

Before the Surface Transportation Board
Washington, D.C. 20423

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Public Record

Finance Docket No. 35914

Fort Transfer Company—Verified Petition for Expedited
Relief for Service Emergencies—Tazewell County, IL

Rebuttal Statement

Fort Transfer Company (“Fort Transfer”), by and through its counsel of record, pursuant to the provisions of 49 C.F.R. § 1146.1(b)(3) and 49 U.S.C. 11123(a), respectfully submits its Rebuttal to the Reply filed by Toledo, Peoria & Western Railway Corp. (“TP&W”). The bottom line, which TP&W has studiously avoided, is that because Fort Transfer has no current rail service and no realistic hope of future rail service being provided by TP&W, it is being significantly harmed. Although TP&W has just now embargoed the Morton Branch line which has been used to provide rail service to Fort Transfer for many years, it has provided no information whatsoever regarding when, if ever, it will reach a final decision on whether it will resume rail operations. When judged against TP&W’s broad pattern of conduct and the choreographed sequence of events beginning with the October 2014 announcement that it was not making enough money operating the Morton Branch Line, it is plainly evident that TP&W is intent upon driving off the two shippers that remain on that line.

The sequence of events that have followed the opening announcement of financial woes follow a well-defined path. First, track inspections reveal defects (such as the alleged need to replace the diamond at the intersection of the line and the Norfolk Southern line) that purportedly involve frightfully expensive repairs and replacements. That is quickly followed by claims that the line is unsafe.

At the same time, demands are made that the shippers agree to a transload operation that will replace direct rail service. Although Morton Building's agreed to the proposed transload operation on a short term basis, Fort Transfer objected and demonstrated that the proposed transload operations would be unreasonable. Without further notice to Fort Transfer, TP&W published its Daily Operating Bulletin No. 052 (internally) and placed the Morton Branch line out of service on February 21, 2015. Following the filing of Fort Transfer's Verified Petition of March 10, 2015,¹ and Keokuk Junction Railway's ("KJRY") offer to provide alternative rail service, TP&W belatedly filed a formal embargo to provide its refusal to honor its railroad common carrier obligation with further cover.

¹ Contrary to TP&W's claim, and as a review of the published petition will show, the petition was verified. During the rush to file the petition, the verification page was inadvertently omitted. On the following day, however, it was duly filed with the Board. Upon review, counsel was asked to conform the date of the verification with the date of filing, which was done. In any event, verification is not required by § 1146.1(b)(1), which details the procedures to be followed. In any event, the instant Rebuttal, which is also verified, once again confirms the events that have precipitated the need for alternative rail service. Counsel apologizes for any inconvenience that may have been caused by the failure to include the verification page with the initial filing.

In addition, TP&W, ***prior to the filing of the embargo***, began diverting inbound tank cars to Fort Transfer's competitor, which it threatens to continue to do "unless Fort Transfer changes its mind about accepting delivery by transload ...". TP&W Reply at 7.

As reflected by its Reply, TP&W, to add insult to injury and preclude the possibility that its position will be shown to be trumped up, has opposed KJRY's good-faith attempt to preserve essential rail service. This is being done even though KJRY's substitute service will allow Fort Transfer to avoid a projected loss of \$1,012,920 of annual storage fees that are covered by existing contracts. See Rebuttal V.S. Kahler at ¶ 2. Fort Transfer reserves the right to seek recovery of its projected losses from TP&W.

Given the sequence of events set forth above, there is no avoiding the conclusion that TP&W has been intent upon removing the line from service, even if that step will significantly harm Fort Transfer. Given the total absence of any indication that TP&W has any intent to restore rail service, the Board should grant Fort Transfer's petition and authorize KJRY to commence operations. At the same time, Fort Transfer requests that the Board authorize mediation, which would perhaps facilitate the sale of the line and the permanent resumption of rail service. Such relief would also mitigate the damages that Fort Transfer is now projecting.

TP&W's Blatant Attempt to Shift Blame to Fort Transfer is Baseless.

Although TP&W has audaciously sought to shift the blame to Fort Transfer through the contrived suggestion that there would not have been “any deterioration in service but for the actions of Fort Transfer,”² the Board must summarily reject that contention. Nor should the Board accept the wholly false claim that Fort Transfer omitted any reference in its Petition to “the offer that TPW made to Fort Transfer to allow transloading in TPW’s East Peoria Yard to allow for substituted truck delivery at TPW’s cost to Fort Transfer.”³ As Brad Kahler, Fort Transfer’s President has testified in rebuttal, “I wish to make it crystal clear that certain statements at pages 6 and 8 are patently false. At no point during our telephone conversation in February did Mr. Grantham ever offer transload service at TP&W’s cost to me or to any other employee of Fort Transfer.”⁴ Hence, the Board should ignore TP&W’s fallacious claim at page 6 of its Reply that it “stands ready, willing and able to arrange for deliveries to be transloaded to Fort Transfer” until it, at some undefined point in the future finally decides to restore service or abandon the line.

As Mr. Kahler has clarified, “[a]lthough TP&W in October suggested some vague transload options in October, I explained that transloading options were not realistic.”⁵ In this instance, transloading services are illusory at best. As Mr. Kahler has explained:

Transloading in East Peoria is not a viable option for multiple reasons. First, we cannot transload in East Peoria

² Reply at 6.

³ Id. at 8.

⁴ Rebuttal V.S. Kahler at ¶ 3.

⁵ Id. at ¶ 3.

because two of our customers do not allow us to transload at non-approved transload sites. This was reconfirmed on March 18, 2015.

Second, the Board should carefully note that even though we do not have the option of pumping directly to the storage tanks from the parked rail tank cars, the fact that the transloading is performed on our own private property provides us with several unique benefits. When we transload onsite, we are able to use our non-driver employees (who do not require a CDL) to complete the transloading process. Furthermore, we are able to utilize a yard-truck (which is a non-road piece of equipment) in the process. Because we do not operate on any public roads, we are able to completely unload a rail car with 3 tank trailers instead of the 4 that would be required if we were to use public streets due to the DOT weight restrictions. Furthermore, a large containment pit is located within our facilities that provides substantial protection in the event of a possible spill. None of these advantages could be realized if we were forced to transload in East Peoria or some other point if KJRY is not allowed to replace TP&W.⁶

A third reason transloading at TP&W's facility in East Peoria is not feasible is that the available driver resources to perform the work aren't readily available to perform the transloading in the inconsistent flow that the railcars arrive. In short, if TP&W is unwilling to provide direct rail service, it should step aside and quietly agree to allow KJRY to perform rail services that will permit Fort Transfer to realize the benefits of direct rail service.⁷

As Mr. Kahler has also explained, "[d]uring the October meeting, we also explained that the inability to receive rail service would actually hinder our future growth potential in Morton. We also informed TP&W that we were

⁶ An overhead photo of Fort Transfer's facility is attached to Mr. Kahler's Verified Statement.

⁷ Rebuttal V.S. Kahler at ¶¶ 3 – 5.

evaluating adding a spur into the property and building additional storage with direct rail-to-storage transfer.”⁸

Unlike the situation underlying *Overbrook Farms Union Cooperative Association—Petition for Declaratory Order—Violation of 49 U.S.C. 11101(a)*, ICC Finance Docket No. 31166 (served February 1989)⁹ and other some precedents of the Board and the Interstate Commerce Commission, wherein they determined that a carrier may not be responsible **if** it provides *reasonable substitute truck service*, those precedents are of no relevance in this situation. In this instance, substitute truck service for Fort Transfer is **not** reasonable. Given TP&W’s apparent unwillingness to honor its common carrier obligations, Fort Transfer is not asking the Board to require TP&W to provide either substitute truck service or rail service, it is only asking TP&W to get out of the way so that KJRY can provide rail service that is responsive to Fort Transfer’s needs.

Although there were some discussions of transloading in October, there is no merit to TP&W’s claim that TP&W’s General Manager offered Fort Transfer transloading services in February of this year. As Mr. Kahler has testified, “I strongly dispute that Mr. Grantham, during the course of his February 23, 2015 follow-up phone call ever mentioned transloading. Simply put, he was well aware of why transloading would not work for Fort Transfer *and* that Fort Transfer desired to continue to use the rail line. As a result, he limited his

⁸ Rebuttal V.S. Kahler at ¶ 6.

⁹ TP&LP Reply at 7.

comments to the claim that the line was unsafe and that TP&W would not be able to provide further service.”¹⁰

As Mr. Kahler has also noted:

the adverse impact of TP&W’s sudden shutdown of all operations on the line is continuing to impact my customer who cannot get TP&W to remove the empty tank cars that the customer needs in order to move its product to other customers. My customer has advised me that although it has contacted TP&W on several occasions it has not been able to get TP&W to make a firm commitment to retrieve the cars from our facility. Such inaction is further jeopardizing our relationship with our customer.¹¹

Without question, the foregoing is yet another indication of the compelling need for prompt action by the Board. There is nothing about the line that would have forced TP&W to place an out of service order on the line before it made arrangements to remove the empty cars.

Serious Questions Exist Regarding TP&W’s Claims That The Line Is Unsafe And That Repairs Would Be Substantial And Costly.

Fort Transfer was first made aware that TP&W had placed a formal embargo on the line on March 16, 2015 when TP&W filed its Reply on March 17. The Board should carefully note that the embargo is not based on any catastrophic event that compelled the cessation of rail operations, such as the flooding that washed out a segment of line in *GS Roofing Products Co. v. STB*, 143 F.3d 387 (8th Cir. 1998) (*GS Roofing*). As the Board has subsequently recognized, in *GS Roofing*, “the court found that the embargo became

¹⁰ Rebuttal V.S. Kahler at ¶ 7.

¹¹ Rebuttal V.S. Kahler at ¶ 8.

unreasonable principally because the owner of the line could have made minor, inexpensive repairs that would have permitted safe service over [the] washed out track, at least for the short term.”¹²

It is respectfully submitted that substantial and costly repairs are not needed to provide service to Fort Transfer. As reflected by the “courtesy inspection report” provided by a Federal Railroad Administration Inspector, the few defects that were noted are the subject of deferred maintenance that, similar to the situation in *GS Roofing*, will likely require only minor, inexpensive repairs that would permit safe service. The Board must ask itself how much effort and cost would it require to repair or replace the piece of track at the Harding Road crossing that is cited in the Inspection Report? The same is true of the heel block that is located at the east end of the switch that is located adjacent to the Caterpillar facility in Morton, a facility that is no longer served by rail. As for muddy spots, it must be suggested that melting snow can cause that problem with little or no lasting effect. Even if the overall tie condition is weak with rotten ties at various locations, the same can be said of the overwhelming number of excepted tracks operated by short line railroads throughout the United States. In any event, KJRY stands ready to replace enough ties and make needed repairs that will ensure safe operations without further delay.¹³

¹² Bolen-Brunson-Bell Lumber Company, Inc. v. CSX Transportation, Inc., STB Finance Docket No. 34236 (STB served May 15, 2003), slip op. at 5.

¹³ It should also be noted that FRA regulations permit the transportation of hazardous materials in a freight train over excepted track so long as the train

Most importantly, although the Inspector has focused on a small bridge that TP&W apparently did a shoddy job of repairing when it installed what the Inspector has described as “a relatively new deck of ties,” there is no need to cross that bridge in order to provide full service to Fort Transfer. As Mr. Kahler has noted, and as a review of Google Maps will confirm, the small bridge, which crosses over Prairie Creek, is located to the south of the Fort Transfer facility.¹⁴ Because no hazardous materials will be moved across that bridge by KJRY, any flaws in TP&W’s past repairs that resulted in issues with the runoff and profile on the east approach will play no role in the resumption of safe operations in order to provide essential rail service to Fort Transfer. Instead, any needed repairs on that small bridge can be addressed at a later date after rail service is reinstated. In fact, because no hazardous materials would be involved in shipments for Morton Buildings, KJRY would be able to cross over the bridge even if it were to remain in the “excepted” track category.

contains no more than five cars required to be placarded by the Hazardous Materials Regulations. See 49 C.F.R. § 213.4(e)(3). The Board should also note that Fort Transport also receives non-hazardous materials via rail tank cars. Rebuttal V.S. Kahler at ¶ 9.

¹⁴ Note also the string of tank cars located adjacent to the Fort Transfer facility.

TP&W's Assertions Regarding Phantom Problems With KJRY's Operations Lack Merit.

In particular, the claim that “KJRY would be adding trains to the already congested use of TPW’s tracks between East Peoria and TZPR” is nonsensical. If KJRY is authorized to provide service, it will operate only four trains per week over that one-mile stretch of track. If the KJRY train is operated at a speed of only fifteen (15) miles per hour, it will take about four minutes per trip, or a total of sixteen minutes combined for all four trains to cross over that segment of track. Based on current operations over the line and personal observations of KJRY personnel, there is no way that the addition of only four trains a week will have any noticeable impact on TZPR or TP&W. *See* Rebuttal V.S. Greg Miller.

In addition, given the fact that KJRY’s four trains per week will replace the four trains per week previously operated by TP&W over Norfolk Southern’s (“NSR”) main line, it necessarily follows that there will be no increased congestion on the NS segment of the line. Because KJRY’s service would bypass the TP&W yard, it would actually reduce the alleged congestion in that facility. Of course, the train counts provided by TP&W, assuming they are accurate, are per week, not per day. On a per-day basis, the use of the lines in question is light. Indeed, there are multiple hours per day when these lines have no traffic at all. In sum, TP&W’s positions cannot be sustained.

As the Board is aware, on March 18, 2015, NSR notified the Board that it is taking a neutral position regarding Fort Transfer’s petition. In so doing, NSR

requested the Board require that any KJRY operations over NSR's lines be subject to certain requirements. As Mr. Greg Miller has stated, "KJRY believes it is capable of, and is willing to comply with the current trackage rights and other agreements between TP&W and NS regarding use of the line between Carndall Jct. and East Peoria." Rebuttal V.S. Miller at 2.

Given TP&W's actions, Fort Transfer adamantly opposes TP&W's proposal that would allow it to continue to move Fort Transfer's traffic to and from the NSR diamond. Simply put, there is no need whatsoever to authorize TP&W to participate in future movements to and from Fort Transfer after KJRY has stepped in and cleaned up the mess that TP&W left in place on the Morton Branch line. Therefore, the Board is requested to summarily deny the alternate proposal that TP&W has suggested at pages 11-12 of its Reply.

The Board Should Require TZPR To Enter Into Any Agreements That Would Be Needed To Allow KJRY To Reach Its Yard in East Peoria.

As KJRY has explained in detail, and contrary to the map attached to TP&W's Reply, KJRY does NOT interchange with TZRP at a yard in Peoria. KJRY interchanges with TZPR, NS, IMR, BNSF, IAIS and CN at TZPR's East Peoria Yard, approximately one mile southwest of the NS track in East Peoria. As explained above, KJRY's momentary transit of that one-mile segment of TP&W track (which NS uses as well to access the TZPR yard for its interchange) will not materially interfere with any other carrier.

Conclusion

For all the above-stated reasons, the Board should grant Fort Transfer's petition and authorize KJRY to commence rail service to it. Furthermore, the Board is requested to authorize mediation in order to encourage and facilitate the sale of the line in order to assure permanent resumption of rail service.

Respectfully submitted,

/s/ Richard H. Streeter

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Fort Transfer Company

Dated March 20, 2015

Before the Surface Transportation Board
Washington, D.C. 20423

Finance Docket No. 35914

Fort Transfer Company—Verified Petition for Expedited
Relief for Service Emergencies—Tazewell County, IL

Rebuttal Verified Statement of Brad Kahler

1. My name is Brad Kahler. I am President of Fort Transfer Company (“Fort Transfer”). My business address is 225 S. Maple Street, Morton, IL 61550. I am duly authorized to present this Rebuttal Verified Statement in support of Fort Transfer’s petition seeking expedited relief. The need for the requested relief is solely caused by Toledo, Peoria & Western Railway Corp.’s (“TP&W”) cessation of rail service to Fort Transfer’s facility located at the above address. I have personal knowledge of the facts presented herein and have participated in negotiations with TP&W regarding rail service.
2. As herein relevant, Fort Transfer is engaged in the transportation and bulk liquid storage of chemicals and agricultural products, including herbicides. As I have previously noted, in 2014 herbicide storage and delivery of herbicides constituted 38% of Fort Transfer’s revenues earned at the Morton facility. In order to put this in perspective, we are projecting a loss of \$1,012,920 of annual storage fees that are covered by existing contracts if we are unable to utilize rail service.

3. I have carefully reviewed the Reply filed by TP&W on March 17. I wish to make it crystal clear that certain statements at pages 6 and 8 are patently false. At no point during our telephone conversation in February did Mr. Grantham ever offer transload service at TP&W's cost to me or to any other employee of Fort Transfer. Although TP&W in October 2014 suggested some vague transload options, I explained that transloading options were not realistic. Simply stated, transloading in East Peoria is not a viable option for multiple reasons. First, we cannot transload in East Peoria because two of our customers do not allow us to transload at non-approved transload sites. This was reconfirmed on March 18, 2015.

4. Second, the Board should carefully note that even though we do not have the option of pumping directly to the storage tanks from the parked rail tank cars, the fact that the transloading is performed on our own private property provides us with several unique benefits. When we transload onsite, we are able to use our non-driver employees (who do not require a CDL) to complete the transloading process. Furthermore, we are able to utilize a yard-truck (which is a non-road piece of equipment) in the process. Because we do not operate on any public roads, we are able to completely unload a rail car with 3 tank trailers instead of the 4 that would be required if we were to use public streets due to the DOT weight restrictions. Furthermore, a large containment pit is located within our facilities that provides substantial protection in the event of a possible spill. None of these advantages could be realized if we were forced to transload in East Peoria or some other point if KJRY is not allowed to

replace TP&W. In order to facilitate the Board's understanding, I have attached an overhead photograph of our facility.

5. A third reason transloading at TP&W's facility in East Peoria is not feasible is that the available driver resources to perform the work aren't readily available to perform the transloading in the inconsistent flow that the railcars arrive. In short, if TP&W is unwilling to provide direct rail service, it should step aside and quietly agree to allow KJRY to perform rail services that will permit Fort Transfer to realize the benefits of direct rail service.

6. During the October meeting, we also explained that the inability to receive rail service would actually hinder our future growth potential in Morton. We also informed TP&W that we were evaluating adding a spur into the property and building additional storage with direct rail-to-storage transfer.

7. I strongly dispute that Mr. Grantham, during the course of his February 23, 2015 follow-up phone call ever mentioned transloading. Simply put, he was well aware of why transloading would not work for Fort Transfer *and* that Fort Transfer desired to continue to use the rail line. As a result, he limited his comments to the claim that the line was unsafe and that TP&W would not be able to provide further service."

8. Unfortunately, the adverse impact of TP&W's sudden shutdown of all operations on the line is continuing to impact my customer who cannot get TP&W to remove the empty tank cars that the customer needs in order to move its product to other customers. My customer has advised me that although it has contacted TP&W on several occasions it has not been able to get TP&W to

make a firm commitment to retrieve the cars from our facility. Such inaction is further jeopardizing our relationship with our customer.

9. I have also reviewed the FRA Inspection Report. In reviewing that report, the Board should note that the small bridge at mile post 45.8 is located to the south of Fort Transport's facility. I have been informed by KJRY that it is possible to deliver tank cars to our facility without having to cross that bridge. I also wish to inform the Board that Fort Transfer also receives non-hazardous materials via rail tank cars.

10. Given the trouble and disruption that TP&W has caused us, including the diversion of product that was shipped to us for storage by customers, Fort Transfer adamantly opposes TP&W's proposal that would allow it to continue to move Fort Transfer's traffic to and from the NSR diamond. If KJRY is capable of providing reliable rail service, we want to use it to the fullest extent possible.

FURTHER SAYETH THE AFFIANT NOT.



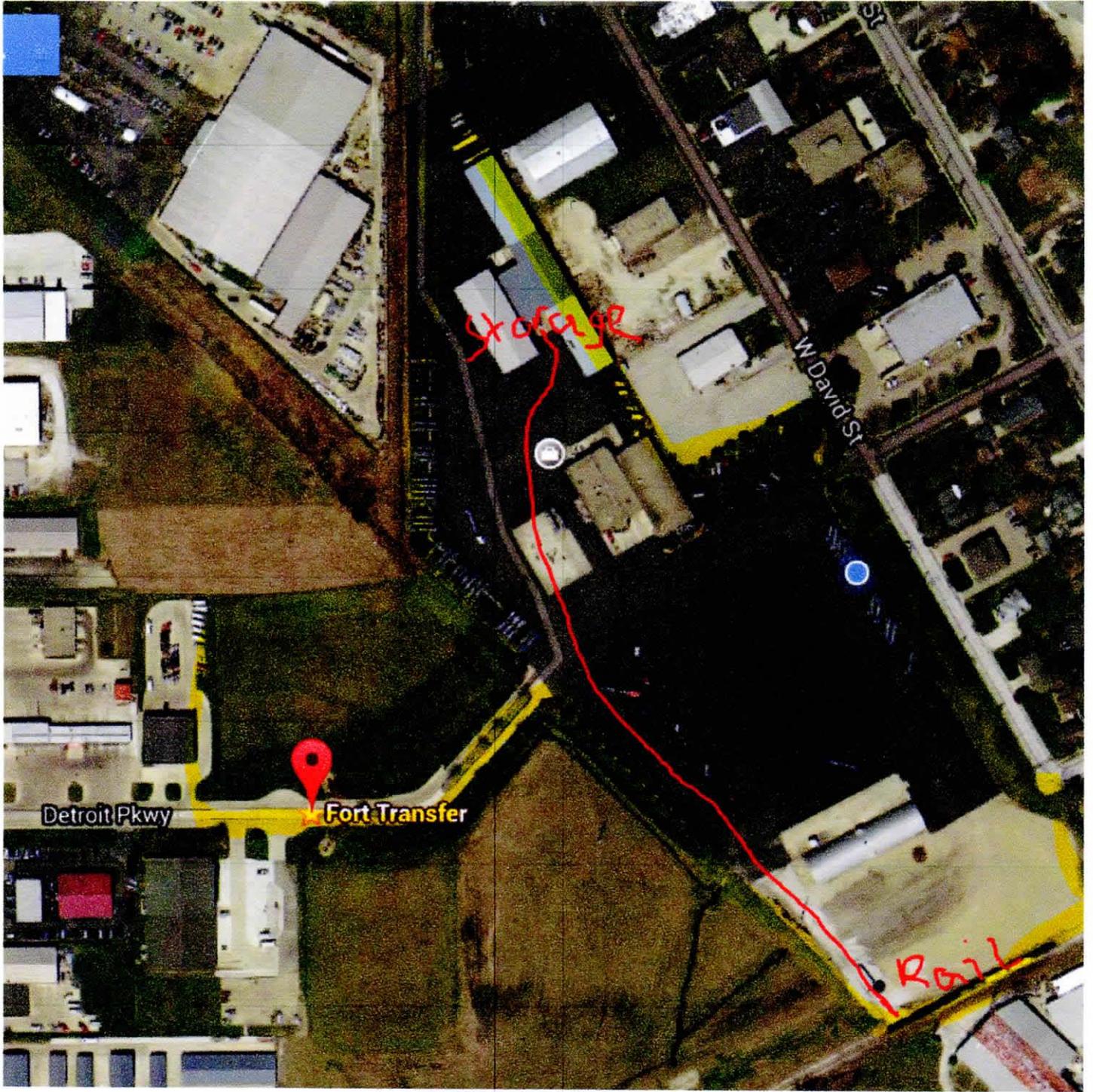
Brad Kahler

VERIFICATION

I, Brad Kahler, President of Fort Transfer, hereby declare under penalty of perjury that the foregoing is true and correct. Executed on March 20, 2015.



Brad Kahler



Storage

Rail



Fort Transfer

Detroit Pkwy

W David St

Before the Surface Transportation Board
Washington, D.C. 20423

Finance Docket No. 35914

Fort Transfer Company—Verified Petition for Expedited
Relief for Service Emergencies—Tazewell County, IL

VERIFIED STATEMENT OF
KEOKUK JUNCTION RAILWAY CO.

Keokuk Junction Railway CO. (“KJRY”), respectfully submits this Verified Statement in response to the Reply filed by Toledo, Peoria & Western Railway Corp. (“TP&W”):

KJRY operation of the Morton Branch, in place of TP&W, will have a very minimal effect upon other carrier’s operation, and will, in fact, have a positive effect on TP&W. Contrary to the map TP&W attached to its Reply, physical interchange between KJRY and TZPR, NS, IMRR, BNSF, IAIS and CN take place in TZPR’s East Peoria yard, approximately one mile southwest of the NS track in East Peoria. KJRY has trackage rights over Union Pacific and TZPR tracks, for interchange purposes, between Sommer and East Peoria. Based upon current operations over the Morton Line, KJRY’s service will merely replace TP&W’s trains over the NS between Crandall Jct. and East Peoria. The momentary transit of the one-mile between NS and the TZPR yard (two days per week) will have a de minimus effect on other carrier’s operations. KJRY

service would by-pass the TP&W yard in East Peoria, thus reducing the alleged congestion there.

KJRY, and its affiliated railroads, currently lease four rail lines from NS (or NS subsidiaries) and physically interchange with NS at 11 different locations around the country. KJRY believes it is capable of, and is willing, to comply with the current trackage rights and other agreements between TP&W and NS regarding use of the NS segment between Crandall Jct. and East Peoria.

While TP&W claims that, officially, it is “operated independently of TPW,” KJRY is informed and believes that TP&W, TZPR, and IMRR, are, not only under common control, but essentially operated as one railroad, primarily from Springfield, Illinois.

KJRY has no serious safety concerns. KJRY has observed all public crossings, and finds them safe for rail service. Although KJRY has not had a full opportunity to inspect the entire line, it has reviewed the FRA’s Inspection Report dated March 12, 2015 and recognizes that any defects that would adversely impact safe operations will have to be corrected prior to commencing operations over the line.

FURTHER SAYETH THE AFFIANT NOT.

VERIFICATION

I, Greg Miller, hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed March 21, 2015



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 show below:

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/s/ Richard H. Streeter

Richard H. Streeter

Dated: March 20, 2015