

213201

BALL JANIK LLP

A T T O R N E Y S

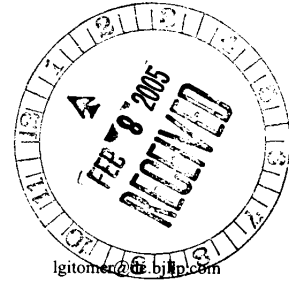
1455 F STREET, NW, SUITE 225
WASHINGTON, D.C. 20005

www.balljanik.com

TELEPHONE 202-638-3307

FACSIMILE 202-783-6947

LOUIS E. GITOMER
OF COUNSEL
(202) 466-6532



February 8, 2005

ENTERED
Office of Proceedings
FEB 8 2005
Part of
Public Record

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

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

Dear Secretary Williams:

The Toledo, Peoria and Western Railway Corporation ("TP&W") is providing the Surface Transportation Board (the "Board") with an update of its compliance with the decision served in the above-entitled proceeding yesterday.

At 4:52 p.m. on February 7, 2005, TP&W forwarded a copy of a permission to enter form to the Keokuk Junction Railway Corporation ("KJRY") to expedite an inspection of the rail line as ordered by the Board (See Exhibit 1). As of now, KJRY has not returned the executed form to TP&W.

Around 5:30 p.m. on February 7, 2005, TP&W received a telephone call from KJRY indicating that KJRY would accept the terms of the Board's decision, and TP&W confirmed to KJRY the wire transfer instructions that TP&W had previously given KJRY.

On February 4, 2005, TP&W forwarded to KJRY a redlined trackage rights agreement (Exhibit 2). KJRY has not responded to TP&W at this time. The revisions are to ensure, as the Board has recently stated, that the trackage rights provide "TP&W with an operationally viable and virtually cost-free means of continuing serving Mapleton Spur shippers." February 7, 2005 decision at 10. At approximately, 11:30 a.m. Today, February 8, 2005, KJRY, by telephone, notified TP&W that it was not willing to make any changes to the trackage rights agreement, even those it proffered before the Board. (Exhibit 3). TP&W respectfully requests the Board to "resolve any remaining issue on the terms of the trackage rights." February 7, 2005 decision at 14. However, TP&W will close on February 11, 2005, as ordered by the Board, even if the trackage rights agreement has not been finalized.

BALL JANIK LLP

Honorable Vernon A. Williams
February 8, 2005
Page 2

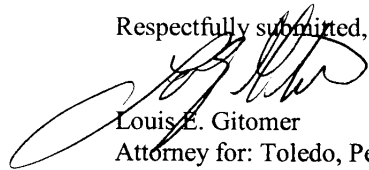
In the October 28, 2004 decision at 25, the Board required KJRY to "offer employment on a priority basis to qualified TP&W employees who worked on the Line in the event KJRY must hire new employees to operate or maintain the Line." To date, KJRY has not provided any notification to TP&W's employees.

TP&W is perplexed that the Board accepted the statement of Mr. Rex supporting Mr. Cecil's prior valuation, but rejected the opinion of Wildman, Harold, Allen & Dixon (the "Wildman Opinion"), which supported Mr. Cecil's prior determination of TP&W's title to the land. The Wildman Opinion was not an entirely new land valuation, merely confirmation of Mr. Cecil's analysis and a response to KJRY's first land title analysis. The only reason for the delay in TP&W's filing was the extraordinary amount of time the Board took to make an initial decision. The record in this proceeding closed on November 7, 2003. The Board, for its own reasons, did not make or serve the initial decision until October 28, 2004, despite KJRY's request for expedited handling. Certainly, TP&W did nothing to delay the Board's action for nearly one year. Indeed, TP&W has not interposed unreasonable delay in this proceeding, it has been and will continue to protect its property interests.

TP&W will keep the Board updated on the progress of this closing, and will certainly bring to the Board's attention for immediate correction any problems encountered in providing service to the Mapleton Spur. This letter is requesting action from the Board on the trackage rights agreement only.

Enclosed are the original and ten copies of this letter. Please time and date stamp the extra copy of this letter and return it with our messenger. Thank you for your assistance. If you have any questions, please contact me.

Respectfully submitted,



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

Enclosures

cc: Parties of record

ORIGINAL

EXHIBIT 1

Gitomer, Lou

From: Laakso, Gary (Boca) [Gary.Laakso@RailAmerica.com]
Sent: Monday, February 07, 2005 4:52 PM
To: lakemper@mtco.com
Cc: Hulstrom, Scott (TPW); Satunas, Alan J. (TPW); Franger, Sandy K. (Boca); Gitomer, Lou
Subject: FW: Rt of Entry Form

Attachments: Permission to Enter.doc



Permission to
Enter.doc (29 KB...

Attached is a right of entry form for the west end of the TP&W as required by today's STB Decision. Please have a signed copy faxed to me at 561 994-4629.

>
> > <<Permission to Enter.doc>>
>
>

[RAILROAD]

PERMISSION TO ENTER UPON PREMISES – VISIT

Toledo, Peoria & Western Railway Corp. (hereinafter referred to as “Railroad”) hereby grants to Keokuk Junction Railway Company (hereinafter referred to as “Invitee”), the right to enter upon its property and right of way from MP 194.5 at LaHarpe to MP 118. at Hollis pursuant to the Surface Transportation Board Decision in Finance Docket No.34335 served on Feb 07, 2005.

In consideration of the permission herein granted by Railroad and without any other consideration, Invitee hereby agrees to indemnify, defend, and hold harmless Railroad and its directors, officers, employees, agents and contractors, from and against any and all loss, damages, claims, demands, actions, causes of action, and liability of any kind (including reasonably attorneys’ fees, court costs and expenses related thereto) including loss resulting from injury to or death of any persons, including Invitee or Invitee’s officers, agents, employees, and contractors, or damage to property, arising from or related to Invitee’s exercise of the rights herein granted by Railroad. Invitee’s indemnity obligation hereunder shall apply regardless of whether the negligence of Railroad is a sole or contributing cause of such injury, death, or damage.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed in duplicate this 7th day of February 2005.

I agree to be bound by the terms and conditions set forth above.

Visitor: Signature _____
Name (printed) _____
Title _____
Company _____

PERMISSION GRANTED:

By: _____

EXHIBIT 2

Gitomer, Lou

From: Laakso, Gary (Boca) [Gary.Laakso@RailAmerica.com]
Sent: Friday, February 04, 2005 11:25 AM
To: lakemper@mtco.com
Cc: Gitomer, Lou; Hulstrom, Scott (TPW); Satunas, Alan J. (TPW); Franger, Sandy K. (Boca)
Subject: FW: Trackage Rights Agreement --TPW and KJ

Attachments: 2005-02-03 Trackage Rights Agreement redline.doc



2005-02-03
Trackage Rights Agr.

Attached is a redline of the trackage rights agreement furnished by KJRY earlier. I look forward to finalizing this agreement for signature.

TRACKAGE RIGHTS AGREEMENT

THIS AGREEMENT, dated this _____ day of ~~June 2003~~ February 2005, by and between **KEOKUK JUNCTION RAILWAY CO.**, an Iowa corporation (hereinafter "KJ"), and **TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION**, a _____ Delaware corporation (hereinafter "TPW");

WITNESSETH, THAT:

WHEREAS, KJ is (or will be) the owner due to a conveyance ordered by the Surface Transportation Board in a Decision in Finance Docket No. 34335 of approximately 34.5 miles of railroad between Hollis (a/k/a Sommer), Illinois (MP 118.5) and Mapleton, Illinois (MP 122 123.0), in Peoria County, Illinois, which connects with the Union Pacific Railroad Company (the "UP") at Hollis, and with the Mapleton Industrial Spur at Kolbe Junction (MP 121-5123.0), and TPW must ~~desires to~~ access the Mapleton Industrial Spur by way of said track; and

WHEREAS, TPW is an unwilling seller to KJ; and

WHEREAS, TPW is the owner of Mapleton Industrial Spur and it is a vital, integral part of TPW that TPW must service on a regular, consistent, daily basis and KJ agrees that this Agreement is designed to preserve such TPW service, which is required by the Surface Transportation Board; and

WHEREAS, KJ has agreed to grant trackage rights to the Joint Trackage, as defined ~~below~~ in the aforementioned segment of track, in order to allow TPW to continue to access the Mapleton Industrial Spur;

Formatted: Font: Bold

NOW, THEREFORE, KJ and TPW, intending to be legally bound, hereby agree as follows:

1. **JOINT LINE DEFINED.** The term "Joint Trackage" as used herein shall refer to that portion of the KJ's main line railroad tracks between the ~~UP~~ Union Pacific Railroad interchange at Hollis, Illinois (MP 118.5) and MP 123.0, near Mapleton, Illinois, along with the right-of-way for the aforesaid track, signals, interlocking devices and plants, and other appurtenances necessary to the use of the aforesaid tracks, excluding, however, the Hollis Pass siding from MP 119.18 to MP 120.19 that is used to support all Mapleton services. It is understood and agreed to by the parties hereto that the length of the Joint Trackage as defined herein is ~~3.54.5~~ 34.5 miles.

Formatted: Font: (Default) Times New Roman, 12 pt

2. **GRANT FOR OPERATION OF TPW TRAINS.** Subject to the terms and conditions herein contained, KJ grants to TPW the non-exclusive right to use the Joint Trackage for the sole purpose of operating its ~~freight~~ trains, locomotives, hi-rail vehicles, cabooses and cars, including track inspection cars and work or wreck equipment, in its account, over the Joint Trackage between the UP ~~Union Pacific Railroad~~ at Hollis and the Mapleton Industrial Spur. TPW shall not have the right to:

(A) set out, pick up or store freight cars, or to perform any switching movement upon said Joint Trackage, or any part thereof (except for the interchange of traffic between KJ and TPW pursuant to any interchange agreement in effect between the parties), or take into its trains or set off there from any fuel or other supplies at any point on said Joint Trackage; or

(B) originate or terminate any freight or transact any business whatsoever upon any portion of the Joint Trackage nor to serve any industry, team or house track now connected to, or which may in the future be connected to, the Joint Trackage; ~~or except at or near MP 118.5, the connection to the UP PT Main, there is a pocket track between MP 118.62 and MP 119.21 that is used by the TPW to connect to the UP main line at MP 118.78 separate from the PT main, which. This track is used exclusively by TPW to interchange potash trains to and from the UP and which shall continue to be used exclusively by TPW to interchange potash trains with UP; and~~

~~(C) operate any passenger train, whether for revenue or otherwise, on the Joint Trackage; or~~

~~(D)~~ (D) permit or admit any third party to the use of all or any portion of the Joint Trackage; provided, however, that cars originating or terminating at the Mapleton Industrial Park and transiting the Joint Trackage in TPW trains, in the ordinary course of business, pursuant to haulage, reciprocal switching or similar agreements, shall not be considered third-party use, and further provided, that, if instructed by KJ's dispatcher or his authorized representative, TPW shall be permitted to use any and all sidings connecting with the Joint Trackage for the purpose of meeting and passing of trains and, in the event of emergency, shall be permitted to set out cars along same on such tracks as may be designated by KJ's dispatcher, or his authorized representative.

3. OPERATION OF JOINT TRACKAGE.

(A) TPW's trains operating in either direction shall be required when approaching Hollis and Kolbe Junction to report by telephone or radio to KJ's dispatcher, or his authorized representative, unless other means of indicating such arrivals or departures to KJ are installed.

(B) TPW shall be responsible for all procedures that may be necessary in order to enter or exit Union Pacific tracks at Hollis.

(C) TPW shall have the right to interchange cars with KJ on designated interchange tracks as agreed to by designated local operating officers of the parties.

~~(D) Operation over the Joint Trackage by TPW shall be strictly limited to a gross weight of not more than 293,000 pounds per car. TPW shall be in default of this Agreement if the gross weight of cars in its trains exceeds 293,000 pounds per car.~~

(ED) Ingress and egress of TPW trains to the Joint Trackage shall be limited to MP 421-5123.0 at Kolbe Junction, and Hollis, Illinois, only, unless interchanged with KJ as provided in Subsection "C" above.

(E) KJ shall dispatch the Joint Trackage in a non-discriminatory basis.

(F) Subject to the terms of this Agreement, KJ shall have control of the dispatch of the Joint Trackage. However, should TPW be dissatisfied with the fairness and equality of treatment of TPW's movements by KJ's dispatchers, KJ and TPW shall attempt to resolve these dispatching concerns. If the attempt does not resolve TPW's concerns about dispatching, TPW shall have the right to request a change of control of dispatching to TPW. If KJ disagrees with such request for change in dispatching control, KJ and TPW agree to submit that request to binding arbitration as provided in this Agreement. From time to time, but not more frequently than twelve (12) months after the last change in dispatching control or arbitration, the party not controlling dispatching may again seek a change and require arbitration.

4. **PAYMENT BY USER.** Beginning with the effective date of this Agreement, TPW shall pay to KJ, in addition to the expenses herein otherwise provided, the sum of One Dollar (\$1.00) per year to operate over the Joint Trackage.

5. **INSURANCE.** ~~TPW~~ Each party shall provide and maintain in effect during the term of this Agreement, a policy of public liability insurance including contractual liability covering liability assumed by ~~TPW~~ each party under the provisions of this Agreement. Said Policies of Insurance and subsequent renewals shall have limits of liability of not less than \$10,000,000, ~~subject to increase from time to time based upon the change in the consumer price index ("CPI").~~ The aforesaid Policies of Insurance shall contain endorsements naming ~~KJ~~ the other party as an additional insured party thereunder, waiving subrogation and requiring the insurance company to notify ~~KJ~~ the other party in writing of any reduction in the limits of liability or any cancellation or non-renewal, at least thirty (30) days prior thereto, at the address for notice provided for in Section 29.

A Certificate of Insurance, containing the required endorsements, shall be furnished to ~~KJ~~ by each party to the other prior to the commencement of any train operations described in this Agreement. If ~~TPW~~ either party fails to maintain the required insurance in effect, such shall constitute a default under this Agreement, ~~and, notwithstanding any correction period provided for herein, no train operations shall be permitted until such coverage is reinstated.~~

6. **CONSTRUCTION, INSTALLATION, OWNERSHIP AND MAINTENANCE OF CONNECTING TRACKS, SIGNALS AND COMMUNICATIONS.**

(A) In the event any additional connecting track and related signals, telephones, telephone boxes, other communications facilities and appurtenances are required to permit the entrance to or exit from the Joint Trackage by the trains, locomotives, hi-rail vehicles, cabooses and cars, including track inspection cars and work or wreck equipment, of TPW, that part of said connecting track as shall lie on the right-of-way of KJ and all of said related signals,

telephones, telephone boxes, other communications facilities and appurtenances shall be constructed or installed and thereafter maintained, repaired and renewed by KJ, and the costs and expenses of such facilities and appurtenances (hereinafter referred to as "Additional Facilities") shall be borne equally by the parties. KJ shall ~~confer~~obtain with TPW's concurrence with the scope and cost of Additional Facilities before constructing or installing such facilities. The balance of said connecting track shall be constructed, maintained, repaired and renewed by TPW at its sole cost and expense.

(B) The ownership of said Additional Facilities shall be vested in the party constructing or installing same.

(C) The term "costs and expenses", as used herein, shall include, but shall not be limited to, any taxes or assessments, general or special, levied by any governmental agency or entity because of the existence of any "Additional Facilities" so constructed or installed.

(D) The normal position of any connecting track switch shall be for continuous movement over the mainline of the Joint Trackage by the trains of KJ, and TPW's employees when entering and leaving the Joint Trackage shall unlock and open said switch and after movement of TPW's train through said switch has been completed, same shall be relined to normal position and securely locked by said employees of TPW.

(E) Each partyTPW hereby agrees to save harmless and forever indemnify KJ ~~the other~~ from any and all loss, damage, injury, liability, penalty, fine, cost and expense, that may result from or be occasioned by the failure of TPW's employees to properly place and securely lock said switches. In the event said switches are hereafter connected with any form of interlocking plant said obligation of TPW's ~~the other company's employees or the directions from the KJ dispatcher~~ employees to handle said switches during such period shall be void.

7. OPERATION AND MAINTENANCE OF JOINT TRACKAGE.

(A) The management, operation, maintenance, repair and renewal of the Joint Trackage shall be under the exclusive direction and control of KJ, which shall be bound to use only reasonable and customary care, skill and diligence in such management, operation, maintenance, repair and renewal, and TPW shall not, by reason of any defect therein or by reason of the failure or neglect on the part of KJ to repair any such defect or by reason of the failure or neglect of KJ to properly operate the same, have or make against KJ any claim or demand for any loss, damage, injury, liability, fine, penalty, cost or expense, whatsoever, ~~resulting from any such defect, neglect or failure.~~

(B) If the use of said Joint Trackage shall at any time be interrupted, or traffic thereon or thereover be delayed for any cause, KJ shall, subject to any condition of force majeure, use reasonable and expeditious diligence to restore the line for the passage of trains of TPW thereover, but TPW shall not have or make any claim against KJ for loss, damage, liability, fine, penalty, cost or expense of any kind caused by or resulting from such interruption or delay, unless KJ fails to use such reasonable diligence to make such restoration.

(C) In the event any locomotive, car, or other rail vehicle of either party is derailed, disabled or damaged while being run or operated upon any of the Joint Trackage, KJ shall pick up and remove same and the cost and expense thereof shall be assumed by the party derailed, disabled or damaged; provided, however, that the employees of TPW shall be permitted to rerail and/or remove TPW equipment if such can be done without a derrick, or other heavy machinery; and further provided that if any locomotive, car, or other rail vehicle of TPW is derailed, disabled or damaged while being run or operated upon any of the Joint Trackage due to KJ's failure to properly maintain the Joint Trackage, the cost and expense thereof shall be assumed by KJ.

8. EXAMINATION OF TPW's EMPLOYEES.

(A) KJ shall not require pilots, except in the case of a new engineer, conductor, or both, not familiar with the Joint Trackage. TPW agrees to reimburse KJ for all reasonable expenses incurred by it for wages and incidentals in connection with furnishing such pilot service.

(B) All employees of TPW engaged in or connected with the operation of trains on and along the Joint Trackage shall be required to pass periodic examinations on the rules and regulations of KJ; provided, however, that upon the request of TPW, KJ shall qualify one or more of TPW's supervisory officers on said rules and regulations and such supervisory officer or officers so qualified may examine all employees of TPW engaged in or connected with the operation of trains on and along the Joint Trackage.

(C) In emergencies, an officer of KJ shall conduct such examinations of TPW's employees and in all such cases TPW shall pay therefor \$500.00 for each group of employees or individual employee so examined. Such fee may be increased from time to time based upon the change in the consumer price index ("CPI") ~~CPI~~.

9. SWITCH KEYS, RULE BOOKS AND TIMETABLES. KJ shall supply the employees of TPW with necessary books of rules, switch keys and KJ timetables, at KJ's cost; provided, however, that if replacements are needed due to actions or loss by TPW employees, TPW shall reimburse KJ for the costs and expenses of such replacements.

10. RADIO EQUIPMENT AND OTHER DEVICES. Any and all radio communications equipment and other special devices, which in the judgment of KJ must be installed on the locomotives of TPW for the safe and efficient operation of the trains of the parties hereto upon and over the Joint Trackage, shall be so installed and thereafter maintained by and at the sole cost and expense of TPW. KJ hereby grants TPW authority to use KJ radio frequency to notify their dispatcher per their Timetable.

11. COMPLIANCE WITH LAWS AND OTHER PUBLIC REQUIREMENTS. TPW, in respect to the use of the Joint Trackage and the operation of its trains, locomotives, hi-rail vehicles, cabooses and cars, including track inspection cars and work or wreck equipment, ~~trains, locomotives, cars, and other rail vehicles thereon and thereover,~~ shall comply with all applicable federal, state and local laws, rules, regulations, orders and other mandates (hereafter

"Requirements"). TPW shall not be admitted to the Joint Trackage if it is not in compliance with such requirements. If any failure on the part of TPW to comply with said Requirements shall result in any fine, penalty, charge, cost or expense being imposed, assessed or levied on or against KJ, or any officer, director, employee, agent, parent, subsidiary, or affiliated entity of KJ, TPW shall promptly reimburse and indemnify KJ (or its officer, director, employee, agent, parent, subsidiary, or affiliated entity) for such fine, penalty, charge, cost or expense, including any attorney fees incurred. If any failure on the part of KJ to comply with said Requirements shall result in any fine, penalty, charge, cost or expense being imposed, assessed or levied on or against TPW, or any officer, director, employee, agent, parent, subsidiary, or affiliated entity of TPW, KJ shall promptly reimburse and indemnify TPW (or its officer, director, employee, agent, parent, subsidiary, or affiliated entity) for such fine, penalty, charge, cost or expense, including any attorney fees incurred

12. ENVIRONMENTAL DISCLOSURE AND INDEMNIFICATION. TPW shall immediately give KJ written notice of any and all incidents involving environmental damage or contamination caused by derailment or damage to any locomotive, car, or other rail vehicle in the care, custody or control of TPW while on or near the Joint Trackage. This includes, but is not limited to the spillage, leakage, seepage, or other release of toxic or hazardous chemicals or materials, radioactive material, flammables, explosives or petroleum products of any kind including diesel fuel, gasoline, oil, etc.). TPW shall indemnify and hold KJ harmless against and from any claims, costs, liabilities, fines, penalties, and expenses (including, without limitation, court costs and attorney fees and expenses) for any environmental damage or contamination arising out of or resulting from acts or omissions of TPW in connection with the use of or operation over the Joint Trackage by any TPW employee or agent, or any locomotive, car or other rail vehicle in the care, custody or control of TPW, unless due to KJ's failure to properly maintain the Joint Trackage, in which case, TPW shall have no liability to KJ.

13. ADMISSION OF OTHER RAILROADS. KJ shall have the sole right to admit other tenants to the use of the Joint Trackage, or any part thereof, on such terms and conditions as it may deem proper; provided, however, that such admittance shall not deprive TPW of the reasonable and proper use of the Joint Trackage for the purposes herein granted; and further provided that nothing herein shall be construed to impair any existing right of Union Pacific Railroad to use the Joint Trackage.

14. PAYMENT OF BILLS. Except as otherwise provided in this Agreement, any bills or invoices rendered hereunder for any money due pursuant to the terms and conditions of this Agreement, shall be paid by TPW within ~~fifteen~~ forty-five (45) days after receipt thereof and said payment shall not be delayed for errors of ordinary character likely to occur in railroad accounts, the necessary corrections to be made in due course. In billing hereunder for such charges, as may arise under this Agreement, KJ may add to labor and material costs, KJ's overhead costs and reasonable equipment rental rates in effect at the time any work is performed by KJ.

15. INSPECTION OF RECORDS. The records of each party hereto, insofar as they relate matters covered by this Agreement, shall be open at all reasonable times to inspection by the properly authorized representatives of the other party hereto.

16. **FORCE MAJEURE.** If either party is unable to fulfill its obligations hereunder due to flood, tornado, hurricane, earthquake, blizzard, ice storm, or other natural disaster; the actions of governmental or military authorities; strike; labor dispute; riot; civil disturbance; war (declared or undeclared); terrorism; criminal acts of third parties; or other causes beyond their control, such failure shall not be considered a default hereunder; provided that the party experiencing the force majeure shall act promptly and with reasonable diligence to overcome such force majeure and shall keep the other party informed as to their progress.

17. **ABANDONMENT BY EITHER PARTY.**

(A) Subject to approval by any governmental authority having jurisdiction, TPW may ~~discontinue service~~ abandon or cease its operation over the Joint Trackage and, in such case, this Agreement shall automatically terminate upon the date such ~~discontinuance of service~~ abandonment or cessation of service becomes effective.

(B) Subject to the approval of any governmental authority having jurisdiction, KJ may, at any time not less than three (3) years after the effective date of this Agreement abandon or cease its operation over the Joint Trackage and, in such case, this Agreement shall automatically terminate upon the date such abandonment or cessation of service becomes effective; provided, however, that KJ shall give TPW at least six (6) months' written notice of its intention to abandon, and give TPW a first right of refusal to acquire the Joint Trackage at its net liquidation value as determined by the Surface Transportation Board.

18. **LOSS AND DAMAGE DEFINED.**

(A) It is understood and agreed that the consideration hereinbefore provided does not in any case include any cost or expense which may be incurred on account of loss of or damage to property or injury to or death of persons, arising out of or in connection with the maintenance, operation, repair or renewal of the Joint Trackage, the use of which is contemplated hereunder, or the making of additions and betterments thereto, or retirements therefrom.

(B) The term "Loss and Damage" as used in this Agreement relates to any cost or expense arising as a result of loss and damage to any of the Joint Trackage, the use of which is contemplated hereunder, including tracks and facilities connected therewith, and embraces all loss or any damage to property of persons employed by either party and to that of third persons, and all liability therefor, including amounts paid under the Federal Employers' Liability Act or any state compensation law, and also embraces all cost and expense incident to such loss and damage, including attorneys' fees, expert fees, and court costs.

19. **CLASSIFICATION OF EMPLOYEES AND EQUIPMENT.**

(A) For the purposes of allocating liability hereunder:

- i. All employees, and any machinery, equipment, tools or other

Formatted: Indent: First line: 0.44"

property of either party hereto engaged in the construction, installation, maintenance, repair or renewal of any Additional Facilities as mentioned in Section 6, and the making of additions and betterments thereto, or retirements therefrom, shall be deemed to be the sole joint employees and sole joint equipment of TPW; and

- ii. All employees, and any machinery, equipment, tools or other property of KJ which pursuant to the terms of this Agreement are to be the sole cost and expense of one of the parties, shall be deemed to be sole employees and sole equipment of the party for whom said work is performed while engaged in the construction, retirement, maintenance, repair or renewal of the Joint Trackage, and the making of additions and betterments thereto, or retirements therefrom, shall, while so engaged, be deemed to be joint equipment and joint employees of the parties hereto; and
- iii. All employees of KJ, while acting as pilots on TPW's trains; or while en route to the Joint Trackage where such service is required shall, while so engaged, be deemed to be the sole employees of TPW; and
- iv. All employees, locomotives, cars, cabooses or other property of either party hereto, including cars and equipment in the care, custody or control of either party, and the lading contained therein or upon such equipment, while engaged in operating over or upon the Joint Trackage, or any part thereof, except as provided in subparagraphs (iii) and (v) of this subsection, shall be deemed to be the sole employees, equipment and lading of such party; and
- v. All employees of either party, operating wrecker or work trains, or assigned thereto while clearing wrecks or derailments or engaged in the repair or renewal of Joint Trackage subsequent to any such wreck or derailment and any machinery, equipment tools or other property of either party used in such service or while en route thereto, or incident to the performance of such work, shall be deemed the sole employees and equipment of the party hereto whose employees, trains, locomotives, cars, cabooses, or other rail vehicles were, in the first instance, solely involved in the accident. In the case of collision or other accident involving the employees, equipment and lading of both parties hereto, such employees and equipment shall be deemed to be the joint employees and equipment of the parties hereto.

Formatted: Font: ie qgukw

(B) The parties agree that the characterization herein of certain employees as "Sole Employees" or "Joint Employees" is only for the purpose of allocating Loss and Damage

Formatted: Indent: First line: 0.5"

suffered by or caused by those Employees. Except for Section 20 (which provides for the allocation of certain Loss and Damage between the parties without regard to fault), no party shall be liable for the acts or omissions (negligent or otherwise) of any other party's employee.

20. **ALLOCATION OF LIABILITY.** The responsibility and liability between the parties for: (i) any personal injury or death of any person (including employees of the parties and third persons), (ii) any real or personal property damage of any person (including property of the parties and third persons), (iii) any damage or destruction to the environment (including land, air, water, wildlife and vegetation), and (iv) all cleanup and remedial expenses, court costs, settlements, claims, judgments, litigation expenses and attorneys' fees resulting from the use of the Joint Trackage by either party as described herein, all of which are collectively referred to as a "Loss", shall be divided as follows:

(A) If a Loss occurs involving the trains, locomotives, engines and/or employees of only one of the parties, then the involved party should be solely responsible for the Loss, even if caused partially or completely by the other party.

(B) If a Loss occurs on the Joint Trackage involving the trains and locomotives of both KJ and TPW, then: (i) each is solely responsible for any Loss to its own employees, locomotives and equipment in its own account, including lading, and (ii) the parties are equally responsible for any Loss to the Joint Trackage and Loss sustained by third parties, regardless of the proportionate responsibility between them as to the cause of the Loss.

(C) For purposes of assigning responsibility of a Loss under this Section as between the parties hereto, a Loss involving one of the parties to this Agreement and a third party or parties shall be construed as being the sole responsibility of that one party to this Agreement.

(D) Whenever any liability, cost, or expense is assumed by or apportioned to a party hereto under the foregoing provisions, that party shall forever protect, defend, indemnify and save harmless the other party to this Agreement and its parent corporation, subsidiaries and affiliates, and all of their respective directors, officers, agents, and employees from and against that liability, cost and expense assumed by that party or apportioned to it, regardless of whether caused in whole or in part by the fault, failure, negligence, misconduct, nonfeasance, or misfeasance of the indemnitee or its directors, officers, agents, or employees.

(E) In every case of death or injury suffered by an employee of either KJ or TPW, when compensation to such employees or employees' dependents is required to be paid under any worker's compensation, occupational disease, employers' liability or other law, and either of said parties, under the provisions of this Agreement, is required to pay said compensation, if such compensation is required to be paid in installments over a period of time, such party shall not be released from paying any such future installments by reason of the expiration or other termination of this Agreement prior to any of the respective dates upon which any such future installments are to be paid.

(F) For purposes of determining liability, pilots furnished by KJ to TPW

pursuant to this Agreement shall be considered as the employees of TPW while such employees are on duty as pilots in TPW locomotives.

(G) For the purposes of determining liability associated with construction, maintenance, repair and renewal of connections as provided in Section 6(A) hereof by KJ, all work performed by KJ shall be deemed performed for the mutual benefit of the parties, and they shall be equally liable for all cost and expense of any and all loss, damage, destruction, injury and death resulting from, arising out of, incidental to or occurring in connection with said construction, maintenance repair and renewal except when such cost and expense of loss, damage, destruction, injury or death is caused by the sole negligence of KJ. Each party shall protect, indemnify, and save harmless the other and its parent corporation, subsidiaries and affiliates, and all of their respective directors, officers, agents and employees from and against any and all expense and liability for which it is responsible.

(H) If any suit or action shall be brought against either party for damages which under the provisions of this Agreement are in whole or in part the responsibility of the other party, said other party shall be notified in writing by the party sued, and the party so notified shall have the right and be obligated to take part in the defense of such suit and shall pay a proportionate part of the judgment and costs, expense and attorney's fees incurred in such suit according to its liability assumed hereunder.

(I) In the event of a Loss as set out herein, the parties to this Agreement shall be bound by the Freight Claim Rules, Principles, and Practices of the Association of American Railroads (AAR) as to the handling of any claims for the loss or damage to lading.

(J) Notwithstanding any and all of the foregoing provisions of this article, in the event a Loss occurs while the Joint Trackage is being used by KJ and/or TPW, and such Loss is attributable solely to the willful or wanton negligence of only one of the parties to this Agreement, then the party hereto which was so willfully or wantonly negligent shall be solely responsible for such Loss.

(A) Except as herein otherwise provided, liability for injury to or death of any persons whomsoever, or for loss of or damage to any property whatsoever, in connection with the construction, operation, maintenance, repair or renewal of the Joint Trackage, or the making of additions and betterments to or retirements from, shall be fixed as between the parties hereto as follows:

When due to:

- (i) the acts or omissions, negligent or otherwise, of the Sole Employee or Employees of one of the parties hereto; or to
- (ii) the concurring acts or omissions, negligent or otherwise, of a Joint Employee or Joint Employees and of the Sole Employee or Employees of one of the parties hereto; or to
- (iii) defect in or failure of any kind in the Sole Equipment or facilities of

Formatted: Indent: First line: 0.42"

Formatted: Bullets and Numbering

Formatted: Bullets and Numbering

Formatted: Bullets and Numbering

either party hereto (except the Joint Trackage)

liability for such Loss and Damage shall be borne solely by the party whose Sole Employee or Sole Equipment is involved or concerned:

When due to:

- (iv) the concurring acts or omissions, negligent or otherwise, of the Sole Employee or Employees of both parties hereto, or to
- (v) the acts or omissions, negligent or otherwise, of a Joint Employee or Employees, or to
- (vi) the concurring acts or omissions, negligent or otherwise, of a Joint Employee or Joint Employees and the Sole Employees of both parties hereto, or to
- (vii) defects in or failure of any kind in the Sole or Joint Equipment or facilities (except the Joint Trackage) of both parties hereto, or to
- (viii) any other cause whatsoever,

Formatted: Bullets and Numbering

Formatted: Bullets and Numbering

Formatted: Bullets and Numbering

liability for such Loss and Damage shall be borne:

- (i) solely by each party as to its own property (other than said Joint Trackage) and/or property in its custody or control and as to its Sole Employees; and
- (ii) jointly and equally by the parties hereto as to third parties, or any other persons and their property, the Joint Employee or Employees and their property, said Joint Trackage and/or Joint Equipment.

Formatted: Bullets and Numbering

(B) The employees of either party while operating or directing operation along the Joint Trackage shall not be considered as Joint Employees but will remain the sole employees of either party. However, when any sole employee of KJ or TPW is engaged in the direct activity of maintaining, repairing, renewing, removing or inspecting the Joint Trackage, or in dispatching, giving orders for or directing the movement of trains over the Joint Trackage, or performing other service involving the Joint Trackage for the common benefit of the parties, and Loss or Damage to KJ, TPW or a third party, arises out of such service for the common benefit of the parties, then the expense of the Loss or Damage shall be borne proportionally by the parties (but in no event shall TPW's proportion exceed 50% in cases in which the Loss or Damage does not involve the employees, trains or equipment of TPW).

The term "proportionally by the parties" means that Loss or Damage will be borne in proportion to the total trains handled by each party over any part of the Joint Trackage during the three calendar months prior to the month of the occurrence (or, if the occurrence is in any of the first three months of operation under this Agreement, such lesser

period as precedes the date of the occurrence). In determining the number of trains operated by TPW, trains operated by TPW for the sole purpose of interchanging traffic between KJ and TPW on the Joint Trackage pursuant to an Interchange Agreement in effect between KJ and TPW shall not be counted. Train shall be defined as a locomotive, with or without cars.

Formatted: Indent: First line: 0.43"

21. MANNER OF SETTLING LOSS AND DAMAGE CLAIMS.

(A) Anything herein to the contrary notwithstanding, neither party shall have any claim against the other for Loss or Damage caused by or resulting from interruption of or delay to such party's business.

Formatted: Tabs: 1", Left + Not at 0.87"

(i) for any Loss or Damage which may occur to its rolling stock equipment or to such equipment in its possession, or to the contents of either, while on the Joint Trackage or any other track the joint use of which is contemplated hereunder, arising by reason of fire, whether such fire be due to the negligence of the other party or otherwise, or

Formatted: Bullets and Numbering

(ii) for Loss or Damage caused by or resulting from interruption of or delay to such party's business.

Formatted: Bullets and Numbering

(B) If a claim is made involving joint liability of the parties hereto, the party hereto against such claim is made shall give prompt notice thereof to the other, and the party so notified shall be bound for its proportionate share of any settlement of such claim or expenses incident thereto, including attorneys' fees, expert fees and court costs. If a claim is made against either party hereto which under this Agreement is not chargeable in whole or in part with the liability involved in such claim, such party shall notify immediately in writing such responsible party.

(C) All releases taken pursuant to the settlement of any and all claims involving joint liability shall include both parties, and copies thereof shall be furnished to each of them; provided no settlement of joint liability claims in excess of \$5,000 shall be voluntarily made by either party without first having obtained in writing the consent of the other party.

(D) If judgment is recovered against and satisfied by one party involving liability which should under this Agreement be borne entirely or partially by the other party, then all expenses of whatsoever nature, including, but not limited to, court costs, attorney fees, and all other monies expended incidental to such claim (or judgment) shall be apportioned between the parties in strict accordance with the provisions of this Agreement, and the party against which such judgment is recovered shall be promptly reimbursed by the other party to the extent to which the latter is indebted.

(E) Neither party shall, however, be precluded by any judgment or decree, at law or in equity, from enforcing its rights under this Agreement against the other party unless it has had reasonable notice from such other party requiring it to appear in the action or suit and

make defense thereto for its own account or jointly with the other party. If such notice shall have been given by one party to the other and the party receiving such notice shall have failed to appear to make defense, it shall be concluded by the judgment or decree in such suit.

(F) Each party shall fully indemnify and save harmless the other, its successors and assigns, from and against all claims, liability, judgments, costs and expenses of whatsoever nature, including, but not limited to, court costs, attorneys' fees, and all costs and expenses resulting from or by reason of any injury to or death of persons or loss or damage to property properly chargeable to such party under the provisions of this Agreement and language to such effect shall appear in any settlement, agreement or release obtained by the chargeable party.

(G) Reports of all injuries to or deaths of persons and loss or destruction of or damage to property shall be made in duplicate and a copy thereof furnished each of the parties hereto.

(H) All claims and demands arising hereunder for injuries to or deaths of employees or for loss or destruction of or damage to property of either party hereto shall be investigated by the party hereto whose employee is injured or whose property is damaged, but in the event the employees of both parties hereto are injured, or the property of both parties is damaged, the representatives of each party hereto may conduct a joint investigation, or may agree among themselves as to which one of them shall make the investigation, and such representatives shall determine from time to time which one of the parties hereto shall investigate all other claims or demands arising hereto.

22. **DEFAULT.** In the event of any substantial failure on the part of TPW to perform its obligations under this Agreement and its continuance in such default for a period of sixty (60) days after written notice thereof by certified mail from KJ, KJ shall have the right to terminate this Agreement. The exercise of such right by KJ shall not impair its rights under this Agreement or any cause or causes of action it may have against TPW for the recovery of damages. It is understood and agreed between the parties hereto that if TPW defaults in the payment of any sum due hereunder, or otherwise fails to perform in accordance with this Agreement, KJ may, if such default is not corrected within ten (10) days after written notice, file suit for collection and/or specific performance, pursuant to Section 27. If TPW fails to pay or comply with any judgment or order entered, within three (3) days after such judgment or order becomes final, KJ shall have the right to terminate this Agreement by written notice. It is further agreed that if TPW's default is of a nature that KJ reasonably believes constitutes an unreasonable danger to the safe operation of the Joint Trackage, KJ may bar TPW from entering the Joint Trackage, on and after the date of the notice of default, and until such dangerous condition(s) is corrected. If any default by TPW results in a suit by KJ, in addition to such other recovery or remedies as KJ may have, TPW shall pay interest on any sums due from the date of default, at the legal judgment rate, as well as KJ's attorney fees, court costs and other expenses.

23. **WAIVER OF BREACH.** The waiver by any party of the breach of any condition, covenant or provision herein contained shall in no way impair the right of the aggrieved party to avail itself of any subsequent breach, whether of the same or similar nature, or

not, nor shall any failure or delay on the part of any party in exercising any right, power or remedy hereunder preclude any subsequent exercise thereof.

24. **CHOICE OF LAW; CHOICE OF FORUM; ARBITRATION.** This Agreement shall be construed and enforced in accordance with the laws of the State of Illinois, without regard for the principles of conflicts of laws. Any litigation arising out of or connected with this Agreement may be instituted and maintained in the ~~Circuit Court of Tazewell County, State of Illinois~~, only, and the parties consent to jurisdiction over their person and over the subject matter of any such litigation in those courts, and consent to service of process issued by such courts; provided, however, that any good faith dispute as to meaning or interpretation of this Agreement shall be submitted to an arbitrator chosen by the parties, or, if they are unable to agree on an arbitrator, then an arbitrator chosen by the Chief Judge of the Tenth Judicial Circuit of Illinois.

25. **BINDING EFFECT AND ASSIGNMENT.** This Agreement shall be binding upon and inure to the benefit of the parties, and their respective officers, directors, employees, agents, attorneys, insurers, representatives, subsidiaries, affiliates, successors and assigns; provided, however, that no right or obligation hereunder may be assigned by either party, without the prior written consent of the other party hereto; and further provided that, if this Agreement is not in default, ~~either party~~ TPW may fully (but not partially) assign it, to any common carrier, upon proper authority from the Surface Transportation Board, and with not less than thirty (30) days' written notice to ~~the other party~~ KJ. This Agreement is intended solely for the benefit of the parties hereto and is not intended to create any rights in any third parties.

26. **SEVERABILITY AND SURVIVAL.** If any clause or provision of this Agreement shall be finally determined invalid, illegal or unenforceable by a Court of competent jurisdiction, then that clause or provision only shall be held inoperative, as though not herein contained, and the remainder of this Agreement shall remain operative and in full force and effect. The representations, indemnifications, and similar obligations of the parties are intended to, and shall, survive the termination or expiration of this Agreement, as to any liability or obligation which accrues prior to such termination or expiration.

~~27. **SPECIFIC PERFORMANCE.** The parties intend to effectuate each and every provision of this Agreement. Any failure by any party to perform any provision herein shall be grounds for injunctive relief and specific performance.~~

~~28~~27. **CONSTRUCTION OF AGREEMENT.** This Agreement constitutes the entire agreement between the parties as to the subject matter covered herein, and supersedes any and all prior agreements, oral or written. No waiver, modification or amendment of this Agreement shall be of any force or effect unless made in writing and manually signed by the parties, and specifying with particularity the nature and extent of such waiver, modification or amendment. Unless otherwise expressly provided or unless the context requires otherwise, words importing the singular number shall mean and include the plural number, and vice versa. When the term "including" is used herein, it shall be construed to mean "including, but not limited to," whether or not such entire phrase is used.

2928. **NOTICES.** All notices which may be or are required to be given or sent by any party pursuant to this Agreement shall be in writing and shall be deemed to have been properly given if sent by certified mail, return receipt requested, to the parties at the following addresses:

TPW: Toledo, Peoria and Western Railway Corporation
1990 East Washington Street
East Peoria, IL 61611

with a copy to:

RailAmerica, Inc.
ATTN: VP-Regulatory Counsel
5300 Broken Sound Blvd., NW
Boca Raton, FL 33487

Formatted: Keep with next, Tabs: 0.83", Left + 1.23", Left + Not at 1"

Formatted: Keep with next

KJ: Keokuk Junction Railway Co.
ATTN: President
1318 S. Johanson Road
Peoria, Illinois 61607

or such other address as the parties may from time to time give written notice of.

3029. **EFFECTIVE DATE.** This Agreement shall take effect as of the date of the transfer of the ownership of the Joint Trackage from TPW to KJ first day following approval of the Surface Transportation Board, and, subject to the rights of the parties to terminate it, this Agreement shall remain in effect for a term of ~~nine hundred and ninety-nine~~ (999) years.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first appearing above.

KEOKUK JUNCTION RAILWAY CO. TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION CORP.

By _____ By _____

Name: _____ Name: _____
Its: _____ Its: _____

V:\Depts\Legal\TPW\Trackage Rights Agreement - TPW-KJ-4.doc

EXHIBIT 3

Gitomer, Lou

From: Laakso, Gary (Boca) [Gary.Laakso@RailAmerica.com]

Sent: Tuesday, February 08, 2005 11:29 AM

To: Gitomer, Lou

Subject: RE: KJRY

Dan LaKemper just now called and said KJRY is making no changes to the trackage rights agreement.
Period end of discussion.