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April 26, 2010

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Public Record

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

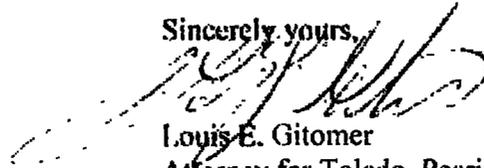
RE: Docket No. AB-6 (Sub-No. 470X), *BNSF Railway Company - Discontinuance of
Trackage Rights Exemption-in Peoria and Tazewell Counties. II.*

Dear Ms. Brown:

The Toledo, Peoria & Western Railroad Co. is e-filing the attached Response.

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

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. RESPONSE TO SUR-REPLY OF BNSF
RAILWAY COMPANY AND TAZEWELL & PEORIA RAILROAD, INC.

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RAILROAD CO.

Dated: April 26, 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.

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RAILWAY COMPANY AND TAZEWELL & PEORIA RAILROAD, INC.

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”). TP&W filed a Reply on March 29, 2010. BNSF, on April 14, 2010, and the Tazewell & Peoria Railroad, Inc. (“TZPR”), on April 16, 2010¹, seek to file Sur-Reply to the TP&W Reply. In this pleading, TP&W responds to the Sur-Reply. The background of this proceeding has been provided previously by TP&W, BNSF, and TZPR and will be repeated here as necessary to TP&W’s argument.

ARGUMENT

The premise for the Sur-Reply of BNSF and TZPR is that the Trackage Rights Agreement dated as of April 30, 1971, among the Peoria and Pekin Union Railway Company (“P&PU,” now the lessor to TZPR), TP&W, and the Burlington Northern, Inc. (“BN,”

¹ The TZPR filing is not a “Late-Filed Reply” to the BNSF Petition for Exemption. If it were, it should have been filed timely and addressed only the issues raised in the BNSF Petition. Instead, the purpose of the TZPR pleading is to respond to TP&W, a Sur-Reply.

predecessor of BNSF) (the "Agreement") is that the Agreement has been cancelled by P&PU (according to BNSF) and terminated by P&PU (according to TZPR). BNSF and TZPR are wrong. The Agreement according to black letter law and its own terms remains in full force and effect.

The Interstate Commerce Commission (the "ICC") granted TP&W and BN trackage rights under the Agreement over P&PU in *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*"). Whether granted by the Board, the ICC, or pursuant to agreements pre-dating ICC jurisdiction over trackage rights, trackage rights cannot be cancelled or terminated by a notice from the grantor to the grantee. Board authorization is required before a trackage rights agreement can be cancelled or terminated. *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134, 144-145 (1946). Not only is black letter law contrary to the cancellation/termination premise raised by BNSF and TZPR, but so is the specific language of the Agreement. Section 9 of the Agreement attached to the TZPR Sur-Reply states "The termination of this agreement shall become effective on the effective date of any necessary order authorizing the abandonment of such trackage rights." As BNSF admits, Sur-Reply at 4, discontinuance authority was not sought in 1982. The contractual prerequisite for termination of the trackage rights does not exist since neither the ICC nor the Board has granted the discontinuance. Therefore, the Agreement could not be cancelled or terminated.

Under the requirements of law and the Agreement, the trackage rights have not been cancelled or terminated. All conclusions drawn by BNSF and TZPR from the false premise that

the trackage rights have been cancelled or terminated are inaccurate and obviously intended to divert the Board from the important competitive issues raised by TP&W. TP&W urges the Board to give no weight to the arguments drawn from the false premise relied upon by BNSF and TZPR.

TP&W's Response to BNSF.

BNSF argues that TP&W could not be paying the trackage rights fees because the Agreement was cancelled. As discussed above, the Agreement has not been cancelled. TP&W has not paid the fees because BN and BNSF have not been using the trackage rights, to the detriment of TP&W. In addition, TP&W is obligated "to assume the trackage rights expense of Burlington accruing to the Union Company for such interchange deliveries." Agreement Section 4(a). Not only is BNSF wrong about the trackage rights fees, but it is also incorrect in alleging that it pays intermediate switch charges on traffic from TP&W to BNSF via TZPR at Peoria. TP&W has reviewed its records and determined that it indeed pays those charges.

BNSF next makes the incredible claim that a move involving three railroads is more efficient than a two-line move, without explanation. Such an unsupported argument is contrary to a general conclusion that the reduction in the number of railroads involved in a move is a public benefit. See e.g. *Burlington Northern et al.-Merger-Santa Fe Pacific et al.*, 10 I.C.C.2d661, 725 (1995). In effect, BNSF is saying that it will not comply with its obligation to interchange with the receiving carrier TP&W at the location specified by TP&W. The right of the receiving carrier to designate the location of interchange was clearly established in *Norfolk Southern Railway Company-Petition for Declaratory Order-Interchange with Reading Blue Mountain & Northern Railroad Company*, STB Docket No. 42078 (STB served April 29, 2003)

at 4 (the "*Interchange Decision*"). BNSF's reluctance to comply with its obligations is not justification for discontinuance.

BNSF argues that since P&PU/TZPR has been a third carrier in the route for 28 years, continuing the presence of a third carrier in the route does not matter. BNSF ignores the principal that it has often endorsed that reducing the number of carriers in a route improves efficiency and competition. Moreover, the presence of P&PU/TZPR in the route has resulted in TP&W's inability to offer a competitive route to Mapleton or the Cilco power plant.

TP&W is not trying to interject BNSF into a dispute between TP&W and TZPR. BNSF's stated concern is that because the Agreement has been "cancelled" there is no trackage rights fee and that if there were, BNSF would have to pay it. BNSF is wrong on both counts. As explained above, the Agreement has not been cancelled. Therefore, the fee remains in effect, and TP&W remains responsible for payment of the fee. In addition, it is presumptuous at best for BNSF to speculate about how TP&W would price absent the P&PU/TZPR interchange fee. It is more logical to conclude that TP&W would provide more competitive rates in order to attract more traffic.

BNSF attacks TP&W for, according to BNSF, failing to mention certain facts. BNSF is incredulous. The most important fact is one which BNSF has failed to mention. By a prior BNSF admission, a TZPR derailment severed BNSF's main track in Peoria thereby isolating BNSF's interchange yard from the BNSF mainline. BNSF has not repaired the original connection, but has established a new connection between BNSF and TZPR at Darst Street, thereby preventing a direct and efficient interchange between BNSF and TP&W. TZPR has refused TP&W access to BNSF via the Darst Street connection.

Finally, BNSF contends that routing traffic is subject to managerial discretion. BNSF is correct, as far as its statement goes. However, the Board has recognized that when it comes to the interchange of traffic, the receiving carrier can specify the interchange location. *Interchange Decision*. Moreover, the purpose of the *TP&W Trackage Rights* and the *BN Trackage Rights* was to maintain the direct interchange between BN and TP&W.

TP&W's Response to TZPR.

TZPR argues that the Board should not require that BNSF “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.” *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 (“*INRD Abandonment*”). TP&W is arguing that discontinuance of the trackage rights will reduce the increased competition ordered by the ICC in the *TP&W Trackage Rights* and the *BN Trackage Rights*. TZPR does not respond to TP&W's competitive arguments. Instead, TZPR relies on the false premise that the Agreement was terminated.

TZPR also argues that shippers should be satisfied with the same three carrier service that they have received for the past 28 years. TP&W is no longer satisfied with inefficient service and as BNSF has noted, TP&W has attempted to improve the efficiency and will continue to do so. Unlike TZPR, TP&W does not believe that the status quo in the rail industry is a valid rationale for continuing an inefficient process.

CONCLUSION

As demonstrated by TP&W in its March 29, 2010 Reply, 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. The Sur-Reply filed by BNSF and TZPR have not refuted TP&W's Reply. For the reasons set forth above, the TP&W respectfully requests that the Board deny the Petition filed by BNSF.

Respectfully submitted,



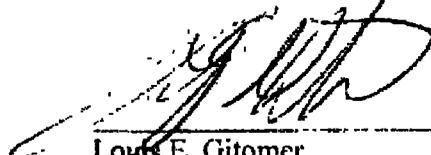
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Dated: April 26, 2010

CERTIFICATE OF SERVICE

I, Louis E. Gitomer certify that, on this 26th day of April, 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).



Louis E. Gitomer