type ownership interest conveyed by some of the deeds. I will utilize references to the "Mooty Chart" that was attached to my original October 28, 2003 letter for ease of reference and because



Attorneys & Counselors at Law

Daniel A. LaKemper

December 17, 2004

Page 2

the Wildman letter also utilizes the Mooty Chart for references to specific deeds. In addition to assist with your review of this letter I have attempted to address issues raised in the Wildman letter in the same order that they appear in Wildman letter.

For both my original opinion letter and this letter I have analyzed all of the deeds contained in the Addendum. My opinion is limited to the type of ownership interest conveyed based on the language contained in each of the deeds as governed by relevant Illinois case law interpreting railroad deeds and relevant Illinois statutes and the Illinois Constitution. I have not attempted fully to determine if the deeds set forth in the Addendum reflect all of the deeds necessary or affecting the rail line property in question, the chain of title regarding the deeds in the Addendum and whether the deeds in fact are the documents indicating the current record title ownership in the rail line. Nevertheless, I have conducted a search of the Peoria County records to determine when the existing Toledo Peoria and Western Railway obtained title to the rail line that is the subject of the STB proceeding and I have attempted to determine the current corporate status of the Toledo Peoria and Western Railway. Unless otherwise stated herein, my opinion is limited to what title or ownership interest was granted by the deeds to the grantee of each of the deeds contained in the Addendum.

Qualifications

I am a member of the law firm of Kavanagh, Scully, Sudow, White and Frederick P.C.. I was admitted to the practice of law in Illinois in 1986. I concentrate my practice in real estate law and represent both buyers and sellers of residential and commercial real estate. I assist many clients with commercial real estate issues including sales and acquisitions, leasing, development, zoning, environmental problems and status of title and title insurance. My real estate practice also includes public, affordable housing, and local government law. My firm is an agent of the Attorneys Title Guarantee Fund and I have personally acted as title agent on numerous transactions and I have issued many real estate title commitments and title policies as a title agent. I am admitted to practice before the U.S. District Court, Central District of Illinois; and the U.S. Court of Appeals, Seventh Circuit. Education: Bachelor of Arts degree in Political Science from Eastern Illinois University (B.A., 1983); and J.D. degree from The Southern Illinois University School of Law (with honors, 1986). I am a member: the Peoria County Bar Association (Member: Real Estate Committee (Chairman, Real Estate Committee, 1994-95 and 2002-03), and the Continuing Legal Education Committee 1990-present, Chairman 2004-05), I am a member of the joint PCBA Peoria Area Realtors Association Contract Committee. I am also a member of the Illinois State Bar Association (Member: Real Estate Section Council 1998-2004, assistant editor of the Real Property Law Section Council News Letter 2004-05), the Illinois Real Estate Lawyers Association and the National Apartment Association (NAA attorney for review of the NAA lease forms for compliance with Illinois law). I am the author of Chapter 18, Easements and Licenses, in *Residential Real Estate* (IICLE 2003) and Chapter 8, The Illinois Responsible Property Transfer Act, in *Environmental Law for Transactional Attorneys* (IICLE 2001). I have been a presenter at many seminars and continuing legal education programs regarding real estate law

Daniel A. LaKemper

December 17, 2004

Page 3

including most recently participating as a presenter at the Illinois Institute of Continuing Legal Education's Annual Real Estate Institute in October 2004.

Assumptions Relied Upon in the Wildman letter

On page 4 of the Wildman letter certain assumptions are stated as being relied on in formulating Wildman's opinions set forth in its letter.

Assumptions 1 and 2. No independent evidence is available regarding the authenticity of the documents. As stated in my original letter my opinion was limited to those deeds attached to Todd N. Cecil's exhibit. However, my rendering an opinion on what appears on the face of the deeds or copies of tract indexes should not be considered an endorsement or opinion by me on the admissibility or evidentiary value of the deeds and tract indexes before the STB or other adjudicatory body. No certified documents or statements from the Recorder's offices of the counties in question have apparently been presented regarding the documents in Cecil's verified statement to authenticate the documents as true and correct records of found at the Recorder's or other governmental offices, or otherwise demonstrating their authenticity. As such, under Illinois law at least, the evidentiary admissibility of the documents may still be in question.

Assumption 3. It should be noted that there are many references to the "TP & W" railroad in documents before the STB in this matter. The "TP & W" in existence at the time of those conveyances to the TP & W was the Toledo, Peoria and Warsaw Rail Road Company. The current existing TP & W railroad corporation is the Toledo Peoria & Western Railway Corporation formed in New Jersey in 1987 as the TP & W Acquisition Corporation. The TP & W Acquisition Corporation obtained ownership of the rail line in question whether in fee, by easement or otherwise from the Atchison, Topeka and Santa Fe Railway Company by a quitclaim deed dated February 3, 1989. It should be noted that this quit claim deed provides no warranties of title and that an easement for fiber optic lines was reserved by the Santa Fe that encumbers the entire rail line. See Exhibit A (Quit claim Deed from Atchison, Topeka and Santa Fe Railway Company to TP & W Acquisition Company).

I. The Wildman Letter Opinions Regarding Deeds Listed in Rows One and Two of Exhibit A: the TP & W RRR Form Deeds.

The Wildman letter in its discussion of the deeds listed in rows one and two state that the deeds conveyed a fee simple interest rather than an easement. For this finding the Wildman letter reviewed the granting and habendum clauses of the deeds and then also attempted to support their interpretation with the presence of the homestead exemption waivers found on some of the deeds as well as federal tax stamps. The use of the homestead waivers and federal tax stamps in the Wildman letter will be discussed below, then the granting and habendum language will be addressed.

Daniel A. LaKemper

December 17, 2004

Page 4

Homestead Exemption

On page 9 of the Wildman letter the letter recites a portion of the version of Illinois Homestead Exemption Act in existence during most of the 1800's and early 20th century. In the second paragraph under the subsection C entitled the "Homestead Exemption" the Wildman letter cites the United States Supreme Court case of *East Alabama Railway Company v. Doe*, 114 U.S. 340, 350 (1885) for the proposition that railroad rights of way in Alabama cannot be sold in satisfaction of a judgment and therefore there would be no reason under Illinois homestead law to waive a homestead interest in a conveyance of Illinois property granting an easement. The *Doe* case does not stand for this claimed rule of law which through a leap in logic and jurisdictions is asserted to be applicable to Illinois real estate law. Nor does *Doe* have any value as precedent, persuasive or binding application to the interpretation of title to rights of way and homestead law in Illinois. The Court in *Doe* based its decision on Alabama real estate and railroad law specific to Alabama. The actual holding in *Doe* was that a judgment creditor attempting to execute on a judgment against a railroad right of way cannot do so unless the creditor also had an Alabama franchise to operate a railroad along that same right of way upon which the judgment levy is sought to be executed.

The Wildman letter then states that it could find no Illinois case law regarding the "intertwining of the waiver of homestead rights with a determination of what type of estate was being conveyed." However, there are a number of Illinois cases that discuss waivers of homestead and the conveyance of less than a fee simple title. First, however, the Arkansas case of *Coleman v. Missouri Pacific Railroad Co.*, 745 S.W. 2d 622 (Ark. 1988) cited in the Wildman letter should be addressed. A 1988 Arkansas case interpreting the homestead laws of Arkansas has no relevance, persuasive, binding or value as precedent regarding the interpretation of the Illinois Homestead Act applicable in the 1800's. The third paragraph of the Wildman letter on page 9 begins by alleging there is no Illinois law that provides guidance on what is waived by a homestead waiver in a conveyance in Illinois, then cites irrelevant Arkansas law to reach the conclusion that if a homestead waiver is provided in Illinois that it could only mean that a fee simple interest was intended to be conveyed by the grantors.

In *Deere v. Chapman* 25 Ill. 610 (1861), the Illinois Supreme Court held that the purpose of the Homestead Act in Illinois was remedial in nature and should be construed to give effect to its purpose. In *Deere*, the court specifically rejected the argument that a waiver of homestead must only apply to conveyances in fee simple. The court held that an exemption may be asserted in property occupied as a homestead although the debtor does not own an estate in fee. The court stated that the intent of the statute is to "secure the head of the family in the possession and enjoyment of the lot and buildings for the maintenance and shelter of himself and his family as a home, without regard to the extent of the estate, or title by which he owned it." The purpose of the act was to "save them, amid all their losses and disasters, a shelter for a family - home." Thus, by 1861, the Illinois Supreme Court in *Deere* had established that the purpose of the

Daniel A. LaKemper

December 17, 2004

Page 5

Homestead Act in Illinois was to protect the homestead from levy by creditors, not as a statute to determine the status of title.

Therefore, in Illinois the homestead right of owners has been properly viewed as encumbrance on title because it is a specific estate in the land, to be removed as a question or objection to title whenever possible when important property rights are being transferred. The TP& W form documents included preprinted waivers of homestead that were necessary to clear title to an perpetual easement for which a substantial investment would be made by the construction and operation of a railroad. Obtaining a waiver of homestead rights can be critical. In *Cortelyou v. Barnsdal*, 140 Ill. App. 163 (4th Dist. 1908) the failure to obtain homestead waivers in accordance the requirements of the homestead statute rendered the attempted conveyance void. See also, *Logue v Van Almen*, 373 Ill. 208, 40 N.E. 2d 73 (1942) (because the value of the farm at the time of the conveyance were less than the statutory exemption a lease was deemed void; the value of subsequently discovered oil and gas on the property did not raise the value of the property above the homestead exemption – the value of the homestead at the time of the conveyance applied rather than subsequent appreciation in value of the land). Therefore, prudent grantees of property interests, whether in fee, by lease, for a security interest or by easement had substantial and prudent reasons to obtain homestead waivers because of the threat of the assertion of a homestead interest with the accompanying risk of voiding of the transaction in question or subjecting the property to an assertion of a homestead interest. Thus, the motivation of grantees of property interests including leases or easements for obtaining a waiver of homestead was relevant to avoiding the remedial nature of the statute and being confronted with the homestead rights of a spouse or children if a waiver was not obtained. An acknowledgement referring to the conveyance of homestead was essential to its validity, until an amendment effective July 16, 1941, and a void acknowledgement invalidated the conveyance of homestead. Ward, Illinois Law of Title Examination §42 (1942).

Under Illinois law regarding homestead the waiver of the right to homestead only applied to the interest the husband and wife conveyed and the grantor's homestead rights in the rights to property not conveyed would not be released. *Rice v. United Mercantile Agencies of Louisville, Ky.*, 395 Ill. 512, 70 N.E. 2d 618 (1947); Illinois Law and Practice, Homesteads §63 (West 1992). Therefore, it was and is possible, in fact presumed, that in Illinois a grantor can waive homestead rights as to an easement but will retain the homestead rights in the property to the extent rights in the property are retained in the grantors. As a consequence, the Wildman letter's assertion, ignoring Illinois real estate law and based on an irrelevant and inapplicable Arkansas case that the grantor's waiver their homestead rights is an affirmative indication of an intent to convey a fee simple interest, because that was the only property interest that such a waiver could convey, is incorrect and clearly erroneous based on Illinois case law interpreting the Illinois Homestead Act.

The motivating factor of grantees for obtaining waivers of homestead in Illinois is to avoid the assertion of the existence or creation of the estate of Homestead attaching to the property rights

Daniel A. LaKemper

December 17, 2004

Page 6

transferred rather than as affirmative evidence of the intent of the grantors as to what type of estate the grantors intended to convey. The issue of what title was conveyed by an instrument in relation to homestead rights only becomes an issue regarding the quality or type of title conveyed when a waiver of homestead is *not* shown on the face of the document. Then the transaction must be analyzed to determine if the interest conveyed remains subject to a homestead interest under Illinois law. Therefore, the existence of waivers of homestead interests do not assist a title examiner in Illinois to determine the estate conveyed by the deed or instrument of conveyance unless the homestead waiver is absent, in which case the examiner must then consider whether the quality of title conveyed has been encumbered or impaired by a homestead interest.

Federal Tax Stamps

The Wildman letter states that evidence of the presence or absence of federal tax stamps on some of the deeds provide support to proof of an intent by the parties to those documents to transfer a fee interest in the property for those deeds that show tax stamps on the documents. To support this claim the Wildman letter cites the definition of "devolution" in the 2002 edition of the Merriam Webster's Collegiate Dictionary as the basis for the finding that the presence of tax stamps on the documents meant the transfer of a fee simple interest in property and therefore easement grants did not require the payment of taxes; apparently because the Wildman letter takes the position that an easement right is not property. No other authority for this interpretation of the 1797 Federal Tax Stamp Act is cited in the Wildman letter. No authority is cited in the Wildman letter supporting the proposition that the definition of "devolution" found in a 21st century dictionary should be used to define a statutory term in 18th and 19th century federal statutes. No authority is cited for the proposition that an easement does not constitute a transfer of a property interest or title to real estate. It is clear under Illinois law that an easement is an interest in property. Illinois Law and Practice, Easements §1 (West 2004); Residential Real Estate, Ch 18, Easements and Licenses §§18.1-8 (HICLE 2004).

There is authority that the conveyance of long term real estate interests other than the conveyance of fee title were subject to taxation under the federal tax stamp statutes including perpetual easements. See attached as Exhibit B the monograph *Stamp Taxes on Conveyances of Real Estate*, Published by The Chicago Title and Trust December, 1957. On page 3 it states:

"For purposes of determining liability for the tax stamp ... the phrase 'lands tenements or other realty' embraces those interests that endure for a period of time, the termination of which is not fixed or ascertained by a specific number of years, such as an estate in fee simple, *perpetual easement*, etc" [emphasis added].

The Wildman letter on page ten cites the Stamp Act of 1864 Chapter 173, 13 Stat. 223 Sections 151 to 170. Section 151 extended the application of the payment of federal taxes evidenced by federal tax stamps to the transactions listed in Schedule B of the 1864 Act. In schedule B taxes are set forth for "Conveyances" by "deed, instrument or writing" of "lands, tenements or other

Daniel A. LaKemper

December 17, 2004

Page 7

realty.” See Exhibit C for excerpts of “An Act to Provide Internal Revenue to Support the Government, to Pay interest on the Public Debt and for other Purposes,” including section 151 thereof and conveyances as defined in schedule B. The word “devolution” is not used regarding conveyances under the 1864 Act. The operative words are “lands tenements or other realty,” not “devolution.” Thus, by the express language of the statute the conveyances taxable under the Act concern more than fee simple conveyances as tenements are expressly mentioned as taxable.

The same language “lands, tenements or other realty” is used in later versions of the statute as cited in the Chicago Title monograph regarding the applicability of the federal tax act to easements and long term leases. See also, *Morrow v. Scofield*, 116 F.2d 17 (5th Cir 1940), *cert. denied*, 313 U.S. 573 (Under statute imposing documentary stamp tax, and in accordance with Texas law, instruments whereby taxpayer assigned oil and gas leaseholds on land in Texas were instruments conveying an interest in 'realty' requiring stamps); *Jones v. Magruder*, 42 F.Supp. 193 (1941) (In stamp tax statute applicable to transfer or conveyance of "lands, tenements, or other realty", the quoted phrase was not used in the technical nicety of the common law in respect to interests in lands flowing from system of feudal tenure, but includes an interest or estate in land constituting a substantial ownership in whole or in part, as distinguished from a mere license or temporary right of possession, and hence Maryland ground rent lease for 99 years renewable forever was subject to the stamp tax.) Thus, contrary to the claims of the Wildman letter, the stamp act clearly applied to conveyances of less than fee simple interests in real estate.

In the deeds under consideration in this matter the TP & W deeds all granted an easement to “have and to hold the same ... proper to the operation of said railway , to the Railway Company and its successors and assigns forever.” Thus, the easements in question were properly taxable under the federal stamp tax act because the long term nature of the easement grant.

More important than the applicability of federal taxes to a transaction, however, is the issue of whether the presence or absence of federal tax stamps on conveyancing documents should be used or considered when attempting to determine the intent of an instrument. In Patton and Patton, *Land Titles, A Treatise on Title Records, Records as Muniments of Title, Priorities, Incumbrance Shown by County, State and Federal Records or Existing Title, and the Nature of Titles Required to Fulfill Contracts for Sale or Security* (1938), at Section 212 states that “a [title] examiner need not, however, examine as to these [federal tax stamps] for the reason that their presence or absence, without a state statute on the subject, cannot affect the validity of the instrument or the sufficiency of the record.” See Exhibit D. Therefore, a major treatise on title examination written during the existence of the federal tax stamp act rejected the use of the presence or absence of federal tax stamps on a document to determine the validity or effect of title documents.

Therefore, contrary to the assertions in the Wildman letter long term or perpetual easements were taxable under the federal tax stamp act and, more importantly, the presence or absence of tax

Daniel A. LaKemper
December 17, 2004
Page 8

stamps were and should not be considered a reliable source of evidence regarding the validity or effect of a title document.

The Granting and Habendum Clauses of the TP & W Deeds in Rows 1 and 2 of the Mooty Chart

The deeds in Rows 1 and 2 provide for the grantor to "grant, bargain and sell unto" the TP & W RR "all that part of the of the following described Real Estate ... which is occupied and used by the said Railway of the width of _____ feet on each side of the main Track of the Railway Company, to wit, ..." The legal description is then inserted.

The deeds then read in their *habendum* clause: "To Have and to Hold the Same, together with all the rights privileges, and appurtenances thereunto belonging or proper to the operation of said Railway, to the said Railway Company, its successors and assigns Forever."

The language of the deeds in question indicate that the ownership interest conveyed was for an easement allowing the grantee rail road the exclusive right to use the property included in the conveyance for railroad purposes. See *Walker v. Illinois Central Rail Road Co.*, 215 Ill. 610, 74 N.E. 812 (1905). In *Walker* the Illinois Supreme Court interpreted similar language in a deed to indicate that the grant was exclusive for the use of the railroad but for less than a complete grant of a fee interest. The grant was valid for so long as the property was used for railroad purposes.

The language of the deeds set forth in Rows 1 and 2 of the Mooty Chart state a similar intention; there is a grant of an interest, but it is qualified by "all that part occupied and used by the Railway." When a deed conveys land to a railroad with no language in the deed limiting the estate conveyed, the deed will be construed to convey a fee simple title. *Keen v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 392 Ill. 362, 64 N.E.2d 499 (1945). See also *Penn Central Corp. v. Commonwealth Edison Co.*, 159 Ill. App. 3d 419, 512 N.E.2d 118 (3rd Dist. 1987). "The words of grant, 'convey and warrant,' convey the fee unless they are limited to a lesser estate by words found in the granting clause or in the *habendum* of the deed, if it contains an *habendum*. Limiting words may be used, however, in conveying a life estate or an estate for years, and words limiting the estate conveyed to an estate of the character of either of the two last mentioned are not inconsistent with such words of grant; and where there is language, either in the granting clause or in the *habendum* of the deed, limiting the estate conveyed by such granting words to one less in extent than a fee, such words of limitation will be given effect." *Tallman v. Eastern Illinois and Peoria Railroad Co.*, 379 Ill. 441, 453, 41 N.E.2d 537, 543 (1942).

Therefore, there was not a complete grant of a fee interest in the land described in the TP & W form deeds because the granting clause language was specifically limited to the land "occupied and used by the Railway." If part of the property described in the deed was not used and occupied by the railway then rights in the land were not conveyed to the railroad despite the fact that it may be described in the deed. In addition, the words "used and occupied" indicate that if

Daniel A. LaKemper

December 17, 2004

Page 9

the land ceases to be used and occupied by the railroad then the easement ownership interest ceases.

Moreover, the grantee railroad's use of the property and the rights granted were further restricted by the *habendum* language "To Have and to Hold the Same, together with all the rights privileges, and appurtenances thereunto belonging or proper to the operation of said Railway...." As a consequence this language indicates the intention of the parties to limit the grantee railroad's use of the property where the rail road was using and occupying the property described in the deed and then only to only those rights in the land necessary to the proper operation of the railway.

If a fee simple conveyance was intended then the limiting language in the granting clause of regarding occupancy and use would have not been necessary. In addition the "To Have and to Hold" language for the proper operation of the railway would not have been necessary. . If a fee simple grant is determined to be the effect of the deed then the "Have and to Hold" language would have to be disregarded and rendered as mere surplusage which is not permitted under Illinois law. See, *Tallman v. Eastern Illinois and Peoria Railroad Co.*, 379 Ill. 441, 41 N.E.2d 537 (1942). The Wildman letter claims to attempt to include all of the language included writing the deeds to arrive at the interpretation of the conveyance of a fee simple interest. However, to do so requires that the language of the "rights, priviledges and appurtenances thereunto belonging, or proper to the operation of said Railway..." as surplus and ignored language. The "or" in the *habendum* language refers to the rights and privileges and appurtenances of a belonging to a *railroad* or *proper to a railroad*. Thus, the grant to the TP & W was limited to rail road purposes.

If a fee simple grant was intended by the deeds no discussion or words referring to a railroad would be necessary as the grantee would be able to use the property for a railroad, farm or any other purpose allowed to a fee simple owner of the property. To find a fee simple conveyance by the Deeds in rows one and two require the entire *habendum* clause to be ignored separately and to be read in conjunction with the "used and occupied" language of the granting clause. The language of the granting clause and *habendum* properly read together rather than attempted to be separately interpreted and defined as in the Wildman letter, indicates an easement grant rather than a fee simple conveyance

The express language of the deeds noted in rows 1 and 2 of the Mooty chart state that the ownership interest conveyed are grants of exclusive easements to the grantee railroad which shall exist as long as the property is used for railroad purposes. The analysis of the Wildman letter is not persuasive because it relies on separate interpretations of the deed's granting and *habendum* language (despite arguing that it is attempting to interpret the deed's overall intent) supported by the homestead waiver and tax stamp arguments set forth in the Wildman letter which as stated above are incorrect and misleading or irrelevant. The interests granted in Rows 1 and 2 of the Mooty Chart were easements.

Daniel A. LaKemper
December 17, 2004
Page 10

Miscellaneous Deeds Noted in Wildman Letter at page 11 regarding specific Deeds in Rows 1 and 2.

1. Deed listed in Row 1 on page 38 (same deed repeated at pages 40 and 44). The Wildman letter is correct. This deed should be considered a fee and listed under Row 5 of the Mooty Chart as a fee simple conveyance.
2. The deed listed under 2) on page 11 of the Wildman letter are properly within the finds of Rows 1 and 2 of the Mooty Chart as easements.
3. The deeds listed under 3) on page 11 of the Wildman letter as being fee interests because of the reference to a strip of land and etcetera are properly noted as easements under Rows 1 and 2 of the Mooty chart as the language noted does not override or contradict the language cited in the original Mooty opinion letter and this letter regarding the interpretation of the language of the deeds as easements and that language can be read in conjunction with the balance of the language of the deed for a finding that an easement was granted.

II. Deed Listed in Row 3

The Wildman letter does not render an opinion regarding this document.

III. Deed Listed in Row 4

This deed contains the same language as the form deeds noted in Rows 1 and 2 and therefore is grant of an easement. However, the property described is in the City of Peoria and does not appear to be a part of the rail line in question. The Wildman letter does not render an opinion regarding this document

IV. Deeds Listed in Row 5

The form deeds with grantee being the TP & W RR noted in Row 5 are form quitclaim deeds with out language of limitation in the granting clause or elsewhere in the deeds. **It is noteworthy that the TP & W RR did use a separate form of quit claim deed without the limiting language shown in the deeds in Rows 1 and 2 of the Mooty Chart.** The ownership interest granted is a fee simple interest of whatever interest, if any, held by the grantor. The Wildman letter does not render an opinion regarding this document.

V. Deed Listed in Row 6

The deed noted in Row 6 (the same deed was included three times in the Addendum) has somewhat different granting language but contains the same limiting language of the deeds in Rows 1 and 2 of Exhibit A, and, therefore, convey an easement to the grantee railroad of the

Daniel A. LaKemper

December 17, 2004

Page 11

same nature as the deeds in Rows 1 and 2. The Wildman letter asserts the analysis it utilizes regarding the deeds in rows 1 and 2. The cited limiting language indicates and easement. VI.

VI. Deeds Listed in Row 7

The Wildman letter does not render an opinion regarding this document. These deeds are the same form of deed used in Rows 1 and 2 but contain express references to the land described in the deeds as having been part of a condemnation action. Railroad condemnation actions prior to August 8, 1870 provided for the railroads to obtain fee simple title to the property. Therefore, the title to the property held by the railroad described in these two deeds may be in fee simple, however, additional research regarding the condemnation would be necessary to confirm the status of title and intent of the deeds.

VII. Deeds Listed in Rows 8 and 9: The Mississippi and Wabash Railroad Grants of Right of Way

The Wildman letter states that the conveyances are "more likely than not" easements. Easements were conveyed.

VIII. Deeds Listed at Row 10

The Wildman letter does not render an opinion regarding these documents.

IX. Deeds Listed in Rows 11 and 12

The Wildman letter does not render an opinion regarding these documents.

X. Deeds Listed in Row 13

The deeds noted in Row 13 of Exhibit A are forms containing the granting language "Convey__ and Quitclaim__." This language without more would indicate a fee simple grant. However, in each of the noted deeds under Row 13 the same or very similar language appears handwritten in after the legal description of the property: "It is understood between the parties hereto that this deed is a settlement of the right of way over the above described land...." As a consequence the deeds indicate that the intent of the parties was to settle the railroads claim of a right of way. Therefore, based on the expressed intent of the parties only an easement for a right of way was conveyed by these deeds. The Wildman letter disagrees and finds an intent to convey a fee. However if a fee grant was intended then the reference to a right of way would be unnecessary as earlier in the deeds a reference is made to a "strip of land" thus the words right of way, to have meaning in the deeds must have been meant to clarify the extent to the settlement of the parties to the deeds.

IX. Deeds Listed in Rows 14 and 15

KAVANAGH,
SCULLY,
SUDOW,
WHITE
&
FREDERICK, P.C.

Attorneys & Counselors at Law

Daniel A. LaKemper

December 17, 2004

Page 12

The deeds are the TP & W RR forms noted in Rows 1 and 2. The same analysis applies with additional language regarding the grant of an easement. An easement was granted.

X. Deeds Listed in Rows 16, 17 and 18

Each of these deeds contain language granting a fee interest but then indicate an intent to grant a right of way. The deed at page 333 was incomplete but appears to grant an easement. All three appear to grant an easement.

If you have any questions please call.

Very truly yours,

KAVANAGH, SCULLY, SUDOW,
WHITE & FREDERICK, P. C.

Brian D. Mooty

BDM:mjg
Enclosure

V.S. Mooty,
Exhibit A

DOCUMENT NO.

89-03986

QUITCLAIM DEED
(ILLINOIS)

Grantor, The Atchison, Topeka and Santa Fe Railway Company, a Delaware corporation, with offices at 80 East Jackson Boulevard, City of Chicago, County of Cook, State of Illinois, for the consideration of TEN DOLLARS (\$10.00), and other good and sufficient consideration, receipt of which is hereby acknowledged by Grantor, conveys and quitclaims to Grantee, TP&W Acquisition Corporation, a New Jersey corporation, with offices at 1550 Park Avenue, Post Office Drawer D, South Plainfield, New Jersey 07080, all of Grantor's interest, except as set forth herein, in the following

described real estate:

ALL OF THE REAL ESTATE AND IMPROVEMENTS THAT CONSTITUTE THAT CERTAIN LINE OF RAILROAD DESIGNATED IN THE RECORDS OF THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (SANTA FE) AS THE PEORIA SUBDIVISION OF THE ILLINOIS DIVISION (FORMERLY KNOWN AS THE TOLEDO, PEORIA AND WESTERN RAILROAD COMPANY), EXTENDING IN A GENERALLY EASTERLY DIRECTION FROM THE VILLAGE OF LOMAX, IN THE COUNTY OF HENDERSON, THROUGH SAID COUNTY OF HENDERSON AND THE COUNTIES OF HANCOCK, MC DONOUGH, FULTON, PEORIA, TAZEWELL, WOODFORD, MC LEAN, LIVINGSTON, FORD AND IROQUOIS, STATE OF ILLINOIS, TO THE EASTERLY LINE OF THE STATE OF ILLINOIS AT THE UNINCORPORATED COMMUNITY OF EFFNER, IROQUOIS COUNTY, ILLINOIS, THE LINE OF RAILROAD IS DESCRIBED MORE SPECIFICALLY AS FOLLOWS:

HENDERSON COUNTY, ILLINOIS

BEGINNING AT THE INTERSECTION OF THE CENTER LINE OF SAID LINE OF RAILROAD WITH THE SOUTHEASTERLY LINE OF THAT CERTAIN PARCEL OF LAND DESCRIBED SECOND IN DEED DATED MAY 25, 1906 TO THE ATCHISON, TOPEKA AND SANTA FE, RECORDED JULY 28, 1906 IN BOOK 51 AT PAGE 413, RECORDS OF HENDERSON COUNTY, LYING IN THE NORTHEAST QUARTER OF SECTION 15, TOWNSHIP 8 NORTH, RANGE 6 WEST

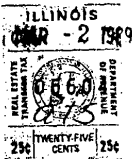
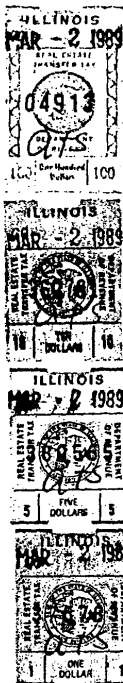
MAR 2 1985

STATE OF ILLINOIS, } ss Filed for record
County of Peoria } in the office of
C. DIRK McGINNIS, County Recorder, un

C. Dirk McGinnis
Recorder of Deeds

89-03986

02932



Peoria County 50%

92724

- 2 -

OF THE FOURTH PRINCIPAL MERIDIAN; THENCE IN A GENERALLY SOUTHERLY DIRECTION THROUGH SAID NORTHEAST QUARTER OF SECTION 15 AND THROUGH SECTIONS 14, 23, 26, 25, 35 AND 36, TOWNSHIP 8 NORTH, RANGE 6 WEST OF THE FOURTH PRINCIPAL MERIDIAN TO THE SOUTHERLY LINE OF SAID SECTION 36, SAID SOUTHERLY LINE ALSO BEING THE COUNTY LINE BETWEEN HENDERSON COUNTY AND HANCOCK COUNTY.

ALSO, ALL OF THE LAND DESCRIBED IN DEED DATED SEPTEMBER 22, 1871, FROM THOMAS J. SMITH ET UXOR TO TOLEDO, PEORIA AND WARSAW RAILWAY COMPANY, FILED FOR RECORD FEBRUARY 6, 1872 IN BOOK 27 AT PAGE 259 OF THE RECORDS OF HENDERSON COUNTY.

ALSO, ALL OF THE LAND DESCRIBED IN DEED DATED MAY 11, 1927, FROM LOMAX INDUSTRIAL CORPORATION ET ALIA TO TOLEDO, PEORIA AND WESTERN RAILROAD, FILED FOR RECORD JUNE 4, 1927 IN BOOK 79 AT PAGE 209 OF THE RECORDS OF HENDERSON COUNTY.

ALSO, ALL OF THE LAND DESCRIBED IN DEED DATED AUGUST 23, 1927, FROM ALFRED COX ET UXOR TO TOLEDO, PEORIA AND WESTERN RAILROAD, FILED FOR RECORD SEPTEMBER 17, 1927 IN BOOK 79 AT PAGE 594 OF THE RECORDS OF HENDERSON COUNTY.

HANCOCK COUNTY, ILLINOIS

BEGINNING AT THE INTERSECTION OF THE CENTER LINE OF SAID LINE OF RAILROAD WITH THE NORTHERLY LINE OF SECTION 1, TOWNSHIP 7 NORTH, RANGE 6 WEST OF THE FOURTH PRINCIPAL MERIDIAN, SAID NORTHERLY LINE ALSO BEING THE COUNTY LINE BETWEEN HANCOCK COUNTY AND HENDERSON COUNTY; THENCE IN A GENERALLY SOUTHEASTERLY DIRECTION THROUGH SAID SECTION 1 AND THE UNINCORPORATED COMMUNITY OF DISCO; THENCE CONTINUING IN A GENERALLY SOUTHEASTERLY AND EASTERLY DIRECTION THROUGH SECTIONS 6, 7, 18, 17, 20, 21, 22, 27, 23, 26 AND 25, TOWNSHIP 7 NORTH, RANGE 5 WEST OF THE FOURTH PRINCIPAL MERIDIAN, THROUGH THE CITY OF LA HARPE, TO THE EASTERLY LINE OF SECTION 25, THE EASTERLY LINE ALSO BEING THE COUNTY LINE BETWEEN HANCOCK COUNTY AND MC DONOUGH COUNTY.

MC DONOUGH COUNTY, ILLINOIS

BEGINNING AT THE INTERSECTION OF THE CENTER LINE OF SAID LINE OF RAILROAD WITH THE WESTERLY LINE OF SECTION 30, TOWNSHIP 7 NORTH, RANGE 4 WEST OF THE FOURTH PRINCIPAL MERIDIAN, SAID WESTERLY LINE ALSO BEING THE COUNTY LINE BETWEEN MC DONOUGH COUNTY AND

89-03986

02931

HANCOCK COUNTY; THENCE IN A GENERALLY EASTERLY DIRECTION THROUGH SECTIONS 30, 31, 29, 32, 33, 34, 35, 26, 25 AND 36 TOWNSHIP 7 NORTH, RANGE 4 WEST OF THE FOURTH PRINCIPAL MERIDIAN, THROUGH THE VILLAGE OF BLANDINSVILLE; THENCE CONTINUING IN A GENERALLY EASTERLY DIRECTION THROUGH SECTIONS 30, 31, 29, 32, 28, 33, 27, 34, 35 AND 36, TOWNSHIP 7 NORTH, RANGE 3 WEST OF THE FOURTH PRINCIPAL MERIDIAN, THROUGH THE VILLAGES OF SCIOTA AND GOOD HOPE; THENCE CONTINUING IN A GENERALLY EASTERLY DIRECTION THROUGH SECTIONS 31, 32, 33, 34, 35 AND 36, TOWNSHIP 7 NORTH, RANGE 2 WEST OF THE FOURTH PRINCIPAL MERIDIAN, THROUGH THE UNINCORPORATED COMMUNITY OF SCOTTSBURG; THENCE CONTINUING IN A GENERALLY EASTERLY AND SOUTHERLY DIRECTION THROUGH SECTIONS 31, 32 AND 33, TOWNSHIP 7 NORTH, RANGE 1 WEST OF THE FOURTH PRINCIPAL MERIDIAN, THROUGH THE CITY OF BUSHNELL; THENCE CONTINUING IN A GENERALLY SOUTHERLY AND EASTERLY DIRECTION THROUGH SECTIONS 4, 9, 16, 15, 22, 23 AND 24, TOWNSHIP 6 NORTH, RANGE 1 WEST OF THE FOURTH PRINCIPAL MERIDIAN, THROUGH THE UNINCORPORATED COMMUNITY OF NEW PHILADELPHIA, TO THE EASTERLY LINE OF SECTION 24, THE EASTERLY LINE ALSO BEING THE COUNTY LINE BETWEEN MC DONOUGH COUNTY AND FULTON COUNTY.

FULTON COUNTY, ILLINOIS

BEGINNING AT THE INTERSECTION OF THE CENTER LINE OF SAID LINE OF RAILROAD WITH THE WESTERLY LINE OF SECTION 19, TOWNSHIP 6 NORTH, RANGE 1 EAST OF THE FOURTH PRINCIPAL MERIDIAN, SAID WESTERLY LINE ALSO BEING THE COUNTY LINE BETWEEN FULTON COUNTY AND MC DONOUGH COUNTY; THENCE IN A GENERALLY EASTERLY DIRECTION THROUGH SECTIONS 19, 20, 21, 22, 27, 23 AND 24, TOWNSHIP 6 NORTH, RANGE 1 EAST OF THE FOURTH PRINCIPAL MERIDIAN; THENCE CONTINUING IN A GENERALLY EASTERLY DIRECTION THROUGH SECTIONS 19, 30, 29, 28, 27, 26, 25 AND 24, TOWNSHIP 6 NORTH, RANGE 2 EAST OF THE FOURTH PRINCIPAL MERIDIAN, THROUGH THE VILLAGE OF SMITHFIELD; THENCE IN A GENERALLY NORTHEASTERLY DIRECTION THROUGH SECTIONS 19, 20, 17, 16, 15, 10, 11, 12 AND 1, TOWNSHIP 6 NORTH, RANGE 3 EAST OF THE FOURTH PRINCIPAL MERIDIAN, THROUGH THE CITY OF CUBA; THENCE CONTINUING IN A GENERALLY NORTHEASTERLY DIRECTION THROUGH SECTIONS 6 AND 5, TOWNSHIP 6 NORTH, RANGE 4 EAST OF THE FOURTH PRINCIPAL MERIDIAN; THENCE CONTINUING IN A GENERALLY NORTHEASTERLY AND EASTERLY DIRECTION THROUGH SECTIONS 32, 33, 34, 35 AND 36, TOWNSHIP 7 NORTH, RANGE 4 EAST OF THE FOURTH PRINCIPAL MERIDIAN, THROUGH THE CITY OF CANTON; THENCE CONTINUING IN A GENERALLY EASTERLY AND NORTHEASTERLY DIRECTION THROUGH SECTIONS 30, 31, 29, 32, 33, 34, 27,

84724

- 4 -

26 AND 25, TOWNSHIP 7 NORTH, RANGE 5 EAST OF THE FOURTH PRINCIPAL MERIDIAN, THROUGH THE UNINCORPORATED COMMUNITY OF BREEDS; THENCE CONTINUING IN A GENERALLY NORTHEASTERLY DIRECTION INTO SECTION 19, TOWNSHIP 7 NORTH, RANGE 6 EAST OF THE FOURTH PRINCIPAL MERIDIAN TO THE COUNTY LINE BETWEEN FULTON COUNTY AND PEORIA COUNTY.

PEORIA COUNTY, ILLINOIS

BEGINNING AT THE INTERSECTION OF THE CENTER LINE OF SAID LINE OF RAILROAD WITH THE COUNTY LINE BETWEEN PEORIA COUNTY AND FULTON COUNTY IN SECTION 19, TOWNSHIP 7 NORTH, RANGE 6 EAST OF THE FOURTH PRINCIPAL MERIDIAN; THENCE IN A GENERALLY EASTERLY DIRECTION THROUGH SECTIONS 19, 20, 28, 21, 22, 23 AND 24, TOWNSHIP 7 NORTH, RANGE 6 EAST OF THE FOURTH PRINCIPAL MERIDIAN, THROUGH THE VILLAGE OF GLASFORD; THENCE CONTINUING IN A GENERALLY EASTERLY AND NORTHEASTERLY DIRECTION THROUGH SECTIONS 19, 30, 29, 20, 21, 22, 15, 14, AND INTO 11, TOWNSHIP 7 NORTH, RANGE 7 EAST OF THE FOURTH PRINCIPAL MERIDIAN TO THE RIGHT OF WAY OF THE CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY AT THE RAILROAD STATION OF SOMMER NEAR THE UNINCORPORATED COMMUNITY OF ORCHARD MINES.

ALSO, ALL OF THE REAL ESTATE AND IMPROVEMENTS THAT CONSTITUTES THAT CERTAIN SPUR TRACK DESIGNATED IN THE RECORDS OF THE SANTA FE AS THE KOLBE SPUR OF SAID PEORIA SUBDIVISION, WHICH BEGINS AT THE WYE TRACKS AT THE RAILROAD STATION OF KOLBE, NEAR THE VILLAGE OF MAPLETON AND EXTENDS IN A SOUTHWESTERLY DIRECTION THROUGH SECTIONS 21, 28, 29 AND 30, TOWNSHIP 7 NORTH, RANGE 7 EAST OF THE FOURTH PRINCIPAL MERIDIAN AND INTO THE SOUTHEAST QUARTER OF SECTION 25, TOWNSHIP 7 NORTH, RANGE 6 EAST OF THE FOURTH PRINCIPAL MERIDIAN, TOWARDS THE VILLAGE OF KINGSTON MINES.

ALSO, ALL OF THAT PORTION OF LOTS 1 AND 2 OF BLOCK 48 IN THE BIGELOW AND UNDERHILL'S ADDITION TO THE CITY OF PEORIA, LYING NORTHERLY OF THE NORTHERLY LINE OF THAT CERTAIN 4906.89 SQUARE FOOT PARCEL OF LAND DESCRIBED IN DEED DATED AUGUST 25, 1864 FROM TOLEDO, PEORIA AND WARSAW RAILWAY COMPANY TO CHICAGO BURLINGTON AND QUINCY RAILROAD COMPANY, FILED FOR RECORD DECEMBER 22, 1864 IN BOOK "QB" AT PAGE 31 OF THE RECORDS OF PEORIA COUNTY.

89-03986

02931

ALSO, A STRIP OF LAND IN THE TOWN (TOWNSHIP) OF HOLLIS, COUNTY OF PEORIA, STATE OF ILLINOIS, LYING IN THE EAST-HALF OF SECTION 11, TOWNSHIP 7 NORTH, RANGE 7 EAST OF THE FOURTH PRINCIPAL MERIDIAN, THE STRIP OF LAND BEING 30 FEET IN WIDTH, 15 FEET ON EACH SIDE OF THE FOLLOWING DESCRIBED CENTER LINE:

COMMENCING AT THE INTERSECTION OF THE CENTER LINE OF THE EXISTING 33-FOOT WIDE TOWNSHIP ROAD THROUGH SAID EAST-HALF OF SECTION 11, AS SAID ROAD WAS ESTABLISHED BY AN AGREEMENT DATED NOVEMBER 14, 1891 AND FILED NOVEMBER 14, 1891 IN BOOK "A" AT PAGE 348 OF THE RECORDS OF SAID TOWN OF HOLLIS, WITH THE SOUTHEASTERLY LINE OF THAT CERTAIN 8.85 ACRE PARCEL OF LAND DESCRIBED IN TRACT 1 IN DEED DATED DECEMBER 6, 1983 FROM TOLEDO, PEORIA AND WESTERN RAILROAD COMPANY TO TRANSIT ICE COMPANY, RECORDED DECEMBER 8, 1983 AS DOCUMENT NUMBER 83-20926 OF THE RECORDS OF SAID COUNTY; THENCE SOUTH 27°55'00" WEST (BEARING ASSUMED FOR THE PURPOSES OF THIS DESCRIPTION) ALONG SAID SOUTHEASTERLY LINE, 160.61 FEET TO THE TRUE POINT OF BEGINNING; THENCE WESTERLY AND SOUTHWESTERLY ALONG THE ARC OF A NONTANGENT CURVE FROM WHICH A RADIAL BEARS SOUTH 19°21'31" WEST, CONCAVE SOUTHERLY AND SOUTHWESTERLY, HAVING A RADIUS OF 458.20 FEET, THROUGH A CENTRAL ANGLE OF 12°30'16", A DISTANCE OF 283.28 FEET TO A POINT IN THE NORTHWESTERLY LINE OF SAID 8.85 ACRE PARCEL.

THE SIDE LINES OF SAID STRIP ARE TO BE LENGTHENED OR SHORTENED TO ORIGINATE IN SAID SOUTHEASTERLY LINE AND TO TERMINATE IN SAID NORTHWESTERLY LINE. THE STRIP OF LAND CONTAINS AN AREA OF 0.19 OF AN ACRE, MORE OR LESS.

TAZEWELL COUNTY.

BEGINNING AT THE INTERSECTION OF THE COUNTY LINE BETWEEN TAZEWELL COUNTY AND PEORIA COUNTY WITH THE ORIGINAL CENTER LINE OF SAID LINE OF RAILROAD; THENCE IN A GENERALLY SOUTHEASTERLY AND EASTERLY DIRECTION THROUGH SECTIONS 29, 28, 32, 33, 34, 35 AND 36, TOWNSHIP 26 NORTH, RANGE 4 WEST OF THE THIRD PRINCIPAL MERIDIAN, THROUGH THE CITY OF EAST PEORIA; THENCE CONTINUING IN A GENERALLY EASTERLY AND NORTHEASTERLY DIRECTION THROUGH SECTIONS 31, 32, 29, 28, 27, 22, 23, 14 AND 13, TOWNSHIP 26 NORTH, RANGE 3 WEST OF THE THIRD PRINCIPAL MERIDIAN, THROUGH THE CITY OF WASHINGTON; THENCE CONTINUING IN A GENERALLY NORTHEASTERLY DIRECTION THROUGH SECTIONS 18, 17, 16 AND 9, TOWNSHIP 26 NORTH, RANGE 2 WEST OF THE THIRD PRINCIPAL MERIDIAN, TO THE

P6724

- 6 -

EASTERLY LINE OF SECTION 9, THE EASTERLY LINE ALSO BEING THE COUNTY LINE BETWEEN TAZEWELL COUNTY AND WOODFORD COUNTY.

ALSO, ALL OF THE REAL ESTATE AND IMPROVEMENTS THAT CONSTITUTE THAT CERTAIN SPUR TRACK DESIGNATED IN THE RECORDS OF SANTA FE AS THE MORTON INDUSTRIAL SPUR OF SANTA FE'S PEORIA SUBDIVISION (FORMERLY A PORTION OF THE PEKIN SUBDIVISION OF THE ILLINOIS DIVISION), WHICH BEGINS AT THE INTERSECTION OF THE NORTHERLY LINE OF SECTION 11, TOWNSHIP 25 NORTH, RANGE 3 WEST OF THE THIRD PRINCIPAL MERIDIAN AND EXTENDS IN A GENERALLY SOUTHWESTERLY DIRECTION THROUGH SECTIONS 11, 10, 15, 16, 17, 20 AND 19, TOWNSHIP 25 NORTH, RANGE 3 WEST OF THE THIRD PRINCIPAL MERIDIAN THEN CONTINUES IN A GENERALLY SOUTHWESTERLY DIRECTION THROUGH SECTION 24 AND THE NORTHEAST QUARTER OF SECTION 23 OF TOWNSHIP 25 NORTH, RANGE 4 WEST OF THE THIRD PRINCIPAL MERIDIAN, TO THE SOUTHERLY LINE OF THE NORTHEAST QUARTER OF SECTION 23.

EXCEPTING THEREFROM THE FOLLOWING TWO (2) PARCELS OF LAND IN THE CITY OF EAST PEORIA, COUNTY OF TAZEWELL, STATE OF ILLINOIS LYING IN THE SOUTHEAST QUARTER (SE 1/4) OF SECTION 29, TOWNSHIP 26 NORTH, RANGE 4 WEST OF THE THIRD PRINCIPAL MERIDIAN DESCRIBED AS FOLLOWS:

PARCEL 1

ALL OF THAT CERTAIN 0.75 ACRE PARCEL OF LAND DESCRIBED IN DEED DATED MAY 22, 1928, FROM WILLIAM J. AND NORA A. GIBBONS TO TOLEDO, PEORIA AND WESTERN RAILROAD (PREDECESSOR IN INTEREST TO THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY) RECORDED JUNE 7, 1928 AS DOCUMENT NO. 107064 IN BOOK 244 AT PAGE 394 OF THE RECORDS OF TAZEWELL COUNTY, DESCRIBED IN SAID DEED FOR REFERENCE AS FOLLOWS:

"BEGINNING AT A POINT AT THE INTERSECTION OF THE WESTERLY LINE OF THE RIGHT OF WAY OF THE TOLEDO, PEORIA & WESTERN RAILROAD AND THE NORTHEASTERLY LINE OF THE RIGHT OF WAY OF FARM CREEK, SAID POINT OF BEGINNING BEING DISTANT 1993.15 FEET SOUTHEASTERLY FROM THE INTERSECTION OF THE EASTERLY LINE OF WEST WASHINGTON STREET AND THE WESTERLY RIGHT OF WAY LINE OF THE TOLEDO, PEORIA & WESTERN RAILROAD; THENCE NORTHWESTERLY ALONG THE FARM CREEK RIGHT OF WAY WITH A RADIUS OF 1545.19 FEET A DISTANCE OF 703.66 FEET; THENCE NORTH 70° AND 20' EAST 161.06 FEET TO THE WESTERLY LINE OF THE RIGHT OF WAY OF THE TOLEDO, PEORIA & WESTERN RAILROAD; THENCE SOUTHEASTERLY ALONG THE RAILROAD RIGHT OF WAY 646.26 FEET TO THE PLACE OF BEGINNING, CONTAINING SEVENTY-FIVE HUNDREDTHS (0.75) ACRE OF GROUND, MORE OR LESS."

89-03986

02931

PARCEL 2

BEGINNING AT A POINT ON THE EASTERLY LINE OF THAT CERTAIN 0.75 ACRE PARCEL OF LAND DESCRIBED IN AFORESAID DEED (BK. 244, PG. 394) DISTANT NORTHERLY 382.26 FEET FROM THE SOUTHERLY CORNER OF SAID 0.75 ACRE PARCEL OF LAND; THENCE SOUTH 42°02'48" EAST (BEARING ASSUMED FOR THE PURPOSES OF THIS DESCRIPTION) 146.20 FEET; THENCE SOUTH 47°57'12" WEST 26.78 FEET TO THE EASTERLY LINE; THENCE NORTH 31°40' WEST ALONG THE EASTERLY LINE 148.63 FEET TO THE POINT OF BEGINNING.

PARCEL 2 CONTAINS AN AREA OF 0.045 OF AN ACRE, MORE OR LESS.

ALSO EXCEPTING THEREFROM THE FOLLOWING TWO (2) PARCELS OF LAND IN THE CITY OF EAST PEORIA, COUNTY OF TAZEWELL, STATE OF ILLINOIS, LYING IN THE NORTHWEST QUARTER OF SECTION 35, TOWNSHIP 26 NORTH, RANGE 4 WEST OF THE THIRD PRINCIPAL MERIDIAN, DESCRIBED AS FOLLOWS:

PARCEL 3

THAT PORTION OF THAT CERTAIN 1.09 ACRE PARCEL OF LAND DESCRIBED IN DEED DATED MAY 19, 1972, FROM TRANSIT ICE COMPANY TO TOLEDO, PEORIA AND WESTERN RAILROAD COMPANY, RECORDED MAY 24, 1972 AS DOCUMENT NUMBER 510807 IN BOOK 900 AT PAGE 329 OF THE RECORDS OF SAID COUNTY, LYING SOUTHERLY OF THE SOUTHERLY LINE OF THAT CERTAIN 0.8904 ACRE PARCEL OF LAND SHOWN ON THAT CERTAIN STREET DEDICATION PLAT RECORDED JANUARY 15, 1987 AS DOCUMENT NUMBER 745171 IN PLAT BOOK "GG" AT PAGE 129 OF THE RECORDS OF SAID COUNTY, AND LYING EASTERLY OF THE EASTERLY LINE OF THAT CERTAIN 2.685 ACRE PARCEL OF LAND SHOWN ON THAT CERTAIN SURVEY PLAT RECORDED JANUARY 15, 1987 AS DOCUMENT NUMBER 745172 IN PLAT BOOK "GG" AT PAGE 130 OF THE RECORDS OF TAZEWELL COUNTY.

PARCEL 4

THAT PORTION OF THAT CERTAIN 0.75 ACRE PARCEL OF LAND DESCRIBED IN DEED DATED SEPTEMBER 7, 1967, FROM TRANSIT ICE COMPANY TO TOLEDO, PEORIA AND WESTERN RAILROAD COMPANY, RECORDED SEPTEMBER 8, 1967 AS DOCUMENT NUMBER 452295 IN VOLUME 779 AT PAGE 122 OF THE RECORDS OF SAID COUNTY, LYING SOUTHERLY OF THE SOUTHERLY LINE OF THAT CERTAIN 0.6239 ACRE PARCEL OF LAND SHOWN ON THAT CERTAIN STREET DEDICATION PLAT RECORDED JANUARY 15, 1987 AS DOCUMENT NUMBER 745171 IN PLAT BOOK "GG" AT PAGE 129 OF THE RECORDS OF TAZEWELL COUNTY.

8824

- 8 -

WOODFORD COUNTY, ILLINOIS

BEGINNING AT THE INTERSECTION OF THE CENTER LINE OF SAID LINE OF RAILROAD WITH THE WESTERLY LINE OF SECTION 10, TOWNSHIP 26 NORTH, RANGE 2 WEST OF THE THIRD PRINCIPAL MERIDIAN, SAID WESTERLY LINE ALSO BEING THE COUNTY LINE BETWEEN WOODFORD COUNTY AND TAZEWELL COUNTY; THENCE IN A GENERALLY NORTHEASTERLY DIRECTION THROUGH SECTIONS 10, 15, 11 AND 12, TOWNSHIP 26 NORTH, RANGE 2 WEST OF THE THIRD PRINCIPAL MERIDIAN, THROUGH THE CITY OF EUREKA; THENCE CONTINUING IN A GENERALLY NORTHEASTERLY DIRECTION THROUGH SECTIONS 7, 8, 9, 10, 11, 2 AND 1, TOWNSHIP 26 NORTH, RANGE 1 WEST OF THE THIRD PRINCIPAL MERIDIAN; THENCE CONTINUING IN A GENERALLY NORTHEASTERLY AND EASTERLY DIRECTION THROUGH SECTIONS 6, 5, 4, 3, 2 AND 1, TOWNSHIP 26 NORTH, RANGE 1 EAST OF THE THIRD PRINCIPAL MERIDIAN, THROUGH THE VILLAGE OF SECOR; THENCE CONTINUING IN A GENERALLY EASTERLY DIRECTION THROUGH SECTIONS 6, 5 AND 4, TOWNSHIP 26 NORTH, RANGE 2 EAST OF THE THIRD PRINCIPAL MERIDIAN, THROUGH THE CITY OF EL PASO, TO THE EASTERLY LINE OF SAID SECTION 4, THE EASTERLY LINE ALSO BEING THE COUNTY LINE BETWEEN WOODFORD COUNTY AND MC LEAN COUNTY.

MC LEAN COUNTY, ILLINOIS

BEGINNING AT THE INTERSECTION OF THE CENTER LINE OF SAID LINE OF RAILROAD WITH THE WESTERLY LINE OF SECTION 3, TOWNSHIP 26 NORTH, RANGE 2 EAST OF THE THIRD PRINCIPAL MERIDIAN, SAID WESTERLY LINE ALSO BEING THE COUNTY LINE BETWEEN MC LEAN COUNTY AND WOODFORD COUNTY; THENCE IN A GENERALLY EASTERLY DIRECTION THROUGH SECTIONS 3, 2 AND 1, TOWNSHIP 26 NORTH, RANGE 2 EAST OF THE THIRD PRINCIPAL MERIDIAN; THENCE CONTINUING IN A GENERALLY EASTERLY DIRECTION THROUGH SECTIONS 6, 5, 4, 3, 2 AND 1, TOWNSHIP 26 NORTH, RANGE 3 EAST OF THE THIRD PRINCIPAL MERIDIAN, THROUGH THE VILLAGE OF GRIDLEY; THENCE CONTINUING IN A GENERALLY EASTERLY DIRECTION THROUGH SECTIONS 6, 5, 4, 3, 2 AND 1, TOWNSHIP 26 NORTH, RANGE 4 EAST OF THE THIRD PRINCIPAL MERIDIAN, THROUGH THE UNINCORPORATED COMMUNITY OF MEADOWS AND THE CITY OF CHENOA; THENCE CONTINUING IN A GENERALLY EASTERLY DIRECTION THROUGH SECTIONS 6, 5, 4, 3, 2 AND 1, TOWNSHIP 26 NORTH, RANGE 5 EAST OF THE THIRD PRINCIPAL MERIDIAN, THROUGH THE UNINCORPORATED COMMUNITY OF WESTON, TO THE EASTERLY LINE OF SAID SECTION 1, THE EASTERLY LINE ALSO BEING THE COUNTY LINE BETWEEN MC LEAN COUNTY AND LIVINGSTON COUNTY.

89-03986

02932

LIVINGSTON COUNTY, ILLINOIS

BEGINNING AT THE INTERSECTION OF THE CENTER LINE OF SAID LINE OF RAILROAD WITH THE WESTERLY LINE OF SECTION 6, TOWNSHIP 26 NORTH, RANGE 6 EAST OF THE THIRD PRINCIPAL MERIDIAN, SAID WESTERLY LINE ALSO BEING THE COUNTY LINE BETWEEN LIVINGSTON COUNTY AND MC LEAN COUNTY; THENCE IN A GENERALLY EASTERLY DIRECTION THROUGH SECTIONS 6, 5, 4, 3, 2 AND 1, TOWNSHIP 26 NORTH, RANGE 6 EAST OF THE THIRD PRINCIPAL MERIDIAN, THROUGH THE CITY OF FAIRBURY; THENCE CONTINUING IN A GENERALLY EASTERLY DIRECTION THROUGH SECTIONS 6, 5, 4, 3, 2 AND 1, TOWNSHIP 26 NORTH, RANGE 7 EAST OF THE THIRD PRINCIPAL MERIDIAN, THROUGH THE VILLAGE OF FORREST; THENCE CONTINUING IN A GENERALLY EASTERLY DIRECTION THROUGH SECTIONS 6, 5, 4, 3, 2 AND 1, TOWNSHIP 26 NORTH, RANGE 8 EAST OF THE THIRD PRINCIPAL MERIDIAN, THROUGH THE TOWN OF CHATSWORTH, TO THE EASTERLY LINE OF SAID SECTION 1, THE EASTERLY LINE ALSO BEING THE COUNTY LINE BETWEEN LIVINGSTON COUNTY AND FORD COUNTY.

FORD COUNTY, ILLINOIS

BEGINNING AT THE INTERSECTION OF THE CENTER LINE OF SAID LINE OF RAILROAD WITH THE WESTERLY LINE OF SECTION 6, TOWNSHIP 26 NORTH, RANGE 9 EAST OF THE THIRD PRINCIPAL MERIDIAN, SAID WESTERLY LINE ALSO BEING THE COUNTY LINE BETWEEN FORD COUNTY AND LIVINGSTON COUNTY; THENCE IN A GENERALLY EASTERLY DIRECTION THROUGH SECTIONS 6, 5, 4, 3, 2 AND 1, TOWNSHIP 26 NORTH, RANGE 9 EAST OF THE THIRD PRINCIPAL MERIDIAN, THROUGH THE VILLAGE OF PIPER CITY, TO THE EASTERLY LINE OF SAID SECTION 1, THE EASTERLY LINE ALSO BEING THE COUNTY LINE BETWEEN FORD COUNTY AND IROQUOIS COUNTY.

IROQUOIS COUNTY, ILLINOIS

BEGINNING AT THE INTERSECTION OF THE CENTER LINE OF SAID LINE OF RAILROAD WITH THE WESTERLY LINE OF SECTION 6, TOWNSHIP 26 NORTH, RANGE 10 EAST OF THE THIRD PRINCIPAL MERIDIAN, SAID WESTERLY LINE ALSO BEING THE COUNTY LINE BETWEEN IROQUOIS COUNTY AND FORD COUNTY; THENCE IN A GENERALLY EASTERLY DIRECTION THROUGH SECTIONS 6, 5, 4 AND 3, TOWNSHIP 26 NORTH, RANGE 10 EAST OF THE THIRD PRINCIPAL MERIDIAN; THENCE CONTINUING IN A GENERALLY EASTERLY DIRECTION THROUGH SECTIONS 33, 34, 35 AND 36, TOWNSHIP 27 NORTH, RANGE 10 EAST OF THE THIRD PRINCIPAL MERIDIAN, THROUGH THE UNINCORPORATED COMMUNITY OF LA HOCUE; THENCE CONTINUING IN A GENERALLY EASTERLY DIRECTION THROUGH

810724

- 10 -

SECTION 31, TOWNSHIP 27 NORTH, RANGE 11 EAST OF THE THIRD PRINCIPAL MERIDIAN; THENCE CONTINUING IN A GENERALLY EASTERLY DIRECTION THROUGH SECTIONS 31, 32, 33, 34, 35 AND 36, TOWNSHIP 27 NORTH, RANGE 14 WEST OF THE SECOND PRINCIPAL MERIDIAN AND SECTIONS 3, 2 AND 1, TOWNSHIP 26 NORTH, RANGE 14 WEST OF THE SECOND PRINCIPAL MERIDIAN, THROUGH THE CITY OF GILMAN; THENCE CONTINUING IN A GENERALLY EASTERLY DIRECTION THROUGH SECTIONS 31, 32, 33, 34, 35 AND 36, TOWNSHIP 27 NORTH, RANGE 13 WEST OF THE SECOND PRINCIPAL MERIDIAN AND SECTIONS 6, 5, 4, 3, 2 AND 1, TOWNSHIP 26 NORTH, RANGE 13 WEST OF THE SECOND PRINCIPAL MERIDIAN, THROUGH THE VILLAGE OF CRESCENT CITY; THENCE CONTINUING IN A GENERALLY EASTERLY DIRECTION THROUGH SECTIONS 31, 32, 33, 34, 35 AND 36, TOWNSHIP 27 NORTH, RANGE 12 WEST OF THE SECOND PRINCIPAL MERIDIAN AND SECTION 6, TOWNSHIP 26 NORTH, RANGE 12 WEST OF THE SECOND PRINCIPAL MERIDIAN, THROUGH THE CITY OF WATSEKA; THENCE CONTINUING IN A GENERALLY EASTERLY DIRECTION THROUGH SECTIONS 2 AND 1 OF TOWNSHIP 26 NORTH, RANGE 12 WEST OF THE SECOND PRINCIPAL MERIDIAN; THENCE CONTINUING IN A GENERALLY EASTERLY DIRECTION THROUGH SECTIONS 6, 5, 4, 3, 2 AND 1, TOWNSHIP 26 NORTH, RANGE 11 WEST OF THE SECOND PRINCIPAL MERIDIAN, THROUGH THE VILLAGE OF SHELTON; THENCE CONTINUING IN A GENERALLY EASTERLY DIRECTION THROUGH SECTION 6, TOWNSHIP 26 NORTH, RANGE 10 WEST OF THE SECOND PRINCIPAL MERIDIAN, INTO THE UNINCORPORATED COMMUNITY OF EFFNER, TO THE STATE LINE BETWEEN THE STATE OF ILLINOIS AND THE STATE OF INDIANA.

TRACK AND EASEMENT AT LOMAX

ALL OF GRANTOR'S INTEREST, EXCEPT AS SET FORTH HEREIN, IN THE FOLLOWING DESCRIBED TRACK AND AN EASEMENT INTEREST IN THE REAL ESTATE EXTENDING 10 FEET EACH SIDE OF CENTERLINE OF THE TRACK FOR AS LONG AS THE TRACK IS REQUIRED BY GRANTEE:

ALL THE TRACK KNOWN AS THE PEORIA SUBDIVISION MAIN TRACK ON THE PROPERTY OF THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY IN SECTION 15, TOWNSHIP 8 NORTH, RANGE 6 WEST OF THE FOURTH PRINCIPAL MERIDIAN AT AND NEAR LOMAX, HENDERSON COUNTY, ILLINOIS BETWEEN MILE POST 206.1L, OPPOSITE HEAD OUT SIGNAL, TO MILE POST 205.54 WHERE SAID TRACK LEAVES PROPERTY OF THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY AND ENTERS PROPERTY BEING CONVEYED TO GRANTEE AT THIS TIME, SAID TRACK BEING 2920 FEET IN LENGTH. GRANTOR RETAINS TO ITSELF THE RIGHT TO USE THE TRACK AND EASEMENT AREA, OR TO PERMIT ITS AGENTS, LICENSEES OR ASSIGNEES TO USE THE TRACK AND EASEMENT AREA TO CONDUCT ANY ACTIVITIES, SO LONG AS GRANTEE IS ADEQUATELY COMPENSATED FOR ANY UNREASONABLE INTERFERENCE WHICH ANY SUCH ACTIVITIES MAY CAUSE WITH RESPECT TO RAIL TRANSPORTATION OPERATIONS CONDUCTED BY GRANTEE.

02932

89-03986

ADDITIONAL PROPERTY TO BE CONVEYED

ALL OF THE REAL ESTATE OWNED BY THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY IN THE COUNTIES OF TAZEWELL, PEORIA AND WOODFORD, STATE OF ILLINOIS, DESCRIBED AS FOLLOWS:

TAZEWELL COUNTY

PARCEL T-3

ALL OF THE REAL ESTATE LYING IN THE WEST-HALF OF THE NORTHWEST QUARTER OF SECTION 35, TOWNSHIP 26 NORTH, RANGE 4 WEST OF THE THIRD PRINCIPAL MERIDIAN, DESCRIBED AS FOLLOWS:

ALL OF THAT CERTAIN RAILROAD EASEMENT RESERVATION DESCRIBED AND SHOWN ON SURVEY PLAT DATED DECEMBER 1, 1986 AND REVISED DECEMBER 16, 1986, RECORDED JANUARY 15, 1987 AS DOCUMENT NUMBER 745172 IN BOOK "GG" OF PLATS AT PAGE 130 OF THE RECORDS OF TAZEWELL COUNTY.

ALSO, ALL OF THAT CERTAIN 1-FOOT WIDE STRIP OF LAND DESCRIBED IN EXCEPTION TO DEED DATED MAY 17, 1957 FROM TOLEDO, PEORIA & WESTERN RAILROAD COMPANY TO THE KROGER CO., RECORDED MAY 20, 1957 AS DOCUMENT NUMBER 339458 IN VOLUME 561 AT PAGE 298 OF THE RECORDS OF TAZEWELL COUNTY.

ALSO, ALL OF THE LAND LYING BETWEEN THE SOUTHERLY RIGHT OF WAY LINE OF THE NORFOLK AND SOUTHERN RAILWAY COMPANY AND THE NORTHERLY LINE OF THAT CERTAIN 10.67 ACRE PARCEL OF LAND DESCRIBED IN DEED DATED AUGUST 6, 1956, FROM TOLEDO, PEORIA & WESTERN RAILROAD COMPANY TO SECKEL-BLANCHARD, INC., RECORDED AUGUST 21, 1956 AS DOCUMENT NUMBER 332120 IN VOLUME 544 AT PAGE 173 OF THE RECORDS OF TAZEWELL COUNTY.

PARCEL T-6

A STRIP OF LAND IN THE NORTHWEST QUARTER OF SECTION 34, TOWNSHIP 26 NORTH, RANGE 4 WEST OF THE THIRD PRINCIPAL MERIDIAN, BEING ALL OF THAT CERTAIN 20-FOOT WIDE STRIP OF LAND DESCRIBED IN DEED DATED DECEMBER 6, 1983, FROM TOLEDO, PEORIA & WESTERN RAILROAD COMPANY TO TRANSIT ICE COMPANY, RECORDED DECEMBER 9, 1983 AS DOCUMENT NUMBER 703585 IN BOOK 2648 AT PAGE 162 OF THE RECORDS OF TAZEWELL COUNTY.

812724

- 12 -

EXCEPTING THEREFROM, ALL OF THAT CERTAIN 20-FOOT WIDE STRIP OF LAND DESCRIBED IN DEED DATED JULY 21, 1987 FROM TRANSIT ICE COMPANY TO SAMUEL M. KENT, RECORDED JULY 23, 1987 AS DOCUMENT NUMBER 754072 IN BOOK 2975 AT PAGE 19 OF THE RECORDS OF TAZEWELL COUNTY.

PARCEL T-18

A STRIP OF LAND IN THE WEST-HALF OF THE SOUTHEAST QUARTER OF SECTION 29, TOWNSHIP 26 NORTH, RANGE 4 WEST OF THE THIRD PRINCIPAL MERIDIAN, BEING ALL OF THAT CERTAIN 225-FOOT WIDE STRIP OF LAND DESCRIBED IN DEED DATED DECEMBER 6, 1983, FROM TOLEDO, PEORIA & WESTERN RAILROAD COMPANY TO TRANSIT ICE COMPANY, RECORDED DECEMBER 9, 1983 AS DOCUMENT NUMBER 703589 IN BOOK 2648 AT PAGE 177 OF THE RECORDS OF TAZEWELL COUNTY.

PARCEL T-32

ALL OF THE REAL ESTATE LYING IN THE EAST-HALF OF THE NORTHWEST QUARTER OF SECTION 35, TOWNSHIP 26 NORTH, RANGE 4 WEST OF THE THIRD PRINCIPAL MERIDIAN, DESCRIBED AS FOLLOWS:

ALL OF THAT CERTAIN 50-FOOT WIDE STRIP OF LAND DESCRIBED IN EXCEPTION TO DEED DATED AUGUST 6, 1956 FROM TOLEDO, PEORIA & WESTERN RAILROAD COMPANY TO SECKEL-BLANCHARD, INC., RECORDED AUGUST 21, 1956 AS DOCUMENT NUMBER 332120 IN VOLUME 544 AT PAGE 173 OF THE RECORDS OF TAZEWELL COUNTY.

ALSO, ALL OF THE LAND LYING BETWEEN THE SOUTHERLY RIGHT OF WAY LINE OF THE NORFOLK AND SOUTHERN RAILWAY COMPANY AND THE NORTHERLY LINE OF THAT CERTAIN 10.67 ACRE PARCEL OF LAND DESCRIBED IN DEED DATED AUGUST 6, 1956, FROM TOLEDO, PEORIA & WESTERN RAILROAD COMPANY TO SECKEL-BLANCHARD, INC., RECORDED AUGUST 21, 1956 AS DOCUMENT NUMBER 332120 IN VOLUME 544 AT PAGE 173 OF THE RECORDS OF TAZEWELL COUNTY.

ALSO, ALL OF THE LAND LYING BETWEEN THE SOUTHERLY RIGHT OF WAY LINE OF THE NORFOLK AND SOUTHERN RAILWAY COMPANY AND THE NORTHERLY LINE OF THAT CERTAIN 5.658 ACRE PARCEL OF LAND DESCRIBED IN DEED DATED JULY 28, 1961, FROM TOLEDO, PEORIA & WESTERN RAILROAD COMPANY TO H.F. CAMPBELL CONSTRUCTION COMPANY, RECORDED JULY 28, 1961 AS DOCUMENT NUMBER 382955 IN VOLUME 649 AT PAGE 213 OF THE RECORDS OF TAZEWELL COUNTY.

ALSO, ALL OF THE FOLLOWING DESCRIBED PARCEL:
BEGINNING AT THE POINT OF BEGINNING OF THAT CERTAIN

89-03986

02932

EXCEPTION DESCRIBED FOURTH IN DEED DATED DECEMBER 6, 1983, FROM TOLEDO, PEORIA & WESTERN RAILROAD COMPANY TO TRANSIT ICE COMPANY, RECORDED DECEMBER 9, 1983 AS DOCUMENT NUMBER 703594 IN BOOK 2648 AT PAGE 199 OF THE RECORDS OF TAZEWELL COUNTY; THENCE NORTH 86°24'32" WEST (BEARING ASSUMED FOR THE PURPOSE OF THIS DESCRIPTION) ALONG THE NORTHERLY LINE OF SAID FOURTH EXCEPTION, 136.51 FEET TO THE SOUTHEASTERLY CORNER OF THAT CERTAIN 4.465 ACRE PARCEL OF LAND DESCRIBED IN DEED JULY 22, 1957, FROM TOLEDO, PEORIA & WESTERN RAILROAD COMPANY TO SECKEL-BLANCHARD, INC. RECORDED IN BOOK 574 AT PAGE 280 OF THE RECORDS OF TAZEWELL COUNTY; THENCE ALONG THE BOUNDARY OF THAT 4.465 ACRE PARCEL THE FOLLOWING TWO (2) COURSES, ONE (1) NORTHERLY ON AN EIGHT DEGREE (8°) CURVE TO THE RIGHT, AN ARC DISTANCE OF THREE HUNDRED SEVENTEEN AND FIVE-TENTHS (317.5) FEET, ITS LONG CHORD OF THREE HUNDRED FIFTEEN (315) FEET BEARING NORTH TWENTY DEGREES FIFTY-TWO MINUTES THIRTY SECONDS WEST (N20°52'30"W) TO A POINT ON A LINE ONE HUNDRED (100) FEET SOUTH OF AND MEASURED NORMALLY TO THE CENTER LINE OF MAIN TRACK OF NORFOLK AND SOUTHERN RAILWAY COMPANY; THENCE TWO (2) WESTERLY PARALLEL WITH AND FIFTY (50) FEET SOUTHERLY OF AND NORMALLY DISTANT FROM THE SOUTHERLY RIGHT OF WAY LINE OF SAID NORFOLK AND SOUTHERN RAILWAY COMPANY AND CONCENTRIC TO A CURVE OF ZERO DEGREES FIFTY-NINE MINUTES FIFTY-NINE SECONDS, PARALLEL WITH AND ONE HUNDRED (100) FEET SOUTH OF AND NORMALLY DISTANT FROM SAID CENTER LINE, AN ARC DISTANCE OF SIX HUNDRED SEVENTY-SIX AND TWO-TENTHS (676.2) FEET, ITS LONG CHORD OF SIX HUNDRED SEVENTY-FIVE AND EIGHT TENTHS (675.8) FEET BEARING SOUTH EIGHTY-NINE DEGREES THIRTY-SIX MINUTES WEST (S89°36'W) TO THE EASTERLY LINE OF THAT CERTAIN 10.67 ACRE PARCEL OF LAND DESCRIBED IN DEED DATED AUGUST 6, 1956, FROM TOLEDO, PEORIA & WESTERN RAILROAD COMPANY TO SECKEL-BLANCHARD, INC., RECORDED AUGUST 21, 1956 AS DOCUMENT NUMBER 332120 IN VOLUME 544 AT PAGE 173 OF THE RECORDS OF TAZEWELL COUNTY; THENCE NORTH 12°43'55" WEST ALONG SAID EASTERLY LINE (VOL. 544, PG. 173), AND ITS PROLONGATION, 50.04 FEET TO SAID SOUTHERLY RIGHT OF WAY LINE OF NORFOLK AND SOUTHERN RAILWAY COMPANY; THENCE EASTERLY ALONG SAID SOUTHERLY RIGHT OF WAY LINE 805 FEET, MORE OR LESS TO THE POINT OF INTERSECTION OF SAID SOUTHERLY RIGHT OF WAY LINE WITH THE NORTHERLY PROLONGATION OF THE MOST WESTERLY LINE OF THAT CERTAIN 5.658 ACRE PARCEL OF LAND DESCRIBED IN DEED DATED JULY 28, 1961, FROM TOLEDO, PEORIA & WESTERN RAILROAD COMPANY TO H.F. CAMPBELL CONSTRUCTION COMPANY, RECORDED JULY 28, 1961 AS DOCUMENT NUMBER 382955 IN VOLUME 649, AT PAGE 213 OF THE RECORDS OF TAZEWELL COUNTY; THENCE SOUTHERLY ALONG SAID PROLONGATION AND

814724

- 14 -

THE WESTERLY BOUNDARY OF SAID 5.658 ACRE PARCEL (VOL. 649, PG. 213) THE FOLLOWING THREE (3) COURSES, ONE (1) SOUTH 1°23' EAST, 110.95 FEET; THENCE TWO (2) SOUTH 21°31' EAST, 75.5 FEET; THENCE THREE (3) SOUTH 31°33' EAST, 191.84 FEET TO THE POINT OF BEGINNING.

PARCEL T-41

A PARCEL OF LAND IN THE NORTHEAST QUARTER OF SECTION 35, TOWNSHIP 26 NORTH, RANGE 4 WEST OF THE THIRD PRINCIPAL MERIDIAN, BEING THAT CERTAIN PARCEL OF LAND DESCRIBED IN DEED DATED DECEMBER 6, 1983, FROM TOLEDO, PEORIA AND WESTERN RAILROAD COMPANY TO TRANSIT ICE COMPANY, RECORDED DECEMBER 9, 1983 AS DOCUMENT NUMBER 703600 IN BOOK 2648 AT PAGE 221 OF THE RECORDS OF TAZEWELL COUNTY.

PEORIA COUNTY

PARCEL P-18

✓ THAT PORTION OF THAT CERTAIN STRIP OF LAND DESCRIBED AS "A STRIP OF LAND FOUR (4) RODS WIDE OFF OF THE NORTH SIDE OF THE SOUTH HALF OF THE NORTHEAST QUARTER OF SECTION THIRTY-SIX (36), IN TOWNSHIP EIGHT (8) NORTH, RANGE SEVEN (7) EAST OF THE FOURTH PRINCIPAL MERIDIAN, EXCEPTING HOWEVER THE RIGHT OF WAY OF THE ST. LOUIS, PEORIA AND NORTHWESTERN RAILWAY OVER AND ACROSS THE SAME, ALSO EXCEPTING THE RIGHT OF WAY OF THE PEORIA AND PEKIN UNION RAILWAY OVER AND ACROSS THE SAME, ALSO EXCEPTING THE RIGHT OF WAY OF THE PEORIA RAILWAY TERMINAL COMPANY OVER AND ACROSS THE SAME, SITUATED IN THE COUNTY OF PEORIA AND STATE OF ILLINOIS." IN DEED DATED MAY 1, 1931 TO TOLEDO, PEORIA & WESTERN RAILROAD (PREDECESSOR IN INTEREST TO TRANSIT ICE COMPANY) RECORDED OCTOBER 13, 1932, IN BOOK 440, PAGE 341, RECORDS OF SAID PEORIA COUNTY, WHICH LIES WESTERLY OF SAID RIGHT OF WAY OF THE PEORIA RAILWAY TERMINAL COMPANY AND EASTERLY OF THAT CERTAIN 4338 SQUARE FOOT PARCEL OF LAND DESCRIBED IN DEED DATED APRIL 10, 1953, FROM TOLEDO, PEORIA & WESTERN RAILROAD COMPANY TO ALLIED MILLS, INC., SAID 4338 SQUARE FOOT PARCEL OF LAND DESCRIBED IN SAID DEED (4-10-53) FOR REFERENCE AS FOLLOWS:

"PART OF THE SOUTHWEST QUARTER (SW 1/4) OF THE NORTHEAST QUARTER (NE 1/4) OF SECTION THIRTY-SIX (36), TOWNSHIP EIGHT (8) NORTH, RANGE SEVEN (7) EAST OF THE FOURTH (4TH) PRINCIPAL MERIDIAN, IN THE VILLAGE OF BARTONVILLE, COUNTY OF PEORIA AND STATE OF

89-03986

0293x

ILLINOIS, MORE PARTICULARLY DESCRIBED AS
FOLLOWS:

"COMMENCING AT THE NORTHWEST CORNER OF SAID
SOUTHWEST QUARTER (SW 1/4) OF THE NORTHEAST
QUARTER (NE 1/4) OF SECTION THIRTY-SIX
(36); THENCE EAST ALONG THE NORTH LINE OF
SAID NORTHEAST QUARTER (NE 1/4) OF SECTION
THIRTY-SIX (36), SIXTY-NINE AND SIXTY-FIVE
HUNDREDTHS (69.65) FEET TO THE WESTERLY LINE
OF NEW STATE HIGHWAY U.S. NO. 24 (FORMERLY
ILLINOIS NO. 9); THENCE SOUTHERLY ALONG SAID
WESTERLY LINE SIXTY-SIX (66) FEET, MORE OR
LESS, TO A PIPE; THENCE WEST PARALLEL WITH
AND SIXTY-SIX (66) FEET NORMALLY DISTANT
FROM SAID NORTH LINE OF SAID NORTHEAST
QUARTER (NE 1/4) OF SECTION THIRTY-SIX (36),
SIXTY-ONE AND EIGHT-TENTHS (61.8) FEET TO
THE WEST LINE OF THE NORTHEAST QUARTER
(NE 1/4) OF SECTION THIRTY-SIX (36); THENCE
NORTH ALONG THE WEST LINE SIXTY-SIX (66)
FEET TO THE POINT OF BEGINNING, CONTAINING
4,338 SQ. FT., MORE OR LESS".

PARCEL P-26

THAT CERTAIN 0.6 ACRE PARCEL OF LAND
DESCRIBED IN TRACT 2 IN DEED DATED DECEMBER
6, 1983, FROM TOLEDO, PEORIA & WESTERN
RAILROAD COMPANY TO TRANSIT ICE COMPANY,
FILED DECEMBER 8, 1983, AS DOCUMENT NO.
83-20927, RECORDS OF PEORIA COUNTY, SAID
PARCEL OF LAND DESCRIBED IN SAID DEED FOR
REFERENCE AS FOLLOWS:

"TRACT 2

"A PART OF THE EAST HALF (E 1/2) OF THE
SOUTHWEST QUARTER (SW 1/4) OF SECTION
FIFTEEN (15), TOWNSHIP SEVEN (7) NORTH,
RANGE SEVEN (7) EAST OF THE FOURTH (4TH)
PRINCIPAL MERIDIAN, MORE PARTICULARLY
DESCRIBED AS FOLLOWS:

"BEGINNING AT THE POINT OF INTERSECTION OF
THE EAST LINE OF THE SOUTHWEST QUARTER (SW
1/4) OF SECTION FIFTEEN (15) AND THE
SOUTHEASTERLY RIGHT OF WAY LINE OF TOLEDO,
PEORIA & WESTERN RAILROAD COMPANY (SAID
RAILROAD RIGHT OF WAY LINE BEING FIFTY (50)
FEET DISTANT SOUTHEASTERLY FROM AND PARALLEL
WITH THE CENTER LINE OF THE MAIN TRACK OF

916824

- 16 -

SAID RAILROAD AS NOW LAID AND CONSTRUCTED); THENCE SOUTHWESTERLY ALONG SAID RAILROAD RIGHT OF WAY LINE SEVEN HUNDRED NINETEEN AND THIRTY-SIX HUNDREDTHS (719.36) FEET TO THE SOUTH LINE OF SAID SOUTHWEST QUARTER (SW 1/4) OF SECTION FIFTEEN (15); THENCE EAST ALONG SAID SOUTH LINE ONE HUNDRED THREE AND THIRTY-FOUR HUNDREDTHS (103.34) FEET; THENCE NORTH 43°-10'-15" EAST SIX HUNDRED FORTY-FIVE AND FOUR-TENTHS (645.4) FEET TO THE POINT OF BEGINNING; CONTAINING SIX-TENTHS (0.6) ACRE, MORE OR LESS:"

PARCEL P-27

THAT CERTAIN PARCEL OF LAND DESCRIBED IN TRACT 1 IN DEED DATED DECEMBER 6, 1983, FROM TOLEDO, PEORIA & WESTERN RAILROAD COMPANY TO TRANSIT ICE COMPANY, FILED DECEMBER 8, 1983, AS DOCUMENT NO. 83-20927, RECORDS OF PEORIA COUNTY, SAID PARCEL OF LAND DESCRIBED IN SAID DEED FOR REFERENCE AS FOLLOWS:

"TRACT 1

"A PART OF THE NORTHWEST QUARTER (NW 1/4) OF SECTION TWENTY-TWO (22), TOWNSHIP SEVEN (7) NORTH, RANGE SEVEN (7) EAST OF THE FOURTH (4TH) PRINCIPAL MERIDIAN, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

"BEGINNING AT A T-RAIL AT THE SOUTHWEST CORNER OF SAID NORTHWEST QUARTER (NW 1/4) OF SECTION TWENTY-TWO (22); THENCE NORTH 89°-47' EAST, ALONG THE SOUTH LINE OF SAID NORTHWEST QUARTER (NW 1/4) OF SECTION TWENTY-TWO (22), FOUR HUNDRED FORTY (440) FEET; THENCE NORTH 25°-29'-45" EAST FIVE HUNDRED THREE (503) FEET; THENCE NORTH 38°-54'-30" EAST ONE THOUSAND FOUR HUNDRED SIXTY-FIVE (1,465) FEET; THENCE NORTH 36°-44'-30" EAST TWO HUNDRED FORTY-EIGHT (248) FEET; THENCE NORTH 37°-17'-04" EAST SIX HUNDRED THIRTY-TWO AND FIVE-TENTHS (632.5) FEET; THENCE NORTH 3°-30'-30" EAST THREE HUNDRED FORTY-SEVEN (347) FEET; THENCE NORTH 6°-32' EAST THIRTY-EIGHT (38) FEET, MORE OR LESS, TO THE NORTH LINE OF SAID NORTHWEST QUARTER (NW 1/4) OF SECTION TWENTY-TWO (22); THENCE WEST ALONG SAID NORTH LINE ONE HUNDRED THREE AND THIRTY-FOUR HUNDREDTHS (103.34) FEET TO THE

89-03986

02931

SOUTHEASTERLY RIGHT OF WAY LINE OF THE TOLEDO, PEORIA & WESTERN RAILROAD COMPANY (THE RAILROAD RIGHT WAY LINE BEING FIFTY (50) FEET DISTANT SOUTHEASTERLY MEASURED PERPENDICULARLY FROM AND PARALLEL WITH THE CENTER LINE OF THE MAIN TRACK OF SAID RAILROAD AS NOW LAID AND CONSTRUCTED); THENCE SOUTH 49°-09' WEST ALONG THE RAILROAD RIGHT OF WAY LINE ONE THOUSAND TWO HUNDRED THIRTY-NINE AND NINE-TENTHS (1,239.9) FEET TO THE CENTER LINE OF THE PUBLIC HIGHWAY KNOWN AS STATE BOND ISSUE ROUTE 9 AND U.S. ROUTE 24; THENCE SOUTH 10°-16' EAST THIRTEEN (13) FEET ALONG SAID HIGHWAY CENTER LINE; THENCE CONTINUING ALONG SAID HIGHWAY CENTER LINE ON A CURVE TO THE RIGHT HAVING A RADIUS OF 501.96 FEET, FOUR

HUNDRED SIXTY-THREE AND FOUR-TENTHS (463.4) FEET; THENCE SOUTH 42°-38' WEST ALONG SAID HIGHWAY CENTER LINE NINE HUNDRED NINETY AND FOUR-TENTHS (990.4) FEET; THENCE SOUTH 47°-22' EAST THIRTY (30) FEET; THENCE SOUTH 66°-18' EAST FIFTY-ONE (51) FEET; THENCE SOUTH 42°-38' WEST ONE HUNDRED SIXTEEN (116) FEET; THENCE NORTH 66°-18' WEST ONE (1) FOOT; THENCE SOUTH 43°-53' WEST ONE HUNDRED TEN (110) FEET; THENCE SOUTH 66°-18' EAST THIRTY-FOUR AND EIGHT-TENTHS (34.8) FEET; THENCE SOUTH 28°-21' WEST ONE HUNDRED AND FIFTY-FIVE HUNDREDTHS (100.55) FEET; THENCE NORTH 43°-08' WEST FIVE AND TWENTY-FIVE HUNDREDTHS (5.25) FEET; THENCE SOUTH 39°02' WEST FORTY-SEVEN AND THIRTY-FIVE HUNDREDTHS (47.35) FEET; THENCE NORTH 42°-05' WEST TEN AND ONE-TENTH (10.1) FEET; THENCE SOUTHWESTERLY, ALONG A CURVE TO THE RIGHT HAVING A RADIUS OF 2814.93 FEET, TWO HUNDRED TWENTY-FIVE (225) FEET TO THE WEST LINE OF SAID NORTHWEST QUARTER (NW 1/4) OF SECTION TWENTY-TWO (22); THENCE SOUTH ALONG SAID WEST LINE TWO HUNDRED SIXTEEN AND FOUR-TENTHS (216.4) FEET TO THE PLACE OF BEGINNING;"

PARCEL P-28

THAT CERTAIN PARCEL OF LAND DESCRIBED IN DEED DATED DECEMBER 6, 1983, FROM TOLEDO, PEORIA & WESTERN RAILROAD COMPANY TO TRANSIT ICE COMPANY, FILED DECEMBER 8, 1983, AS DOCUMENT NO. 83-20928, RECORDS OF

89-03986

02932

918724

- 18 -

PEORIA COUNTY, SAID PARCEL OF LAND DESCRIBED
IN SAID DEED FOR REFERENCE AS FOLLOWS:

"A PART OF THE NW 1/4 OF THE SW 1/4 OF
SECTION 22, TOWNSHIP 7 NORTH, RANGE 7 EAST
OF THE 4TH PRINCIPAL MERIDIAN, PEORIA
COUNTY, ILLINOIS, MORE PARTICULARLY
DESCRIBED AS FOLLOWS:

"BEGINNING AT A T-RAIL AT THE NORTHWEST
CORNER OF THE SW 1/4 OF SAID SECTION 22 AS
THE POINT OF BEGINNING OF THE TRACT TO BE
DESCRIBED; THENCE SOUTH ALONG THE WEST LINE
OF THE SW 1/4 OF SAID SECTION 22, A DISTANCE
OF 596 FEET; THENCE N23°-11'-10"E, 649.4
FEET TO THE NORTH LINE OF THE SW 1/4 OF SAID
SECTION 22; THENCE IN A WESTERLY DIRECTION
ALONG THE NORTH LINE OF THE SW 1/4 OF SAID
SECTION 22, A DISTANCE OF 255.68 FEET, MORE
OR LESS, TO THE PLACE OF BEGINNING,
CONTAINING 1.75 ACRES MORE OR LESS, AND
SUBJECT TO ANY AND ALL EASEMENTS,
RIGHTS-OF-WAY, DEDICATIONS, ETC. FOR
WHATEVER PURPOSE DESIGNATED, SITUATE, LYING
AND BEING IN THE COUNTY OF PEORIA AND STATE
OF ILLINOIS."

PARCEL P-29

THAT CERTAIN TRACT 1, AND THAT CERTAIN TRACT
2 DESCRIBED IN DEED DATED DECEMBER 6, 1983,
FROM TOLEDO, PEORIA & WESTERN RAILROAD
COMPANY TO TRANSIT ICE COMPANY, FILED
DECEMBER 8, 1983, AS DOCUMENT NO. 83-20930,
RECORDS OF PEORIA COUNTY, SAID TRACTS
DESCRIBED IN SAID DEED (DOC. NO. 83-20930)
FOR REFERENCE AS FOLLOWS:

"TRACT 1

"A PART OF THE EAST HALF (E1/2) OF THE
NORTHEAST QUARTER (NE1/4) OF SECTION
TWENTY-ONE (21), TOWNSHIP SEVEN (7) NORTH,
RANGE SEVEN (7) EAST OF THE FOURTH (4TH)
PRINCIPAL MERIDIAN, MORE PARTICULARLY
DESCRIBED AS FOLLOWS:

"BEGINNING AT A T-RAIL AT THE SOUTHEAST
CORNER OF SAID NORTHEAST QUARTER (NE 1/4) OF
SECTION TWENTY-ONE (21); THENCE NORTH, ALONG
THE EAST LINE OF THE NORTHEAST QUARTER

89-03986

0293x

(NE 1/4) OF SECTION TWENTY-ONE (21), TWO HUNDRED SIXTEEN AND FOUR-TENTHS (216.4) FEET; THENCE SOUTHWESTERLY, ALONG A CURVE TO THE RIGHT HAVING A RADIUS OF 2814.93 FEET, TWO HUNDRED THIRTY-NINE AND THREE-TENTHS (239.3) FEET TO A POINT IN A LINE BEARING NORTH 13°-31'-30" WEST FIFTY AND ONE-TENTH (50.1) FEET FROM THE SOUTH LINE OF SAID NORTHEAST QUARTER (NE 1/4) OF SECTION TWENTY-ONE (21); THENCE SOUTH 13°-31'-30" EAST FIFTY AND ONE-TENTH (50.1) FEET TO SAID SOUTH LINE; THENCE EAST ALONG SAID SOUTH LINE ONE HUNDRED SIXTY-TWO AND FIVE-TENTHS (162.5) FEET TO THE PLACE OF BEGINNING, CONTAINING ONE-HALF (1/2) ACRE, MORE OR LESS.

"TRACT 2

"A PART OF THE SOUTHEAST QUARTER (SE 1/4) OF THE NORTHEAST QUARTER (NE 1/4) OF SECTION TWENTY-ONE (21), TOWNSHIP SEVEN (7) NORTH, RANGE SEVEN (7) EAST OF THE FOURTH (4TH) PRINCIPAL MERIDIAN, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

"BEGINNING AT A POINT IN THE SOUTH LINE OF SAID NORTHEAST QUARTER (NE 1/4) OF SECTION TWENTY-ONE (21), ONE HUNDRED SIXTY-TWO AND FIVE-TENTHS (162.5) FEET WEST OF A T-RAIL AT THE SOUTHEAST CORNER OF SAID NORTHEAST QUARTER (NE 1/4) OF SECTION TWENTY-ONE (21); THENCE WEST ALONG SAID SOUTH LINE SIXTY-SEVEN AND SIX-TENTHS (67.6) FEET; THENCE NORTHEASTERLY, ALONG A CURVE TO THE LEFT HAVING A RADIUS OF 2814.93 FEET, SEVENTY-FOUR AND THREE-TENTHS (74.3) FEET TO A POINT IN A LINE BEARING NORTH 13°-31'-30" WEST FIFTY AND ONE-TENTH (50.1) FEET FROM THE POINT OF BEGINNING; THENCE SOUTH 13°-31'-30" EAST FIFTY AND ONE-TENTH (50.1) FEET TO THE POINT OF BEGINNING; CONTAINING FIVE-HUNDREDTHS (0.05) ACRE, MORE OR LESS"

PARCEL P-30

THAT CERTAIN PARCEL OF LAND DESCRIBED IN DEED DATED DECEMBER 6, 1983, FROM TOLEDO, PEORIA & WESTERN RAILROAD COMPANY TO TRANSIT ICE COMPANY, FILED DECEMBER 8, 1983, AS DOCUMENT NO. 83-20931, RECORDS OF PEORIA COUNTY, THE PARCEL OF LAND DESCRIBED IN SAID DEED FOR REFERENCE AS FOLLOWS:

820724

- 20 -

"A PART OF THE SE 1/4 OF SECTION 21, TOWNSHIP 7 NORTH, RANGE 7, EAST OF THE 4th PRINCIPAL MERIDIAN, PEORIA COUNTY, ILLINOIS, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

"A STRIP OF LAND 30 FEET IN WIDTH AND 800 FEET IN LENGTH, THE SOUTH LINE OF THE STRIP BEING 98 FEET SOUTH OF THE SOUTH RIGHT OF WAY LINE OF OLD HIGHWAY U.S. ROUTE 24 PRODUCED, ON A TANGENT BEARING S88°-51'E, THE STRIP EXTENDING EASTERLY 800 FEET FROM THE WEST LINE OF THE SE 1/4 OF SECTION 21, CONTAINING 0.54 ACRE, MORE OR LESS, . . ."

WOODFORD COUNTY

PARCEL WD-1

A PARCEL OF LAND IN THE COUNTY OF WOODFORD, STATE OF ILLINOIS, LYING IN THE SOUTHEAST QUARTER OF SECTION 5, TOWNSHIP 26 NORTH, RANGE 1 EAST OF THE THIRD PRINCIPAL MERIDIAN, DESCRIBED AS FOLLOWS:

THAT PORTION OF THAT CERTAIN PARCEL OF LAND DESCRIBED IN DEED DATED DECEMBER 6, 1983, FROM TOLEDO, PEORIA AND WESTERN RAILROAD COMPANY TO TRANSIT ICE COMPANY FILED FOR RECORD DECEMBER 16, 1983 AS DOCUMENT NUMBER 83-3262 OF THE RECORDS OF WOODFORD COUNTY, LYING EASTERLY OF THE EASTERLY LINE OF THAT CERTAIN 3.76 ACRE PARCEL OF LAND DESCRIBED IN DEED DATED JULY 15, 1970, FROM TOLEDO, PEORIA AND WESTERN RAILROAD COMPANY TO AMERICAN CYANAMID COMPANY FILED FOR RECORD JULY 21, 1970 AS DOCUMENT NUMBER 245821 IN VOLUME 39 AT PAGE 445 OF THE RECORDS OF WOODFORD COUNTY.

Grantor reserves and excepts from this grant for itself or any assignee(s) or licensee(s) a non-exclusive easement for construction, reconstruction, maintenance, use and/or operation of fiber optic communication lines, facilities and appurtenances in, under, across, along and through the above-described real estate, including the right for Grantor or any assignee(s) or licensee(s) to enter, disturb the surface and occupy the above-described real estate for purposes of

89-03986

02932

constructing, reconstructing, maintaining, using and/or operating fiber optic communication lines, facilities and appurtenances in, under, across, along and through the above-described real estate; provided however, that (1) Grantor or any assignee(s) or licensee(s) shall notify Grantor in advance of any such entry, and shall enter and occupy the property in a manner which conflicts to the minimum degree practicable with Grantee's railroad operations on the above-described real estate, and, except where circumstances do not permit, subject to Grantee's approval as to time of entry; (2) Grantor or any assignee(s) or licensee(s) shall reimburse Grantee for any damage to Grantee's property which is caused by any such entry; and (3) Grantor or any assignee(s) or licensee(s) shall reimburse Grantee for any reasonable additional cost which Grantee incurs as a result of any such entry. If Grantee at some future date abandons all or a portion of its rail operations conducted on the above-described real estate, Grantor agrees that if Grantor desires to continue to exercise its reserved easement rights, Grantor shall purchase from Grantee, at a price agreeable to both parties, whatever structures on the above-described real estate are necessary to enable Grantor to keep in place the

722724

- 22 -

reserved easement or any fiber optics construction under such easement.

Dated this 3rd day of February, 1989.

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY

By *As Xndel*

Senior Vice President-Finance

Its and Chief Financial Officer



L. McGovern
Assistant Secretary

89-03986

02932

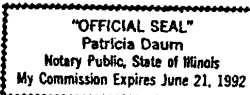
STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

I, Patricia Daum, a Notary Public in and for the County and State aforesaid, do hereby certify that G. W. Dodd, Senior Vice President-Finance and Chief Financial Officer and T. M. McGovern, Assistant Secretary of The Atchison, Topeka and Santa Fe Railway Company, personally known to me to be the persons holding such offices in such corporation whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed and delivered the said instrument as their free and voluntary act and as the free and voluntary act of said corporation for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal this 3rd day of February, 1989.

Patricia Daum

Notary Public



THIS INSTRUMENT PREPARED BY:

Dennis W. Wilson
THE ATCHISON, TOPEKA & SANTA
FE RAILWAY COMPANY
80 E. Jackson Boulevard
Chicago, Illinois 60604

AFTER RECORDING RETURN TO:

Richard Demarest Yant
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 E. Monroe St., Ste. 4200
Chicago, Illinois 60603

89-03986

0508z

924824

February 21, 1989

TP&W Acquisition Corporation - Tax Numbers

Hollis Township - No. 20

20-19-506-004
20-30-506-001
20-30-506-003
20-29-506-001
20-29-506-002
20-29-506-003
20-29-506-004
20-20-506-003
20-21-506-006
20-22-506-001
20-15-506-001
20-15-506-002
20-15-506-003
20-14-506-008
20-11-506-025

Timber Township - No. 19

19-19-506-001
19-19-506-002
19-20-506-003
19-28-506-001
19-21-506-002
19-21-506-003
19-22-506-001
19-22-506-004
19-22-506-003
19-23-506-003
19-24-506-001
19-24-506-002

City of Peoria - No. 18

18-09-501-001

89-03986

**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**

**KEOKUK JUNCTION RAILWAY CO.'S REPLY TO
TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION'S
PETITION FOR RECONSIDERATION**

Exhibit D

**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**

**KEOKUK JUNCTION RAILWAY CO.'S REPLY TO
TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION'S
PETITION FOR RECONSIDERATION**

Exhibit E

H.R.4520

American Jobs Creation Act of 2004 (Enrolled as Agreed to or Passed by Both House and Senate)

SEC. 245. CREDIT FOR MAINTENANCE OF RAILROAD TRACK.

(a) IN GENERAL- Subpart D of part IV of subchapter A of chapter 1 (relating to business-related credits) is amended by adding at the end the following new section:

SEC. 45G. RAILROAD TRACK MAINTENANCE CREDIT.

(a) GENERAL RULE- For purposes of section 38, the railroad track maintenance credit determined under this section for the taxable year is an amount equal to 50 percent of the qualified railroad track maintenance expenditures paid or incurred by an eligible taxpayer during the taxable year.

(b) LIMITATION- The credit allowed under subsection (a) for any taxable year shall not exceed the product of--

(1) \$3,500, and

(2) the number of miles of railroad track owned or leased by the eligible taxpayer as of the close of the taxable year.

A mile of railroad track may be taken into account by a person other than the owner only if such mile is assigned to such person by the owner for purposes of this subsection. Any mile which is so assigned may not be taken into account by the owner for purposes of this subsection.

(c) ELIGIBLE TAXPAYER- For purposes of this section, the term 'eligible taxpayer' means--

(1) any Class II or Class III railroad, and

(2) any person who transports property using the rail facilities of a person described in paragraph (1) or who furnishes railroad-related property or services to such a person.

(d) QUALIFIED RAILROAD TRACK MAINTENANCE EXPENDITURES- For purposes of this section, the term 'qualified railroad track maintenance expenditures' means expenditures (whether or not otherwise chargeable to capital account) for maintaining railroad track (including roadbed, bridges, and related track structures) owned or leased as of January 1, 2005, by a Class II or Class III railroad.

(e) OTHER DEFINITIONS AND SPECIAL RULES-

(1) CLASS II OR CLASS III RAILROAD- For purposes of this section, the terms 'Class II railroad' and 'Class III railroad' have the respective meanings given such terms by the Surface Transportation Board.

(2) CONTROLLED GROUPS- Rules similar to the rules of paragraph (1) of section 41(f) shall apply for purposes of this section.

(3) BASIS ADJUSTMENT- For purposes of this subtitle, if a credit is allowed under this section with respect to any railroad track, the basis of such track shall be reduced by the amount of the credit so allowed.

`(f) APPLICATION OF SECTION- This section shall apply to qualified railroad track maintenance expenditures paid or incurred during taxable years beginning after December 31, 2004, and before January 1, 2008.'

(b) LIMITATION ON CARRYBACK-

(1) IN GENERAL- Subsection (d) of section 39 is amended to read as follows:

`(d) TRANSITIONAL RULE- No portion of the unused business credit for any taxable year which is attributable to a credit specified in section 38(b) or any portion thereof may be carried back to any taxable year before the first taxable year for which such specified credit or such portion is allowable (without regard to subsection (a)).'

(2) EFFECTIVE DATE- The amendment made by paragraph (1) shall apply with respect to taxable years ending after December 31, 2003.

(c) CONFORMING AMENDMENTS-

(1) Section 38(b) (relating to general business credit) is amended by striking 'plus' at the end of paragraph (14), by striking the period at the end of paragraph (15) and inserting ', plus', and by adding at the end the following new paragraph:

`(16) the railroad track maintenance credit determined under section 45G(a).'

(2) Subsection (a) of section 1016 is amended by striking 'and' at the end of paragraph (27), by striking the period at the end of paragraph (28) and inserting ', and', and by inserting after paragraph (28) the following new paragraph:

`(29) in the case of railroad track with respect to which a credit was allowed under section 45G, to the extent provided in section 45G(e)(3).'

(d) CLERICAL AMENDMENT- The table of sections for subpart D of part IV of subchapter A of chapter 1 is amended by inserting after the item relating to section 45F the following new item:

`Sec. 45G. Railroad track maintenance credit.'

(e) EFFECTIVE DATE- The amendments made by this section shall apply to taxable years beginning after December 31, 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**

**KEOKUK JUNCTION RAILWAY CO.'S REPLY TO
TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION'S
PETITION FOR RECONSIDERATION**

Exhibit F

**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**

**KEOKUK JUNCTION RAILWAY CO.'S REPLY TO
TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION'S
PETITION FOR RECONSIDERATION**

**VERIFIED STATEMENT OF J. MICHAEL CARR,
PRESIDENT AND C.F.O. OF PIONEER RAILCORP**

My name is J. Michael Carr. I am President and Chief Financial Officer of Pioneer Railcorp ("Pioneer"), and Chief Financial Officer ("CFO") of Pioneer's subsidiary Keokuk Junction Railway Co. ("KJRY"). I have given three previous verified statements in this proceeding.

This statement addresses two issues relevant to the Petition for Reconsideration submitted by Toledo, Peoria and Western Railroad Corporation ("TP&W"). Specifically, I will first address TP&W's argument that it should be paid for the alleged loss of a newly-enacted tax credit. Second, I will discuss TP&W's unwillingness thus far to cooperate with KJRY on matters related to the January 26 closing scheduled by the Board's October 28 Decision, and indications that TP&W will not, and perhaps cannot because of prior sales of some parcels, convey the property that it has asked the Board to value in this proceeding.

The Supposed Tax Credit

As CFO of Pioneer and KJRY, I am quite familiar with the shortline railroad tax credit provision of the recently-enacted American Jobs Creation Act of 2004 ("AJCA"). In its Petition for Reconsideration, TP&W claims that KJRY should pay TP&W \$874,650 (\$3,500 per mile per year times 3 years times 83.3 miles of main Line and siding) as compensation for TP&W's supposed lost opportunity to earn this credit with respect to the Line.

TP&W's argument concerning this tax credit is riddled with errors and unproven assumptions. Those errors and unsupported assumptions include the following:

- To obtain the tax credit, TP&W would have to spend twice the amount of the credit on track maintenance. TP&W has not proven that it will do so over each of the next three calendar years. Accordingly, it has not shown that it would be able to take full advantage of the tax credit. Also, TP&W fails to establish how losing the opportunity to spend \$7000 per year in order to obtain a tax credit of half that amount results in a net loss to TP&W.
- To use the tax credit, TP&W (or perhaps its parent under the aggregation rules of the AJCA provision) has to make a profit. TP&W has not shown that it will do so over each of the next three years or after that.
- The tax credit is only available with respect to track that is owned by the Class II or III carrier as of the end of each taxable year. TP&W has previously sought to rid itself of the vast majority of the Hollis to La Harpe line, first by selling it to SF&L, Inc. ("SF&L"), and then by seeking to be substituted as the petitioner in an abandonment exemption filed by SF&L. Based on these past efforts to abandon virtually the entire Line, I submit that TP&W has not shown that it would own the

entire Line through December 31, 2007 so as to be able to claim the credit with respect to all of the miles of the Line for each of the next three years.

- TP&W's calculation does not discount the supposed value of the credit over the next three years back to current value. Accordingly, even if TP&W had otherwise proved that it would be able to take the credit, the value it assigns to the credit is significantly overstated.

In short, TP&W has not established that it would earn the credit, and the Board should not order KJRY to pay TP&W any amount for the supposed loss of the credit.

TP&W's Compliance with Its Closing Obligations

I also want to bring to the Board's attention KJRY's concern with signs that TP&W intends not to close on this transaction as the Board has ordered. KJRY has twice requested wire transfer instructions from TP&W/RailAmerica for transferring the purchase price at closing. TP&W has refused to provide that information, claiming that doing so would be premature. TP&W also has refused to allow KJRY access to the Line prior to closing. As KJRY has indicated, that refusal will likely complicate and delay restoration of service on the Line once KJRY acquires it because of the potential for winter snowfall.

RailAmerica's Senior Vice President and General Counsel Scott Williams has written to KJRY that "TP&W will not be willing to sell any of its property at below the constitutional minimum value and will ask for court review of any STB decision that it feels sets a price below that level." This appears to me to be saying that unless the Board grants TP&W the value that it claims for the Line (which, as KJRY has shown, is over-inflated), TP&W will refuse to close the transaction. While KJRY believes that defiance of the Board's order would be wholly inappropriate and indeed illegal, TP&W's statements to us imply that is what TP&W plans.

Also, TP&W stated in its stay petition that it had sold as fee simple property some parcels that the Board had characterized as not being fee simple ownership. In light of this statement, KJRY believes that TP&W may have sold off, and may still be in the process of selling off, property that it has asked the Board in its October 16, 2003 filing or subsequently to include in the value of the Line to be paid by KJRY.

Accordingly, KJRY requests that, in acting on TP&W's Petition for Reconsideration, the Board clearly admonish TP&W that it must carry through with the scheduled closing on the sale. In addition, KJRY requests that the Board direct TP&W that it not sell any property which it has included in its valuation information submitted to the Board in this proceeding, and that TP&W must promptly inform KJRY, at least 10 days prior to the scheduled closing, of any such property which it has sold since its October 16, 2003 filing in this case.

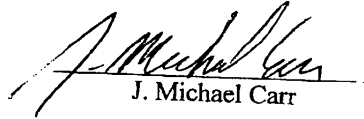
VERIFICATION

I, J. Michael Carr, verify under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this Verified Statement.

122009

Date


J. Michael Carr

**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**

**KEOKUK JUNCTION RAILWAY CO.'S REPLY TO
TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION'S
PETITION FOR RECONSIDERATION**

Appendix of Color Copies



RAILAMERICA

Choose a Railroad:

TOLEDO, PEORIA & WESTERN RAILWAY

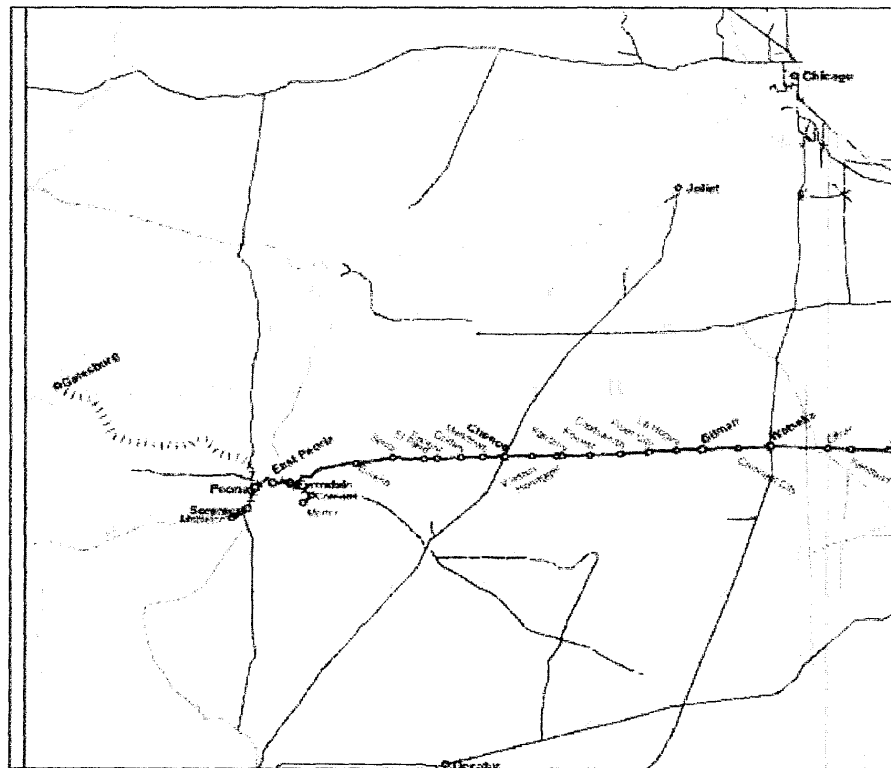
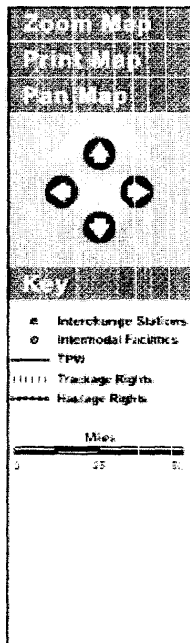
1990 East Washington Street
East Peoria, IL 61611-2961 USA

Phone: 309-698-2600

General Manager: Al Satunas
Marketing & Sales: Mike Klass

Tariffs and Charges:

- TPW 4000 I Naming Local & Proportional Rates on Carloads of Lumber
- TPW 4100 E Naming Local and Proportional Rates on Carloads of Grain
- TPW 4101 West End Grain Rates providing rates on grain for TPW stations west of Maplet
- TPW T 4105 G CN Grain Naming Through Rates on Carloads of Grain Between Stations o
- TPW 4400-F Supp 1 - Naming Local & Proportional Rates on Carloads of Fertilizer
- TPW 5000-A Naming Local & Proportional Rates on Carloads of Iron or Steel Scrap
- TPW 8000-F Containing Switching & Accessorial Charges



Rail maps developed by: Deskmap Systems, Inc. | Interactive element