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March 29, 2010

Ms. Cynthia T. Brown  
Chief of the Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D. C. 20423

ENTERED  
Office of Proceedings  
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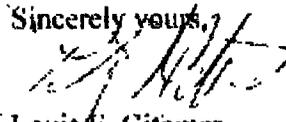
RE: Docket No. AB-6 (Sub-No. 470X), *BNSF Railway Company Discontinuance of  
Trackage Rights Exemption—in Peoria and Tazewell Counties IL*

Dear Ms. Brown:

The Toledo, Peoria & Western Railroad Co. is e-filing the attached Reply in Opposition to  
the Petition for Exemption filed by the BNSF Railway Company.

Thank you for your assistance. If you have any questions please call or email me.

Sincerely yours,

  
Louis E. Gitomer  
Attorney for Toledo, Peoria & Western Railroad Co.

Attachment

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Docket No. AB-6 (Sub-No. 470X)

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

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TOLEDO, PEORIA & WESTERN RAILROAD CO. REPLY IN OPPOSITION TO BNSF  
RAILWAY COMPANY PETITION FOR EXEMPTION

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Attorneys for: TOLEDO, PEORIA & WESTERN  
RAILROAD CO.

Dated: March 29, 2010

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

TOLEDO, PEORIA & WESTERN RAILROAD CO. REPLY IN OPPOSITION TO BNSF  
RAILWAY COMPANY PETITION FOR EXEMPTION

BNSF Railway Company (“BNSF”) filed a Petition for Exemption on February 8, 2010 (“Petition”) seeking to discontinue use of trackage rights over approximately 3 miles of rail line owned by the Peoria and Pekin Union Railway Company (“P&PU”) between Bridge Junction in Peoria and P&PU Junction in East Peoria, in Peoria and Tazewell Counties, IL (the “Line”) that connects with the Toledo, Peoria & Western Railroad Co. (“TP&W”). The TP&W opposes the Petition filed by BNSF, and respectfully requests the Surface Transportation Board (the “Board”) to deny the Petition.

**BACKGROUND**

TP&W operates a yard in East Peoria where it receives cars in interchange from BNSF, via the Tazewell & Peoria Railroad, Inc. (“TZPR”).<sup>1</sup> TP&W and BNSF, including its predecessors, interchanged traffic **directly** at Peoria and East Peoria over their own lines since time immemorial up until 1970.

<sup>1</sup> P&PU leased its rail lines to TZPR in *Tazewell & Peoria Railroad, Inc.-Lease and Operation Exemption- Peoria and Pekin Union Railway Company*, STB Finance Docket No. 34544 (STB served September 28, 2004).

In 1970 TP&W's bridge across the Illinois River, which connected TP&W's lines in Peoria and East Peoria and were used for the direct interchange with BNSF's predecessors, was damaged beyond repair after being struck by a barge. To bypass TP&W's bridge and for the specific purpose of continuing direct interchange in Peoria, TP&W and Burlington Northern, Inc. ("BN," BNSF's immediate predecessor) sought trackage rights over the P&PU. *Toledo, Peoria & Western Railroad Co. -Trackage Rights-Peoria & Pekin Union Railway Co.*, ICC Finance Docket No. 26476 (ICC served June 25, 1971) ("*TP&W Trackage Rights*") and *Burlington Northern, Inc.-Trackage Rights-Peoria & Pekin Union Railway Company between Peoria and East Peoria, Illinois*, ICC Finance Docket No. 27317 (ICC served May 31, 1973) (the "*BN Trackage Rights*"). In both proceedings, the Interstate Commerce Commission (the "ICC") found that **direct** interchange between TP&W and BN was consistent with the public interest.

In order to maintain interchange deliveries directly to TP&W from BN, TP&W agreed to assume BN's trackage rights expenses, and make those payments to P&PU. TP&W paid the trackage rights expenses and received direct interchange until June 1, 1982. Prior to 1982, TP&W and BN alternated every 6 months on delivering cars to their respective yards for direct interchange.

Since 1982, at BN's insistence, all traffic destined to be interchanged between BNSF and TP&W in the Peoria area has been handled by P&PU (and after the lease, TZPR) through an intermediate switch, at a charge in addition to the trackage rights fees. Interchange is now accomplished by TP&W and BNSF delivering railcars to TZPR's yard where TZPR assembles an outbound movement for delivery to TP&W or BNSF as appropriate with available crews and equipment. TZPR also delivers, from time to time, a cut of cars from BNSF to TP&W's yard in East Peoria. As a general rule, the TZPR switch adds an additional one to two more days of

transit time for cars moving to TP&W from BNSF, than would be required if BNSF interchanged directly to TP&W. This delay affects about 2,700 cars per year. As of January 2010, the additional one way per car charge for TZPR's services was \$106. The added cost of using the TZPR intermediate service is \$286,200 for loaded cars and \$286,200 for empty cars handled by TZPR. Because it costs significantly more and is significantly less efficient to use TZPR for intermediate switching, TP&W is opposing the discontinuance so that BNSF will retain the trackage rights, which will enable TP&W to reinstitute the direct interchange with BNSF. Eliminating the one to two day delay caused by the intermediate switching of TZPR will improve car utilization. Direct interchange from BNSF to TP&W will terminate the payment of \$106 per car (annually \$572,400) for the intermediate switch charge, which TP&W makes to TZPR.<sup>2</sup> Improved car utilization and reduced intermediate charges will benefit shippers.

## **ARGUMENT**

### **Legal Standard.**

In order to grant an exemption for BNSF to discontinue service over the Line, the Board must find that regulation

- (1) is not necessary to carry out the transportation policy of section 10101 of this title; and
- (2) either--
  - (A) the transaction or service is of limited scope; or
  - (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

49 U.S.C. §10502(a).

When abandonment authorization is sought, whether by application or exemption petition, the railroad must demonstrate either that there is no longer any need for service on the line or that the line in question has become a burden on interstate commerce.

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<sup>2</sup> TP&W will continue to pay TZPR for the trackage rights.

*The Indiana Rail Road Company-Abandonment Exemption-in Martin and Lawrence Counties, IN*, STB Docket No. AB-295 (Sub-No. 7X) (STB served March 26, 2010) at 6 (“*INRI Abandonment*”). BNSF has made neither showing in this discontinuance proceeding.

**The Need for Service.**

After the TP&W bridge over the Illinois River was damaged beyond repair in 1970, TP&W and BN sought authority from the ICC for trackage rights over the P&PU so that they could continue the efficient direct interchange of traffic. The ICC granted the TP&W and BN applications in *TP&W Trackage Rights* and *BN Trackage Rights*.

The ICC found that:

the trackage rights will enable TP&W to by pass its damaged bridge over the Illinois River and connect its Eastern and Western Divisions for the purpose of making interchange of traffic with the Burlington-Northern and Chicago, Rock Island and Pacific Railways; ... [make certain payments to P&PU] on all interchange movements directly to the TP&W from the Burlington-Northern and Chicago, Rock Island and Pacific Railways ... and that the transaction, otherwise, will be consistent with the public interest.

*TP&W Trackage Rights*, at 1-2.

In granting BN trackage rights over the P&PU, the ICC found:

That the trackage rights will enable BN to bypass the damaged [TP&W] bridge over the Illinois River to allow interchange of traffic to TP&W ... ; that ... TP&W in order to maintain interchange deliveries directly to it from BN, will, among other things, assume BN's trackage rights expenses....

*BN Trackage Rights*, at 1. The ICC also found “that the transaction, otherwise, will be consistent with the public interest.” *Id.* at 2. The ICC found a need for direct interchange from the BN, now the BNSF, to the TP&W. The ICC was correct, and the need for the direct interchange has recently become more necessary as TZPR increased the intermediate switch charge to \$106 per car (empty or loaded) as of January 2010. TP&W is now paying TZPR about \$572,400 per year for a less efficient intermediate switch. The increased charge and delay caused by TZPR acting

as an unnecessary intermediary demonstrate the need for continued BNSF operations under the trackage rights in order to preserve direct interchange from BNSF to TP&W.

**Continued Operation under the Trackage Rights Would Not Impose a Burden on BNSF.**

BNSF has not demonstrated any burden of continuing to operate the Line. In *BN Trackage Rights*, at 1, the ICC found that “TP&W ... will ... assume BN’s trackage rights expenses ... and pay to P&PU monthly, BN’s portion of the cost of joint operation.” In other words, TP&W is responsible for the costs of BNSF’s operations over IZPR and is entitled to maintaining the option of directly interchanging with BNSF.

the railroad bears the burden of showing that keeping the line in service would impose a burden on it that outweighs the harm that would befall shippers and other members of the public and the adverse impacts on rural and community development, if the rail line were abandoned. See *Ganley River Railroad, LLC—Abandonment and Discontinuance of Service—in Webster and Nicholas Counties, WV*, STB Docket No. AB-559 (Sub-No. 1X) et al., slip op. at 7 (STB served June 16, 1999).

*INRD Abandonment* at 6. BNSF does not present any evidence of burden.

**BNSF has not met the exemption criteria.**

To obtain an exemption, BNSF must demonstrate that regulation is not required by the rail transportation policy and that the proposed transaction will not result in an abuse of market power. In the proposed discontinuance of the Line, BNSF has failed to meet either standard.

**The Rail Transportation Policy.** Regulation of BNSF’s proposed discontinuance of service over the Line is required to carry out the pro-competitive sections of the transportation policy.

Discontinuance of service over the Line will make permanent the three line movement that was required by BN and foreclose TP&W from reinstating the less costly and more efficient direct interchange between BNSF and TP&W in the Peoria area. The Board has

recognized that a rail move is less efficient where there are more carriers involved. *See CSX Corp. et al.-Control-Conrail Inc. et al.*, 3 S.T.B. 196, 271 (1998). The discontinuance will eliminate the more efficient interchange option. There is an additional one way charge of \$106 per car, or a total of \$572,400 for the 2,700 cars per year handled by TZPR. By discontinuing service over the Line, BNSF will act contrary to the competition policies of the rail transportation policy.

Discontinuance of service over the Line by BNSF will: (1) not allow competition and the demand for services to establish reasonable rates for transportation by rail (49 U.S.C. §10101(1)), but will instead ensure a less efficient three carrier routing; (2) promote an inefficient rail transportation system, contrary to 49 U.S.C. §10101(3); (3) not ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense as required by 49 U.S.C. §10101(4), but will perpetuate a balkanized three carrier interchange instead of a more efficient less costly two carrier interchange; (4) not foster sound economic conditions in transportation and not ensure effective competition and coordination between rail carriers under 49 U.S.C. §10101(5) because discontinuance will leave the three carrier interchange with the added TZPR charges as the only option for BNSF and TP&W to interchange traffic in Peoria; and (5) not encourage honest and efficient management of railroads as required by 49 U.S.C. §10101(9) because the less efficient interchange will be the only option available. Moreover, the addition of another railroad and the delay caused by that railroad will not encourage and promote energy conservation as required by 49 U.S.C. §10101(14).

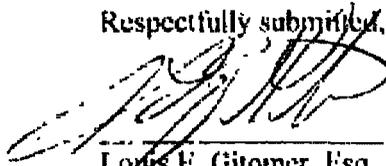
**Discontinuance will result in an abuse of market power.** The discontinuance of BN service over the Line will result in an abuse of market power because it will reduce the number

of competitive interchanges available to the shipping public. If BNSF is allowed to discontinue service over the Line, TP&W will not be able to establish a direct interchange with BNSF for the receipt and delivery of cars. Indeed, TZPR will be required to be added as a third carrier in the route. This will impair TP&W's ability to provide competitive service to meet the needs of the public. BNSF's discontinuance of service over the Line would prevent BNSF and TP&W from offering shippers a less costly more efficient service by preventing BNSF and TP&W from directly interchanging. Cars interchanged from BNSF to TP&W will not have the option of being interchanged directly between those two carriers. Rather those cars must move through an intermediate switch provided by TZPR which is more costly and less efficient. Where TZPR acts as an intermediate switch carrier it costs \$106 per car in each direction (about \$572,400 per year) and adds one to two days in transit time. Thus, TP&W must pay TZPR \$106 to deliver a loaded car to TP&W and TP&W must pay TZPR \$106 to return that car to BNSF empty. This cost is passed on to the shipper.

**CONCLUSION**

The proposed discontinuance of the service over the Line by BNSF is contrary to the rail transportation policy of 49 U.S.C. §10101 and will result in an abuse of market power by perpetuating an inefficient and costly interchange arrangement that TP&W has sought to change and which TP&W will continue to seek to change. For the reasons set forth above, the TP&W respectfully requests that the Board deny the Petition filed by BNSF.

Respectfully submitted,



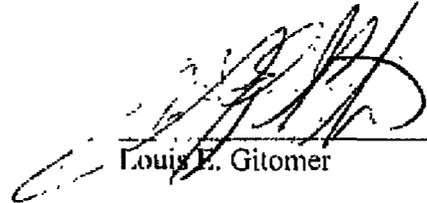
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Dated: March 29, 2010

**CERTIFICATE OF SERVICE**

I, Louis E. Gitomer certify that, on this 29<sup>th</sup> day of March, 2010, I caused a copy of the foregoing document to be served by e-mail on all parties of record in STB Docket No. AB-6 (Sub-No. 470X).

  
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Louis E. Gitomer