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July 16, 2010

E-FILE

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-001

Re: STB Docket No. AB-6 (Sub-No. 470X), BNSF Railway Company –
Discontinuance Of Trackage Rights Exemption -- In Peoria and
Tazewell Counties, Illinois

Dear Ms. Brown:

Attached for filing is the Reply of BNSF Railway Company to the Petition
To Revoke filed by Toledo, Peoria & Western Railroad Company.

If you have any questions, please call me.

Sincerely,



Karl Morell

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-6 (SUB-NO. 470X)

BNSF RAILWAY COMPANY
-- DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION --
IN PEORIA AND TAZEWELL COUNTIES, IL.

REPLY TO PETITION TO REVOKE

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Dated: July 16, 2010

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SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-6 (SUB-NO. 470X)

BNSF RAILWAY COMPANY
-- DISCONTINUANCE OF TRackage RIGHTS EXEMPTION --
IN PEORIA AND TAZEWELL COUNTIES, IL.

REPLY TO PETITION TO REVOKE

BNSF Railway Company ("BNSF") hereby replies in opposition to the Petition To Revoke filed by Toledo, Peoria & Western Railroad Company ("TP&W") with the Surface Transportation Board ("Board") on June 29, 2010 ("Petition"). As is demonstrated below, the Petition is premised on erroneous and misleading facts and a misstatement of the law governing through routes and interchanges between railroads. Consequently, the Petition should be denied.

REPLY

The standard for revoking an exemption is whether regulation is needed to carry out the rail transportation policy of 49 U.S.C. § 10101. 49 U.S.C. § 10502(d). The party seeking revocation of an exemption has the burden of proving that regulation of the transaction is necessary. Requests to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted. STB Docket No. AB-33 (Sub-No. 265), *Union Pacific Railroad Company – Abandonment and Discontinuance of Trackage Rights Exemption -- In Los Angeles County, CA* (not printed), served December 16, 2008; *Minnesota Comm. Ry., Inc. – Trackage Exempt. – BN RR. Co.*, 8 I.C.C.2d 31, 35-36 (1991); Finance Docket No. 31617, *Chesapeake & Albemarle R. Co. – Lease, Acq. & Oper. Exemp. – Southern Ry. Co.*

(not printed), served September 19, 1991; Finance Docket No. 31102, *Wisconsin Central Ltd. – Exemp. Acq. & Oper. – Certain Lines of Soo L.R. Co.* (not printed), served July 28, 1988.

The Petition is governed by 49 C.F.R. § 1152.25(c)(4), which requires TP&W to state in detail the respects in which the decision in this proceeding involves material error, or is affected by new evidence or substantially changed circumstances. The Petition may only be granted upon a showing that the challenged action would be materially affected by one or more of these criteria. 49 C.F.R. § 1152.25(e)(2)(ii). See STB Docket No. AB-6 (Sub-No. 335X), *Burlington Northern Railroad Company – Abandonment Exemption – Between Klickitat and Goldendale, WA* (not printed), served June 8, 2005. Here, TP&W has simply come forward with erroneous and misleading factual assertions. Because TP&W has submitted no credible evidence in support of its revocation request, it has failed to meet its burden of proof and its requested relief should be denied.

TP&W’s request for revocation rests on three erroneous contentions.

First, TP&W claims that BNSF misled the Board in BNSF’s response to the Opposition Filing on April 14, 2010 (“BNSF Response”) and that the Board relied on those misleading statements in the Board’s decision in this proceeding served on June 4, 2010 (“June 4th Decision”). Contrary to TP&W’s contentions, BNSF never categorically stated that TP&W has alternative means of interchanging with BNSF in Peoria.

In its Opposition Filing, TP&W specifically cited to the 1971 proceeding that authorized TP&W’s trackage rights over Peoria and Pekin Union Railway Company (“P&PU”) (“1971 Trackage Rights”). See Finance Docket No. 26476, *Toledo, Peoria & Western Railroad Co. – Trackage Rights – Peoria & Pekin Union Railway Co.* (not printed), served June 25, 1971. Opposition Filing at 4. The 1971 Trackage Rights authorized TP&W to: (1) bridge the gap

between TP&W's rail lines east of Peoria and its rail lines west of Peoria; (2) interchange traffic with BNSF predecessor at its yard in Peoria; and (3) interchange traffic with the former Chicago, Rock Island and Pacific Railroad Company.

In the BNSF Response, BNSF, relying on TP&W's citation to its 1971 Trackage Rights, stated that: "To the best of BNSF's knowledge, those trackage rights are still in effect. TP&W has failed to explain to BNSF or the Board why TP&W does not use its own trackage rights to circumvent [TZPR's] intermediate switch charge." BNSF Response at 6-7. The above-quoted statement was made by BNSF on the mistaken belief that the 1971 Trackage Rights were still in effect.

In the TP&W Response filed on April 26, 2010, TP&W once again cited to its 1971 Trackage Rights. TP&W Response at 4. In so doing, TP&W again intentionally failed to address BNSF's query as to why it was not using the 1971 Trackage Rights to circumvent TZPR's intermediate switch charge.

TP&W had ample opportunity to correct BNSF's mistaken belief that the 1971 Trackage Rights were still in effect. TP&W, however, consciously elected not to correct the record. To the extent the Board was misled as to the direct interchange options in Peoria between TP&W and BNSF it was not BNSF's query, but TP&W's conscious failure to respond to the query, that caused the misunderstanding. TP&W now seeks to benefit from its own intentional error of omission.

In any event, the Board's June 4th Decision was not premised on BNSF's prior misunderstanding of TP&W's trackage rights over Tazewell & Peoria Railroad, Inc. ("TZPR"). In finding that TP&W was unlikely to prevail on the merits, Chairman Elliott correctly noted that:

“...the central focus of the Board’s June 4 decision is the statutory finding that regulation of the proposed transaction is not necessary to protect shippers from an abuse of market power. Furthermore, the Board held that TP&W had failed to make its case that ... it would be harmed by the discontinuance because it had not shown that it would fare any better by interchanging directly with BNSF over the trackage rights being discontinued than it was faring under the interchange with TZPR.”

STB Docket No. AB 6 (Sub-No. 470X), *BNSF Railway Company – Discontinuance of Trackage Rights Exemption – In Peoria and Tazewell Counties, IL* (not printed), served July 2, 2010, slip op. at 3 (“*Stay Decision*”).

Second, TP&W mischaracterizes the nature of the operations in Peoria and the scope of BNSF’s terminated trackage rights over TZPR. TP&W would have the Board believe that, if somehow the terminated BNSF trackage rights were resurrected, TP&W would be able to circumvent the TZPR switch fee. Nothing could be further from the truth. As BNSF pointed out in its Reply to the TP&W stay request, the terminated trackage rights only authorized BNSF to access TP&W’s yard in East Peoria for east bound traffic. Because BNSF pays the TZPR switch fee for the east bound traffic, TP&W stands to gain nothing if BNSF were to recommence operations pursuant to the terminated trackage rights. While TP&W pays the TZPR switch fee for west bound traffic, the terminated BNSF trackage rights did not authorize BNSF to handle that traffic. Consequently, resurrecting the terminated trackage rights would be of absolutely no benefit to TP&W, a fact which TP&W mysteriously hides from the Board.

TP&W asserts that it is “willing to accept interchange at BNSF’s yard in Galesburg and to transport the traffic itself from Galesburg to TP&W’s yard in Peoria using the haulage rights” over BNSF’s line between Galesburg and Peoria. Petition at 7-8. TP&W’s haulage rights and trackage rights over the BNSF line end at the BNSF siding in Peoria. TP&W may be “willing” to perform those operations but it has no

authority to do so. TP&W fails to explain how it plans to **lawfully** move the traffic from the BNSF siding in Peoria to the TP&W yard in East Peoria, in light of the fact that the only track between the siding and yard is owned by PP&U and leased to TZPR. TP&W goes on to make the even more absurd contention that it “is willing to deliver traffic to BNSF in Peoria, but BNSF’s insistence that its traffic be delivered to the TZPR yard requires TP&W to incur intermediate switch charges.” Petition at 8. BNSF has not and cannot dictate to TP&W how it handles its west bound traffic through Peoria. It is not BNSF’s actions that obligate TP&W to use TZPR’s intermediate switch but TP&W’s voluntary election years ago not to repair its bridge and subsequently to forego its trackage rights over the TZPR line for purposes of interchanging with BNSF. The only thing BNSF has insisted on is that TP&W conduct its operations in Peoria in a lawful manner.

Moreover, TP&W’s contemplated east bound operations, if conducted lawfully, would impose additional costs and operating burdens on BNSF. TP&W would haul BNSF traffic from Galesburg to a BNSF siding in Peoria from where BNSF would haul the traffic over TZPR (via the terminated trackage rights) to TP&W’s yard in East Peoria. In order to do so, BNSF would have to station a locomotive and crew in Peoria whose sole function would be to perform a three mile switch over the TZPR line. If BNSF were required to reinstitute the terminated trackage rights operations over TZPR, it would likely be more economical and operationally efficient for BNSF to haul its own traffic from Galesburg to Peoria.

Third, TP&W distorts both the facts and the law in asserting that rail carriers are required to establish through routes (including physical connections), that a rail carrier

must provide reasonable interchange facilities, and that TP&W has the right to designate the location of interchange. Petition at 7. “A ‘through route’ is an arrangement, express or implied, between **connecting railroads** for the continuous carriage of goods from the origination point on the line of one carrier to destination on the line of another.”

Thompson v. United States, 343 U.S. 549, 556-57 (1952) citing *Through Routes and Through Rates*, 12 I.C.C. 163, 166 (1907)(emphasis added). BNSF and TP&W have not been connecting carriers in Peoria on east bound traffic since BNSF’s trackage rights were terminated in 1982 and on west bound traffic since TP&W voluntarily surrendered its trackage rights that permitted interchange with BNSF. Consequently, any through route between Galesburg and TP&W’s yard in East Peoria necessarily involves TPZR. If TP&W wishes to reestablish a direct connection with BNSF at Peoria, TP&W should rebuild its bridge.

Similarly, the obligation to provide reasonable interchange facilities and TP&W’s right to designate the location of interchange necessarily applies only in instances where the two carriers directly connect. BNSF has no right, much less an obligation, to provide TP&W a “free route” over the track of another carrier. TP&W makes the remarkable assertion that it “is willing to deliver west bound traffic to BNSF as the receiving carrier in Peoria, however, with the inclusion of the intermediate switch charge from TZPR, BNSF is not providing TP&W with the required free route.” Petition at 7. BNSF has never had the right to operate over TZPR for west bound traffic and TP&W voluntarily surrendered its rights years ago. BNSF has neither the right nor the obligation to provide TP&W a “free route” over TZPR’s rail line.

In summary, as Chairman Elliot correctly noted in the *Stay Decision*, “TP&W has made no effort to challenge either the Board’s ‘abuse of market power’ finding or its analysis of the likely effect of interchanging directly with BNSF over the trackage rights. Rather, TP&W focuses entirely on the issue of whether there is an alternative direct interchange with BNSF.” *Stay Decision*, slip op. at 3.

Finally, BNSF is becoming increasingly concerned over TP&W’s conduct in its ever bolder efforts to circumvent the TZPR switch fee. On July 8, 2010, TP&W notified BNSF that, as of July 9, 2010, TP&W would begin operating unlawfully over TZPR on east bound traffic. *See* Exhibit 1. BNSF has been informed that TP&W’s planned unlawful operations were thwarted by TZPR. It has also come to BNSF’s attention that TP&W may be adversely affecting service to BNSF customers in an apparent attempt to solicit support for its efforts to circumvent the TZPR switch fee. BNSF will not allow TP&W to degrade service to BNSF’s customers nor will BNSF participate in TP&W’s brazen efforts to unlawfully operate over a rail line owned by a third party.

As previously noted, TP&W stands to gain nothing from having the discontinuance of the trackage rights denied. The terminated trackage rights only allowed BNSF to handle east bound traffic to the TP&W yard in East Peoria and BNSF currently pays the TZPR switch charge on the east bound traffic. It has become painfully obvious to BNSF that TP&W is not seeking to resurrect the terminated trackage rights but rather to use (or more appropriately misuse) this proceeding as cover for the blatantly unlawful operations TP&W is attempting to initiate. The Board should not countenance such clearly abusive behavior.

CONCLUSION

BNSF respectfully urges the Board to deny TP&W's Petition. The Petition falls woefully short of demonstrating that regulation of the discontinuance of the terminated trackage rights is necessary. Moreover, the Board should not allow its good offices to be abused by TP&W's senseless quest to circumvent the TZPR switch fee.

Respectfully submitted,



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BNSF Railway Company

Dated: July 16, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July, 2010, I have caused a copy of the forgoing Response to be served on all parties of record by first class mail.


Karl Morell

Mark

From: Rohal, David (GPRK) [mailto:David.Rohal@RailAmerica.com]
Sent: Thursday, July 08, 2010 4:50 PM
To: Schmidt, R Mark (Shortline)
Cc: Putterman, Josh (GPRK); Charron, Kenneth (GPRK); Crawford, Paul (TPW)
Subject: TPW Interchange with BNSF

Mark –

The purpose of this letter is to bring you up to date on the interchange between BNSF and TPW.

For eastbound traffic to be interchanged from BNSF to TPW at TPW's yard in Peoria, TPW will transport traffic in haulage from Galesburg directly into TPW's yard in Peoria. TPW at that time will separate the TPW traffic from the BNSF/TZPR traffic and make the TZPR traffic available for TZPR.

For westbound traffic, TPW will be delivering BNSF traffic to BNSF at the TZPR yard, as per your instructions, unless you have a different means for interchange with a free, unrestricted route.

TPW anticipates these changes will be effective on Friday, July 9, unless I hear differently from you.

David Rohal