

238192

ENTERED
Office of Proceedings
April 13, 2015
Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 35914

**FORT TRANSFER COMPANY – VERIFIED PETITION FOR EXPEDITED
RELIEF FOR SERVICE EMERGENCIES – TAZEWELL COUNTY, IL**

**SUPPLEMENTAL FILING OF
TOLEDO, PEORIA & WESTERN RAILWAY CORP.**

ERIC M. HOCKY
CLARK HILL PLC
One Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103
(215) 640-8500
ehocky@clarkhill.com

Dated: April 13, 2015

Attorneys for
Toledo, Peoria & Western Railway Corp.

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 35914

**FORT TRANSFER COMPANY – VERIFIED PETITION FOR EXPEDITED
RELIEF FOR SERVICE EMERGENCIES – TAZEWELL COUNTY, IL**

**SUPPLEMENTAL FILING OF
TOLEDO, PEORIA & WESTERN RAILWAY CORP.**

On April 1, 2015, the Board’s staff conducted a conference (the “Technical Conference”) of the concerned parties in accordance with a decision served on March 30, 2015. The transcript of the proceeding was made part of the record on April 8, 2015. By decision served on April 9, 2015, the Board directed that corrections to the transcript or supplemental information be filed no later than April 13, 2015. In accordance with the Board’s decision, Toledo, Peoria & Western Railway Corp. (“TPW”) is submitting this Supplemental Filing for the Board’s consideration.

Discussion

The Technical Conference explored many factual issues related to the filings made by the parties including the discussions that had (or had not) taken place between the parties, the availability of substitute service, the condition of the track on the Morton Industrial Lead (the “Lead”), the repairs that would be necessary to restore service on the Lead, and the proposed alternative service and how it would impact other railroads and their service to their customers. In this Supplemental Filing, TPW will attempt to limit its discussion to points that may need

clarification¹, and most importantly will provide the Board with updated information regarding repairs to the Lead undertaken by TPW and the estimated timing of when service is expected to be restored to Fort Transfer by TPW. Because repair of the Lead has begun and service will be restored within a reasonable period of time, and further because Fort Transfer is unable to meet the requirements for directed service, the request for alternative service should be denied.

- 1. TPW has begun repair of the Lead, and expects rail service to Fort Transfer to be restored by the end of April, with some traffic to move sooner if possible.**

In the Technical Conference, TPW described the work that it believes is necessary to restore the track to safe “excepted” operating condition² based on its knowledge as the owner and operator of the Lead, its inspections of the Lead, and the recent FRA inspection. Tr. 99-103. At the time of the Technical Conference, TPW had not yet determined whether it would undertake the repairs or how long they would take (although it estimated about 30 days). Transcript (“Tr.”) 66- 70, 103. Since the Technical Conference, TPW has determined that it will proceed with the repairs to the Lead using its own forces for a portion of the work, and retaining a contractor for the balance. The contractor and TPW’s maintenance of way forces were on site on Saturday, April 11, 2015, and began to install new ties along the Lead. Based on review of the scope of the repairs with the contractor, TPW believes that sufficient work will be complete

¹ In this regard, attached hereto as Exhibit A is a more detailed drawing of the Lead showing the location of places and conditions referenced in the Technical Conference and in this Supplemental Filing.

² The Harding Street crossing would be restored to the equivalent of FRA Class I condition as required by the FRA inspection; however, that will not change the overall classification of the Lead.

to restore service over the Lead to Fort Transfer by the end of April 2015.³ If necessary repairs are completed, TPW will attempt to restore service for at least some traffic sooner than that time. TPW is in the process of completing the repairs necessary to the Lead to restore service within a reasonable period of time, and therefore is meeting its common carrier obligations. Accordingly, there is no justification for the Board to direct alternative rail service over the Lead.

2. The statutory requirements for interim alternative rail service have not been demonstrated.

Under 49 USC §11123(a), before the Board can order alternative rail service, it must determine:

that shortage of equipment, congestion of traffic, unauthorized cessation of operations, failure of existing commuter rail passenger transportation operations caused by a cessation of service by the National Railroad Passenger Corporation, or other failure of traffic movement exists which creates an emergency situation of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States, or that a rail carrier providing transportation subject to the jurisdiction of the Board under this part cannot transport the traffic offered to it in a manner that properly serves the public...

In this proceeding, the Board cannot make the required determination.

There can be no dispute that the Lead is currently properly embargoed as unsafe for rail operations, and that TPW is currently excused from providing service. The FRA inspection report confirms TPW's analysis of the condition of the Lead. An embargo temporarily excuses a carrier from its duty to provide service while it makes a determination of what is necessary to return the line to safe operation, and while it determines whether the required repairs are justified. An embargo is not considered to be unreasonable unless it remains in effect longer than necessary to remove the impediment that underlies the embargo. *Pejepscott Industrial*

³ This time frame assumes that the Village of Morton will be cooperative in closing Harding Street, and establishing necessary detours, as and when necessary.

Park, Inc., d/b/a Grimmel Industries – Petition for Declaratory Order, STB Finance Docket No. 33989 (served May 15, 2003) at 3, n.5.

As has been explained in prior filings and at the Technical Conference, TPW initially determined that the Lead would require approximately \$690,000 to be put into FRA Class 1 track condition⁴ for long term operations over the Lead, and has since determined that approximately \$166,500 of repairs are necessary to put the track into safe operating FRA “excepted” track condition, the condition the track was in prior to the Lead being taken out of service. Tr. 99-103. As discussed in Section 1 above, TPW has begun the repairs and will restore service in a reasonable period of time. While an extraordinarily long embargo can result in an unauthorized de facto abandonment, TPW has been proceeding diligently to determine the work necessary to return the Lead to service – and not just for the immediate short term. Thus, the embargo is proper, TPW’s temporary suspension of service is justified, and Fort Transfer cannot make the required showing that service will not be restored within a reasonable period of time. *See* 49 CFR § 1146.1(b)(ii). Accordingly, there is no basis under the statute or the regulations for the Board to order interim alternative rail service. If the Board determines that alternative rail service is not justified at this time, then it need not consider any other issues.

3. **There is no emergency need for interim alternative rail service, as Fort Transfer financials have not been meaningfully impacted to date, and TPW is prospectively offering to contribute to transload services until the Lead is back in service.**

At the Technical Conference, Fort Transfer acknowledged that its primary source of

⁴ The total included \$300,000 to replace the Crandall diamond and \$75,000 to install up-to-date signals.

income are the contracts that it has with its customers for storage space,⁵ and that its customers have not threatened to terminate those agreements. Tr. 40. Thus, to date, Fort Transfer's income has not been meaningfully impacted. Tr. 39-42. There is nothing in the record to suggest that the customers will not give Fort Transfer the additional time necessary for TPW to finish making repairs to the Lead.

Fort Transfer in a letter filed with the Board on April 8, 2015, claimed that its customer's alternate storage facilities in Farmer City are almost full and that Fort Transfer must make immediate arrangements to receive product at its own facility; however, Fort Transfer acknowledged in the Technical Conference that it has made temporary arrangements to receive the storage product by truck from Farmer City location while it works on having rail service restored. Tr. 43. Fort Transfer's letter did not indicate why it cannot continue to receive the product by truck from Farmer City while the repairs are being made to the Lead. Moreover, given that Fort Transfer's customer evidently will not allow transloading of its product (herbicides) from TPW's East Peoria yard (Tr. at 31) as had been offered by TPW, TPW is willing to contribute financially towards substitute truck service from Farmer City until rail service is restored. Specifically, TPW is willing to contribute \$300 to the cost of truck service from Farmer City to Morton (Fort Transfer told TPW it estimated the cost at \$600/truck) for up to 24 trucks – the equivalent of six rail cars of product. This represents the number of rail cars at issue at the time of the suspension of service and embargo.⁶ Six rail cars represents

⁵ From the testimony, it appears that Fort Transfer is paid to have the space available for storage, and its charges do not depend on how much freight is actually in storage from time to time. Tr. 41.

⁶ At the time of the suspension of service and embargo, TPW was holding three loaded rail cars, and Fort Transfer indicated that there were three more on the way.

approximately a month's worth of deliveries to Fort Transfer based on 2013 and 2014 volumes. See Exhibit B to TPW Reply filed March 17, 2015. Pursuant to the above, an emergency service order is unwarranted as Fort Transfer has not suffered material loss to date, and will not do so prospectively.

4. Providing temporary minor repairs is not the best way to provide for long term service to Fort Transfer.

In the Technical Conference, Fort Transfer made clear that it was looking for long-term rail service and not just a quick fix. As discussed above, Fort Transfer made short-term arrangements to receive at least some of its storage product by truck from Farmer City, and TPW has offered to contribute towards the movement of up to 24 additional truckloads until rail service has been restored.

KJRY's offer to do the repairs necessary to satisfy FRA requirements and make the line immediately safe for hazardous material operations is suspect. Neither KJRY (nor Fort Transfer) have inspected the Lead, checked the tie condition, measured the gauge of the tracks, or examined the culverts.⁷ The risk to the public associated with the handling of this lading cannot be taken lightly. KJRY was represented at the Technical Conference by its in-house attorney and not by a track engineer or operating manager. Moreover, TPW does not agree that the replacement of the single piece of broken rail at the Harding Crossing will fix the crossing. The wide gauge at the crossing suggests that the ties within the crossing are defective and need to be

⁷ At the Technical Conference, TPW indicated that it would authorize KJRY to hi-rail the line. Tr. 87. KJRY contacted TPW in the afternoon on Wednesday, April 8, 2015, regarding a possible hi-rail of the Lead on Friday morning. TPW's Roadmaster was out of town and not available to accompany KJRY at that time. TPW asked what times KJRY would be available this week, and who would be on the hi-rail so that TPW could coordinate work with the contractor; TPW was advised that KJRY's General Roadmaster would be out of town and not available to do the hi-rail until the week of April 20, 2015.

replaced. Tearing out the crossing, replacing the ballast and ties to create better support, and reinstalling the crossing with proper flanges for protection of the rails, is the recommended railroad engineering method for addressing the issues. Moreover, since it has not inspected the Lead, KJRY acknowledged that there could be other work that would need to be done. Tr. 104. The FRA inspection report confirms the overall bad tie condition, and heaved up crossing timbers in the private crossings, as well as other issues, including the broken rail. TPW Reply, Exhibit D. KJRY also acknowledged that the work it is proposing to do would only be the initial work, and that further work would likely be necessary (Tr. 105, 107) – KJRY does not suggest how much additional work will be required or when it would be done, or whether the additional work would further interrupt service on the Lead.

On the other hand, the work that TPW is doing will restore safe operating conditions for at least 6 to 9 months or longer while it determines and prepares for further rehabilitation that may be necessary over the long term. Allowing an alternative service operator on the Lead would prevent TPW from making the full and adequate repairs to the Lead for safe operations, and could have the unintended result of jeopardizing long term service to Fort Transfer instead of ensuring such service.

5. Alternative rail service is not likely to result in a quick restoration of service.

Before authorizing alternative rail service, the Board should consider whether authorizing the service will truly hasten the restoration of service. First, as discussed above, KJRY has acknowledged that it does not really know how much work needs to be done to make the Lead safe under FRA standards. Further, KJRY has represented that it will not be able to hi-rail the Lead to determine the repairs necessary until the week of April 20, 2015. Given the hazardous nature of most of Fort Transfer's traffic, and the minimum amount of work that KJRY proposes

to perform before starting operations, as part of any order, the Board should protect the owners of any tracks and property over which KJRY would operate by requiring KJRY to provide indemnification and insurance, and should require KJRY to enter into written agreements with each owner that would include such protection. *See* 49 USC § 11123(b)(2). Depending on the authorized route, before KJRY is allowed to operate it should be required to negotiate and reach agreements with TPW for use of the Lead, as well as either an interchange agreement with TPW, or trackage rights agreements with Norfolk Southern Railway (“NS”) and TPW as well as an interchange agreement with Tazewell & Peoria Railroad, Inc. (“TZPR”). Moreover, KJRY’s employees would need to be qualified before they could operate over the tracks owned by any other railroad. All of this makes it unlikely that KJRY could begin service much before TPW intends to restore service.

6. KJRY’s proposed service would unreasonably interfere with the operations of other carriers.

KJRY claims that it should be permitted to operate from the Lead, over NS, TPW and into the TZPR yard where it would pick up or deliver cars for Fort Transfer. KJRY asserts that its operations would merely substitute for the service that TPW has been providing and that there will be no impact on other carriers. However, as was explained at the Technical Conference, that is not the case. Because alternative rail service cannot be provided without unreasonably interfering with the service being provided by other carriers, the request for alternative service should be denied. 49 CFR § 1146.1(b)(1)(iii).

Attached hereto as Exhibit B is a track drawing from the NS-TPW trackage rights agreement which illustrates the tracks used for the handling of Fort Transfer traffic discussed at the Technical Conference. As noted in the Technical Conference, TPW currently picks up Fort

Transfer traffic from TZPR in TZPR's yard. The Fort Transfer traffic is intermingled with other TPW traffic in the daily delivery to TPW; TZPR does not separately block or set out the Fort Transfer traffic. TPW then brings all of its traffic to the TPW yard where it sorts the traffic into blocks for delivery. The Fort Transfer traffic is then handled by a special train that takes the cars from the yard out onto the NS tracks to Crandall, and then onto the Lead for delivery. Empties released by Fort Transfer are handled the same way in reverse.

The NS Supplement to Technical Conference Record ("NS Supplement") filed on April 10, 2015, notes that volumes have increased recently on the line between the Lead and TPW in East Peoria, and that additional operations and coordinating another railroad's access will add complexity and increase the likelihood of adverse impacts on NS traffic. NS Supplement, p. 2.

Additionally, while alternative service by KJRY would substitute for TPW on the Lead, it would represent additional trains going over the TPW tracks into and out of the TZPR yard. There would be no reduction in the number of trains of TPW is moving into and out of the TZPR yard (as those trains handle not only the Morton traffic but TPW's other traffic as well). Since there would be no place for KJRY to pull over, all of the tracks from the Crandall diamond over NS and then over TPW and into the TZPR yard would need to be cleared of traffic before KJRY could perform service in either direction.⁸ This would disrupt TPW's yard operations and its train classifications. Tr. 128. Moreover, TZPR would need to separate out and block the Fort Transfer traffic, and set aside track space so that KJRY could access the cars. All of this would interfere with the orderly operations in the TZPR yard.

⁸ Although KJRY indicated that it could merely wait on the NS tracks "for a while" for traffic to clear (Tr. 132), there was no indication from NS that it would allow KJRY to sit on the NS line, potentially delaying NS train traffic.

7. If alternative service were to be ordered, interchange could reasonably take place on the Lead.

If the Board were to order alternative service, it should be limited to the Lead, which is the only track over which service is not currently being provided. Such limitation would have the least interference with current operations and arrangements, and require the fewest number of new agreements. TZPR and NS would not be affected as TPW would continue to provide service between the TZPR yard and the Crandall diamond in the same way that it always has. As shown on Exhibit A, there is a sidetrack on the Lead near the diamond where loads or empties could be placed for interchange between TPW and TZPR. Tr. 142-143. The movement of cars up and down the Lead, and their placement and release from Fort Transfer would be done just as it is today. The NS Supplement, p. 2, confirms that if KJRY's locomotive is limited to the Lead then the proposed alternative service operations would not affect NS's operations.

Conclusion

For the foregoing reasons and the reasons set forth in TPW's Reply, TPW requests that the Board deny the request of Fort Transfer for emergency alternative service relief. In short, the Lead is properly embargoed at this time, TPW has begun repairs to the Lead with service to Fort Transfer estimated to resume by the end of April 2015, if not sooner, and has offered to contribute to Fort Transfer's transloading costs until such time. If the Board were to determine that alternative service is necessary, then the service provided by KJRY should be limited to service on the Morton Industrial Lead, and only after KJRY does the work to make the Lead safe for hazardous material operations. Further, particularly in light of the hazardous materials that would be handled, the Board should require that any operator fully indemnify, defend and hold harmless the owner of the tracks and property over which it will be operating, and that the

operator carry sufficient insurance to support the indemnity.

Respectfully submitted,


ERIC M. HOCKY
CLARK HILL PLC
One Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103
(215) 640-8500
ehocky@clarkhill.com

Dated: April 13, 2015

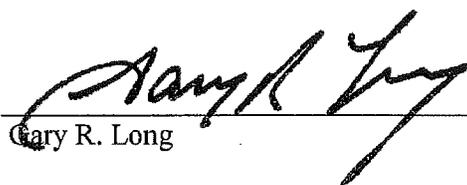
Attorneys for
Toledo, Peoria & Western Railway Corp.

VERIFICATION

I, Gary R. Long, President of Toledo, Peoria & Western Railway Corp. verify under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Further, I certify that I am qualified and authorized to file the foregoing document.

Executed on April 13, 2015.



Gary R. Long

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing document was served on the parties, and by the method shown below:

By email:

Richard H. Streeter
Law Office of Richard H. Streeter
5255 Partridge Lane, NW
Washington, DC 20016
rhstreeter@gmail.com

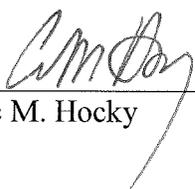
Dan LaKemper
Keokuk Junction Railway Co.
1318 S. Johanson Road
Peoria, IL 61607
lakemper@pioneer-railcorp.com

Maquiling Parkerson
General Attorney
Norfolk Southern Corp.
Three Commercial Place
Norfolk, VA 23510
Maqui.Parkerson@nscorp.com

Daniel C. Orlaskey
Attorney-Advisor
Federal Railroad Administration
US Department of Transportation
1200 New Jersey Ave., SE
Washington, DC 20590
Daniel.Orlaskey@dot.gov

By US First Class Mail, Postage Prepaid:

Ronald Rainson, President
Village of Morton
120 North Main Street
Morton, IL 61550


Eric M. Hocky

Dated: April 13, 2015

EXHIBIT A

MAP OF MORTON INDUSTRIAL LEAD

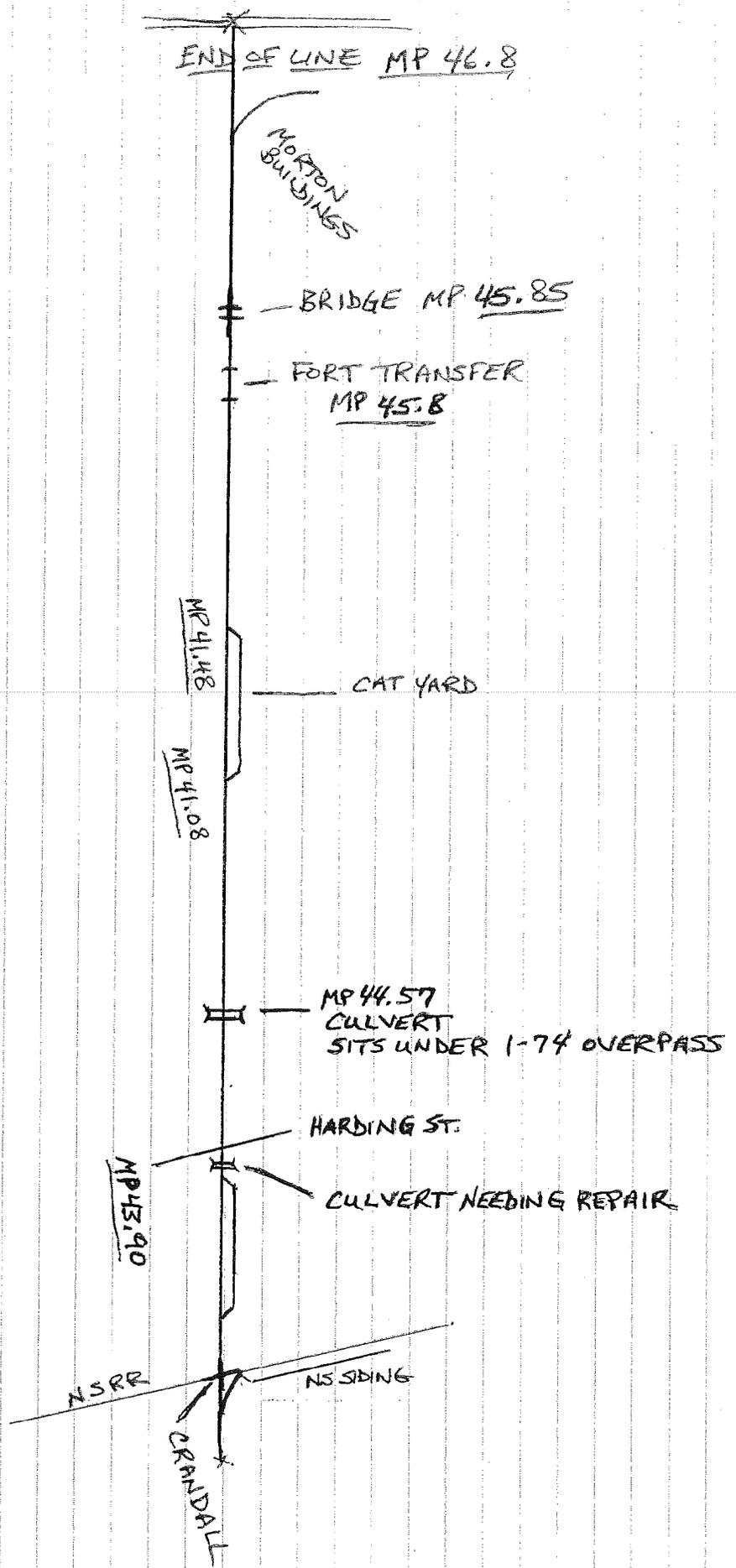
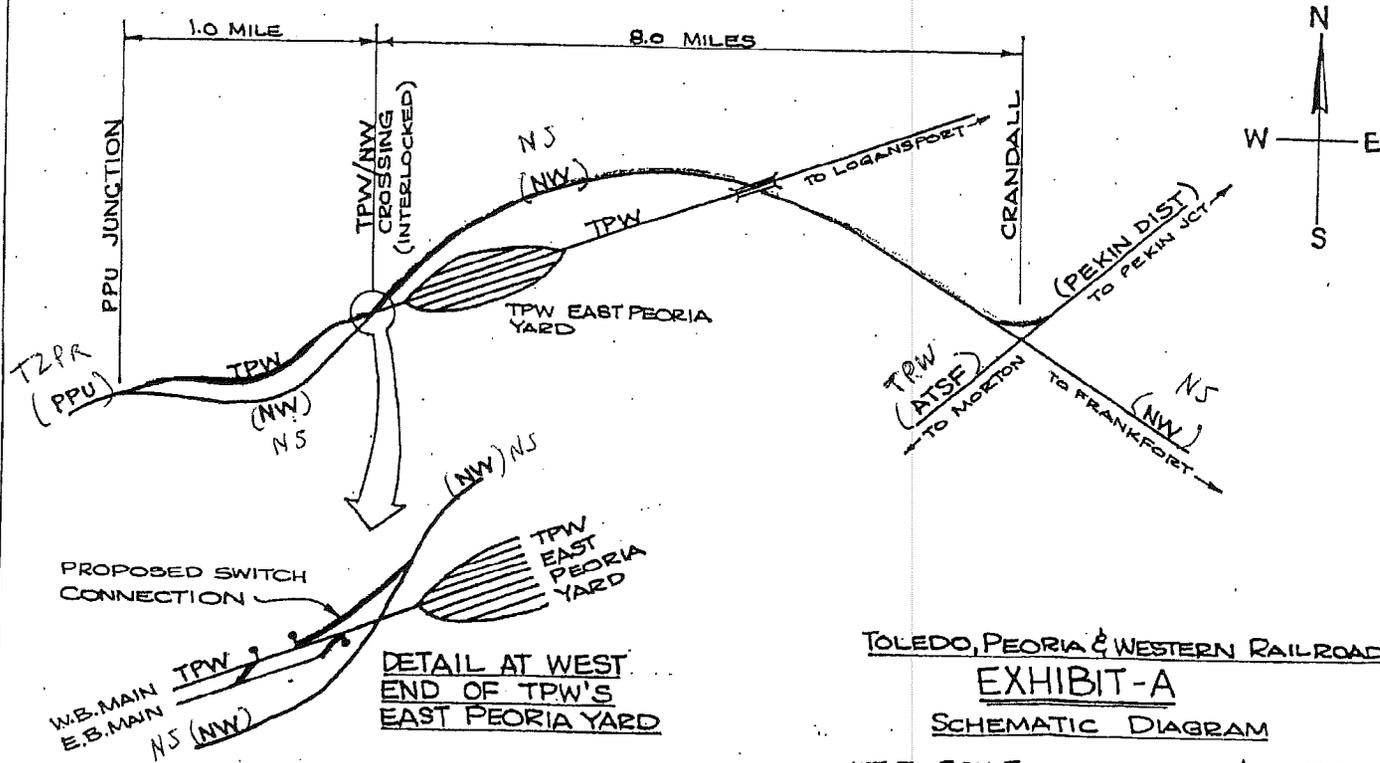


EXHIBIT B

MAP OF TPW-NS TRACKAGE RIGHTS LINES



TOLEDO, PEORIA & WESTERN RAILROAD
EXHIBIT-A
 SCHEMATIC DIAGRAM

NOT TO SCALE

JULY 12, 1982

REV. JAN 17, 1983

TPW DWG. NO. D5F3106 106