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February 24, 2005

BY ELECTRONIC FILING

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
La Harpe and Hollis, IL

Dear Secretary Williams:

Yesterday, BNSF Railway ("BNSF") filed a letter with the Board responding to Keokuk Junction Railway Co.'s ("KJRY") February 18, 2005 letter. In its February 18 letter, KJRY requested the Board to immediately enforce its October 28, 2004 and February 7, 2005 orders by requiring BNSF to reinstall the crossing diamonds at Bushnell that had been removed sometime in May 2004 (while this proceeding was in progress), and to provide KJRY with an alternative crossing arrangement via Blair Junction in the interim.. The Board's February 7th order required BNSF to restore those diamonds by February 10th, but as of the filing of KJRY's February 18th letter, those diamonds had not been restored. As of today, they still have not been restored. BNSF's February 23rd reply attempts to explain BNSF's failure to comply with the Board's order to restore the crossing diamonds. KJRY hereby writes to respond to the numerous misstatements and misunderstandings expressed by BNSF and to again request that the Board enforce its order by requiring BNSF to reinstall the crossing diamonds, even as a temporary measure, and without cost to KJRY. The Board should also require BNSF to construct, at its own expense, the necessary connections to allow KJRY to use the Blair Junction alternative, pending the temporary reinstallation of the old diamonds and ordering and installation of new crossing diamonds.

KJRY does not take issue with BNSF's representations regarding the unsuitability of the existing diamonds as a permanent solution. KJRY accepts BNSF's claims that new diamonds will eventually need to be ordered and installed. But, as BNSF itself admits, the old existing

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diamonds could be reinstalled, at least on a temporary basis, within a 5 to 6 week period.¹ BNSF should be required to begin that process immediately. BNSF also admits that new diamonds could be ordered and reinstalled within a 90 to 180 day timeframe. BNSF should be required to begin that process immediately as well. In the meantime, BNSF should be required, at its own expense, to implement the "Blair Junction" alternative, which BNSF admits could be implemented by March 11. Despite BNSF's arguments to the contrary, such action by the Board is more than warranted.

Notwithstanding the numerous statements in BNSF's letter of yesterday, BNSF misses the point. KJRY is not trying to interfere with a private contractual arrangement between BNSF and TP&W nor is KJRY trying to receive a "windfall;" rather, KJRY is simply trying to get what it paid for and what the Board awarded it--an intact Line and right-of-way with crossings installed. Precedent requires nothing less. *See Railroad Ventures, Inc.-Abandonment Exemption-Between Youngstown, OH and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA*, STB Docket No. AB-556 (Sub-No. 2X) (served March 3, 2000) at 4 ("We will require RVI to transfer the interests that formed the basis for our January 7 decision setting the terms and conditions for the transfer . . . RVI may not unilaterally diminish the assets or their value."). Nor is KJRY trying to avoid its "concomitant maintenance funding obligations." KJRY is more than willing to accept assignment of the 1932 Agreement and assume its share of the maintenance costs and responsibilities with respect to intact crossing diamonds. It is the 1932 Agreement that governed the crossing for decades before the diamonds were removed, that governed at the time the Application was filed, and that governed at the time the STB ordered the Line to be sold to KJRY. That is the agreement that should govern KJRY's obligations. Requiring BNSF to restore the diamonds simply provides KJRY with a return to the status quo ante. KJRY is entitled to nothing less, and asks nothing more.

What KJRY will not do nor should it be required to do is to pay the costs associated with reinstalling the diamonds or to take assignment of the February 1, 2005 BNSF/TP&W agreement² governing the costs and obligations associated with removing and reinstalling the

¹ It is hard for KJRY to understand how, not six months ago, both BNSF and TP&W claimed that these diamonds could be reinstalled within 5 *days*, while BNSF now claims that it would take 5 to 6 *weeks*, and those representations to the Board were not amended until February 9, 2005, the day before the diamonds were to be restored pursuant to the Board's February 7 order. Nonetheless, KJRY accepts BNSF's new representations at face value.

² BNSF now claims that an agreement it signed on February 1, 2005, after the Board had previously ordered the diamonds restored and the Line sold to KJRY, was intended to "supersede both the terms of the 1932 Crossing as well as any oral or written representations made by any persons concerning the crossing matter." This is an astounding statement given that neither BNSF nor TP&W bothered to inform the Board or KJRY of that fact, despite the numerous other

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diamonds. BNSF and TP&W took the action to remove the diamonds and they should be responsible (both financially and otherwise) for putting them back. KJRY does not seek to have the STB “intervene in a private contract matter” and does not seek to have the “terms for the crossing arrangements [] abrogated.” Quite the contrary, KJRY’s proposal give effect to both the 1932 Agreement and the February 1 Agreement. The February 1 Agreement is between BNSF and TP&W and it should be allowed to govern as between those two parties.³ An STB order requiring TP&W to request that the diamonds be reinstalled⁴ and requiring BNSF to restore those diamonds merely allows both agreements to govern. In fact, by its own terms, once the diamonds are reinstalled, the future maintenance obligations are governed by the 1932 Agreement and, as noted, KJRY is willing to accept the 1932 Agreement. Thus, an STB order of the nature requested by KJRY would actually give effect to both of the contracts, not abrogate them.⁵

As noted previously, KJRY accepts BNSF’s representations that the quickest that any diamonds could be restored is 5 to 6 weeks, but even this timeframe is unacceptable. As such, it is imperative that BNSF be required to implement an alternative “crossing” arrangement. The Board may ask, as BNSF posits, why the urgency? According to BNSF, it “is unclear to us that

contrary representations on the record at that time. It is also difficult to imagine how a previously-undisclosed agreement between BNSF and TP&W could be offered as superseding any representations either party made to KJRY or to the Board.

³ KJRY fully understood the existence of the February 1 Agreement at the time of KJRY’s February 18 letter, and did not call it a “proposal” as claimed by Ms. Bailiff. The “proposal” referred to in KJRY’s February 18 letter was BNSF’s proposal to provide haulage rights to KJRY as an alternative to reinstalling the diamonds. This arrangement is unacceptable as it does nothing to restore the historic through nature of the Line, is contrary to the Application, and makes KJRY’s service non-competitive.

⁴ As BNSF’s letter states and as set forth in the February 1 Agreement, if TP&W requests reinstallation of the diamonds, BNSF has a contractual obligation to do so “within a commercially reasonable period of time” and the costs are shared by BNSF and TP&W. The Board ordered the reinstallation because TP&W refused to make the request.

⁵ Indeed, it is BNSF and TP&W who have sought to change the terms of the long-standing crossing agreement by entering into an agreement that was not executed until February 1, 2005, long after the Board granted KJRY’s application, and then seeking to impose that agreement on KJRY. While BNSF may consent to the assignment of this February 1 agreement to KJRY, KJRY has not and will not accept an assignment of that agreement. That agreement is between BNSF and TP&W and should stay that way.

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Keokuk has an urgent and immediate need for large volumes to cross at Bushnell in view of the condition of Keokuk Junction's trackage." But BNSF knows good and well the urgency of the matter. BNSF knows that there is at least one large volume shipper whose existing three year contract with BNSF expires March 1. BNSF knows that this shipper has expressed a desire to utilize KJRY's route between Peoria and Keokuk rather than BNSF's route, and that is precisely what BNSF doesn't want to happen. Indeed, the newfound cause for delay seems completely calculated to force this particular shipper to renew a contract with BNSF for another three years rather than use KJRY's new service. By obstructing restoration of service on the Line, BNSF would preserve itself as the only carrier capable of moving traffic between Peoria and Keokuk, thereby thwarting the restoration of competition between those two cities that the Board's order would have provided absent the diamonds being removed.⁶

Regardless of the reasons for BNSF's newfound excuse for delay, KJRY must have a means of connecting its now severed Line and of providing through service between Peoria and Keokuk. In May, when the diamonds were removed, TP&W and BNSF told this Board that the ADM detour arrangement was that alternative means. We now know, as BNSF admits, that this arrangement is not physically viable for "large volumes over the long term" and cannot accommodate through trains. ADM, in fact, has informed KJRY that it will not consent to KJRY's use of ADM's private tracks for such a detour arrangement. Furthermore, KJRY has quoted rates to ADM, and anticipates using that track for delivering cars to ADM. Thus, the ADM detour arrangement is unacceptable, even as a temporary measure.

In the end, the only acceptable alternative arrangement that can be quickly implemented is the "Blair Junction" arrangement, though even that can't be done until March 11, requiring the aforementioned large agricultural shipper to ship under high tariff rates for 11 days before utilizing the KJRY alternative. This alternative "crossing" arrangement may cost anywhere from

⁶ BNSF knows who this large agricultural shipper is and that this shipper has previously filed letters in support of KJRY's Application. In fact, prior to TP&W's sale of the Line to SF&L, Inc., that shipper had the choice to use either TP&W or BNSF for its movements between those two points. After the sale to SF&L, and knowing that SF&L intended to scrap the Line, TP&W and BNSF entered into a haulage arrangement whereby both TP&W and BNSF benefited by shifting the traffic off of the Line and onto BNSF's Galesburg route. Having no choice but to use the BNSF route, this shipper entered into a three year contract with BNSF/TP&W. That contract expires March 1. Knowing that KJRY cannot provide an alternative route if KJRY's line remains severed at Bushnell and knowing the existing contract expires March 1, BNSF has refused to offer this shipper anything less than another three year contract. On March 1, this shipper is thus faced with a dilemma: sign up with BNSF for another three years at rates likely significantly higher than those KJRY can offer; or ship under very high tariff rates while it waits for the Board to act to force BNSF to do what BNSF has already been ordered to do - restore the crossing diamonds or provide for an alternative crossing arrangement.

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\$100,000 to \$180,000, but BNSF should be required to pay it.⁷ While it was consistent with BNSF's and TP&W's mutual interests to remove the diamonds, KJRY served notice often throughout this proceeding that KJRY, unlike TP&W, intended to offer through service between Keokuk and Peoria and required an intact route to do so. Having removed the diamonds in the face of this information, and having been put on notice by the Board's October 28 decision that KJRY had been granted authority to acquire the Line and that the crossing diamonds would need to be restored, responsibility to restore the continuity of the route lies with those who agreed to sever it. If BNSF had taken action in October, rather than delaying and then ignoring the Board's orders, BNSF would not be standing as it is now, in defiance of the Board's orders. In October, BNSF could have ordered new diamonds, had them installed, had TP&W pay for some of those costs, and have the 1932 Agreement in place and ready to be assigned to KJRY. Doing none of those things, and now having made its own bed, BNSF should be forced to sleep in it.

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. Please provide a receipt for the electronic filing of this letter. Furthermore, by my signature below, I certify that I have on this date caused copies of this submission to be delivered to Louis E. Gitomer and Gordon P. MacDougall by courier, to Sarah W. Bailiff, counsel for BNSF, by fax, and to be served on other parties of record by first class mail.

Respectfully submitted,

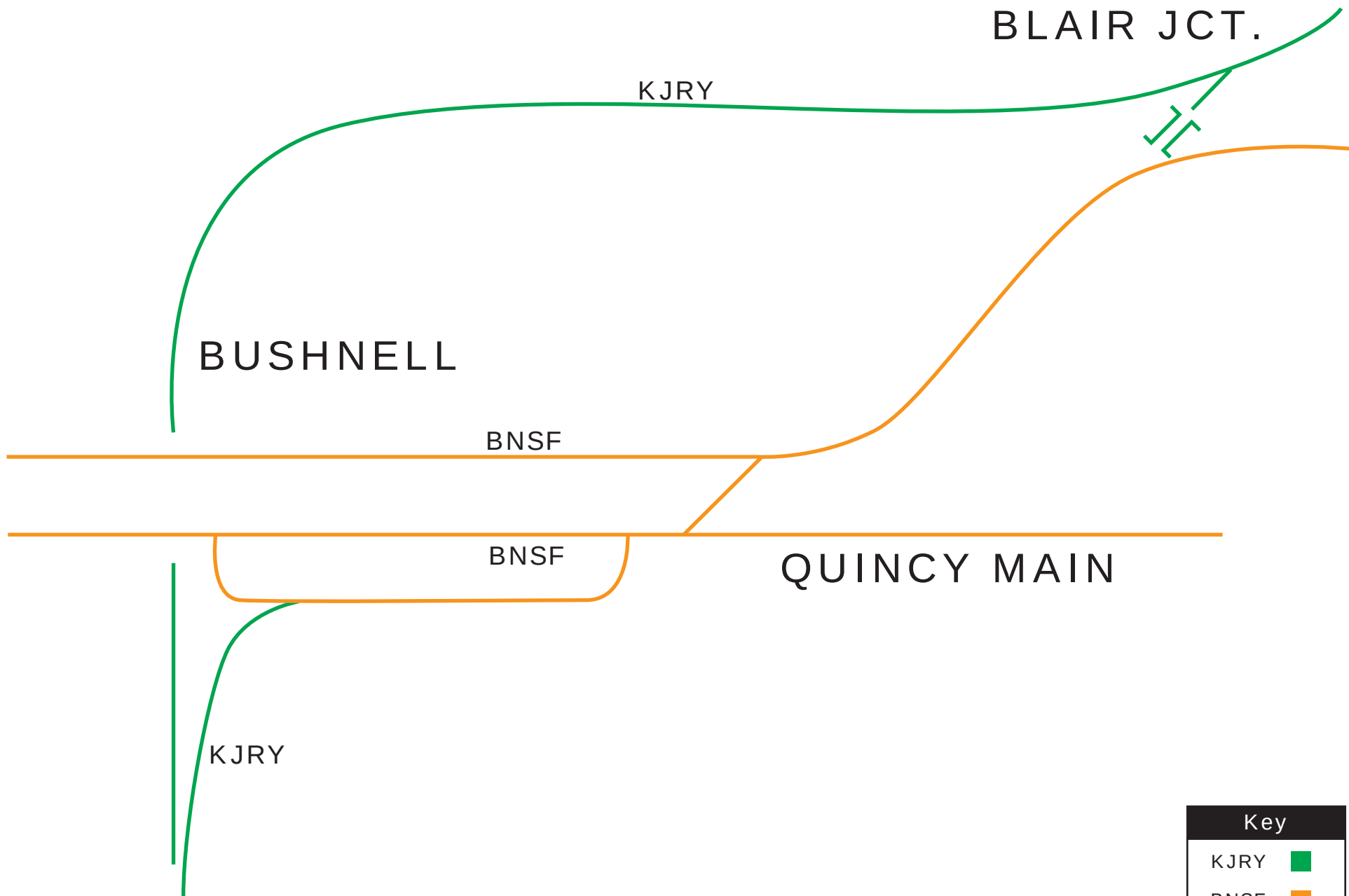


William A. Mullins

Attorney for Keokuk Junction Railway Co.

cc: All Parties of Record

⁷ KJRY has no desire to impose unnecessary costs on BNSF. Since this is a temporary crossing, and BNSF is single-track at Blair Junction (see attached track schematic), KJRY would not require signalization, so long as KJRY is allowed to cross BNSF without unreasonable dispatching delays. This should significantly reduce both the time and costs to BNSF of restoring the Blair Junction crossing. BNSF performs similar track work, in derailment and other emergency situations, in hours, not weeks. Nevertheless, KJRY is willing to accept March 11 as the completion date, so long as the connection is usable on that date. Anything later than March 11 would impose unreasonable burdens on KJRY and its shippers.



NOT TO SCALE

Key	
KJRY	■
BNSF	■