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June 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

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 Petition to Revoke.

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

Sincerely yours,



Melanie B. Yasbin
Attorney for Toledo, Peoria & Western Railroad Co.

Attachment

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-6 (Sub-No. 470X)

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

PETITION TO REVOKE

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WESTERN RAILWAY CORPORATION

Dated: June 28, 2010

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-6 (Sub-No. 470X)

BNSF RAILWAY COMPANY—DISCONTINUANCE OF TRackage RIGHTS
EXEMPTION—IN PEORIA AND TAZEWell COUNTIES, IL

PETITION TO REVOKE

The Toledo, Peoria and Western Railway Corporation (“TP&W”) respectfully petitions the Surface Transportation Board (the “Board”) to revoke the exemption granted in *BNSF Railway Company—Discontinuance of Trackage Rights Exemption—in Peoria and Tazewell Counties, Ill.*, STB Docket No. AB 6 (Sub-No. 470X) (STB served June 4, 2010) (the “*Discontinuance Exemption*”). In the *Discontinuance Exemption*, the Board granted BNSF Railway Company (“BNSF”) an exemption from the prior approval requirements of 49 U.S.C. §10903 to discontinue 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”).¹

TP&W contends that regulation of the transaction is necessary to carry out the rail transportation policy of 49 U.S.C. §10101 in light of new evidence.

BACKGROUND

BNSF filed a Petition for Exemption on February 16, 2010 seeking to discontinue service under trackage rights over the Line.² In the *Discontinuance Exemption*, the Board granted the

¹ The Line is leased by the Tazewell & Peoria Railroad, Inc. (“TZPR”).

² The trackage rights were for the specific pro-competitive purpose of continuing a direct interchange between TP&W and BNSF’s predecessor after TP&W’s bridge over the Peoria

exemption from 49 U.S.C. §10903 after noting that regulation was not necessary to protect TP&W because TP&W had “alternative means of interchanging traffic with BNSF.” *Id.* at 4. The Board’s conclusion was based on a representation made by BNSF that “TP&W has alternative means of directly interchanging traffic with BNSF.” *Id.* at 2.

The Board stated that TP&W could “interchange traffic directly with BNSF at a connection between BNSF’s and P&PU’s rail lines located near Darst Street, in Peoria” or use “both trackage rights and haulage rights over another BNSF line between Galesburg and Peoria” to effect direct interchange. *Id.* at 4.

In 2004 there was a derailment by TZPR which severed BNSF’s main line track from its Uptown Yard, preventing TP&W direct access to the trackage rights line from BNSF’s Uptown Yard. At that time, BNSF removed the crossover track between the Line and BNSF’s main line. TZPR put in a switch between its line and the BNSF main line for its own use. Currently, TP&W is allowed to use TZPR’s switch to reach TP&W’s trackage rights over the BNSF line from Peoria to Galesburg, strictly when providing haulage for BNSF.

On east bound moves where TP&W is the receiving carrier, TP&W picks cars up from BNSF in Galesburg and delivers them to TZPR in Peoria, where an intermediate switch charge is paid to TZPR by BNSF and TZPR blocks the cars that TP&W then picks up from TZPR and takes to TP&W’s yard in Peoria. On west bound moves from TP&W to BNSF, BNSF requires TP&W to deliver its cars to TZPR in Peoria for blocking and TP&W is required to pay the intermediate switch charge, contrary to the free route that BNSF is supposed to provide. Once the cars are delivered to TZPR, they remain in TP&W’s account for an additional day for car hire

River was rendered inoperable in 1970. *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).

purposes. After the cars are blocked by TZPR, TP&W delivers the cars to BNSF at Galesburg via haulage. TP&W finds the current interchange with BNSF to be inefficient and costly compared to a direct interchange between TP&W and BNSF.

Immediately after the *Discontinuance Exemption*, TP&W commenced negotiations with BNSF in an effort to reinstate direct interchange between TP&W and BNSF in Peoria. The attached verified statement from David Rohal describes the contacts he has had with BNSF and the response from BNSF.

As the receiving carrier at Peoria, TP&W has the right to designate the location of an interchange delivery from BNSF as long as TP&W provides a free route.³ TP&W has proposed picking up traffic east bound traffic from BNSF at Galesburg and transporting the traffic from BNSF's Yard in Galesburg to TP&W's yard in Peoria using the haulage rights agreed to between BNSF and TP&W. See *Burlington Northern et al.-Merger-Santa Fe Pacific et al.*, 10 I.C.C.2d 661, 675, and 813 (1995) ("*BNSF Merger*").

By using the haulage rights it obtained in *BNSF Merger*, TP&W will provide BNSF with the required free route. Moreover, TP&W 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. See the Verified Statement of David Rohal ("Rohal VS").

Contrary to the representations that BNSF made in its pleadings, which were also relied upon by the Board in granting the discontinuance, BNSF has made it clear that it will not directly

³ See *Norfolk Southern Railway Company—Petition for Declaratory Order—Interchange with Reading Blue Mountain & Northern Railroad Company*, STB Docket No. 42078 (STB served April 23, 2003) ("*NS-RBM*"), *New York, C. & St. L.R. Co. v. New York Central R. Co.*, 314 I.C.C. 344 (1961) ("*New York, Chicago*") and *Kansas City S. Ry. Co. v. Louisiana & A. Ry. Co.*, 213 I.C.C. 351 (1935) ("*Kansas City*").

interchange traffic with TP&W at Darst Street. In a voice mail sent on June 16, 2010 from Mark Schmidt of BNSF to David Rohal, Mr. Schmidt states that BNSF is “very satisfied with what goes on now” in Peoria and is not looking to change it. Rohal VS, Exhibit C (an audio recording of the message from Mr. Schmidt).

ARGUMENT

Under 49 U.S.C. §10502 (d) the Board may revoke an exemption when regulation “is necessary to carry out the transportation policy of section 10101.” The Board also has stated that it would use revocation in the event the Board’s process had been misused or abused.⁴

BNSF’s refusal to interchange directly with TP&W is contrary to the rail transportation policy and impedes TP&W’s ability to avoid having to use TZPR as an intermediate switch for both interchange with BNSF and haulage for BNSF over the Peoria-Galesburg line. In opposing the discontinuance of service over the Line, TP&W argued that granting the trackage rights discontinuance would reduce competitive options to shippers by forcing them to use TZPR as an intermediate carrier adding time and expense to the movement of traffic. The Board rejected TP&W’s claimed competitive harm and suggested that there were alternatives.

However, based on the new evidence that BNSF will not agree to direct interchange with TP&W at Peoria, TP&W will have no alternative means of interchanging traffic with BNSF. TP&W will be forced to use TZPR. TP&W will have to use TZPR for interchange to and from BNSF and will have to rely on the TZPR/BNSF switch agreement when providing haulage for BNSF. TP&W will have no way to access its trackage rights over the BNSF line from Peoria to Galesburg for any other traffic. If the *Discontinuance Exemption* is not revoked, TZPR will

⁴ *Milwaukee Industrial Trade Center, LLC, d/b/a Milwaukee Terminal Railway—Acquisition and Operation Exemption—Line Owned by Milwaukee Industrial Trade Center, LLC, d/b/a Milwaukee Terminal Railway*, STB Finance Docket No. 35133 (STB served June 16, 2010) at 7-8 (“*Milwaukee*”).

control all means of TP&W and BNSF interchange in Peoria, thus removing any competitive interchange option.

Regulation of this transaction is necessary to protect competition in the area but it is also necessary to insure effective coordination between TP&W and BNSF. Rail carriers subject to the Board's jurisdiction, are required to "establish through routes (including physical connections) with each other..." 49 U.S.C. §10703. In establishing these routes, a rail carrier must provide "reasonable, proper, and equal facilities... for the interchange of traffic between, and for the receiving, forwarding, and delivery of ...property to and from, its respective line and a connecting line of another rail carrier..." 49 U.S.C. §10742.

As the receiving carrier at Peoria, TP&W has the right to designate the location of an interchange delivery from BNSF as long as TP&W provides a free route.⁵ As discussed above, TP&W is willing to provide a free route to BNSF, however, BNSF is not willing to provide a free route to TP&W. TP&W 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.

Revocation of the *Discontinuance Exemption* will permit direct interchange between TP&W and BNSF, which would be more competitive, more efficient, and less costly than the intermediate switch. See the attached Verified Statement of Paul Crawford. BNSF argued that it would have to make up a new train to deliver cars to TP&W and that such a train could be more costly than using the current intermediate switch. TP&W is willing to accept interchange at

⁵ See *Norfolk Southern Railway Company—Petition for Declaratory Order—Interchange with Reading Blue Mountain & Northern Railroad Company*, STB Docket No. 42078 (STB served April 23, 2003) ("NS-RBM"), *New York, C. & St. L.R. Co. v. New York Central R. Co.*, 314 I.C.C. 344 (1961) ("New York, Chicago") and *Kansas City S. Ry. Co. v. Louisiana & A. Ry. Co.*, 213 I.C.C. 351 (1935) ("Kansas City").

BNSF's yard in Galesburg and to transport the traffic itself from Galesburg to TP&W's yard in Peoria using the haulage rights agreed to and imposed in the *BNSF Merger*, thus avoiding the need for a new train. TP&W is also 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.

BNSF has abused the Board's process by making a representation relied upon by the Board in reaching its decision that BNSF had no intention of complying with. In the *Discontinuance Exemption* at 4, the Board said:

if TP&W does not wish to continue using the intermediate switch, it appears to have alternative means of interchanging traffic with BNSF. P&PU granted TP&W overhead trackage rights that enable TP&W to interchange traffic directly with BNSF at a connection between BNSF's and P&PU's rail lines located near Darst Street, in Peoria. Additionally, TP&W has both trackage rights and haulage rights over another BNSF line between Galesburg and Peoria. If the intermediate switch proves too costly or inefficient, TP&W could avail itself of these alternatives. Under these circumstances, we do not believe that regulation is necessary. (footnotes omitted).

The Board's conclusion was based on BNSF's representation summarized in the

Discontinuance Exemption at 2 that:

TP&W has alternative means of directly interchanging traffic with BNSF: TP&W has its own trackage rights over the line, which would permit it to interchange with BNSF at BNSF's yard in Peoria, and it also has trackage and haulage rights over a BNSF line between Galesburg and Peoria, Ill.

BNSF represented that TP&W could interchange traffic directly with BNSF at a connection between BNSF's and P&PU's rail lines near Darst Street even though BNSF had removed the connecting track. BNSF has now clearly shown that it never intended to carry out the representation made to the Board. Based on Mr. Schmidt's statement, it is clear that BNSF will not fulfill the representation made to the Board that TP&W has other interchange options.

As detailed in the Rohal VS, Mr. Schmidt states that BNSF does not want to change the current interchange procedures at Peoria, contrary to the representation made to the Board.

CONCLUSION

TP&W has demonstrated that regulation of the discontinuance of trackage rights is necessary to carry out the rail transportation policy and to protect the integrity of the Board's processes. Therefore, TP&W respectfully requests that the Board revoke the *Discontinuance Exemption*.

Respectfully Submitted,



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Attorneys for: TOLEDO, PEORIA AND
WESTERN RAILWAY CORPORATION

Dated: June 28, 2010

CERTIFICATE OF SERVICE

I certify that I have this June 29, 2010 served copies of this Petition to Revoke upon all parties of record in this proceeding, by electronic delivery.



Melanie B. Yasbin

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

VERIFIED STATEMENT OF DAVID ROHAL

My name is David Rohal, Senior Vice President Strategic Relations of RailAmerica, Inc. (“RailAmerica”), a shortline holding company that controls the Toledo, Peoria and Western Railway Corporation (“TP&W”). The purpose of this statement is to describe the negotiations that have taken place with the BNSF Railway Company (“BNSF”) since the Surface Transportation Board granted BNSF a discontinuance of trackage rights in the Peoria area in *BNSF Railway Company— Discontinuance of Trackage Rights Exemption in Peoria and Tazewell Counties, Ill.*, STB Docket No. AB-6 (Sub-No. 470X) (STB served June 4, 2010) (the “*Discontinuance Exemption*”).

After reviewing the *Discontinuance Exemption* and conferring within RailAmerica and TP&W, and in reliance on the specific statement that “if TP&W does not wish to continue using the intermediate switch, it appears to have alternative means of interchanging traffic with BNSF. P&PU granted TP&W overhead trackage rights that enable TP&W to interchange traffic directly with BNSF at a connection between BNSF’s and P&PU’s rail lines located near Darst Street, in Peoria. Additionally, TP&W has both trackage rights and haulage rights over another BNSF line between Galesburg and Peoria. If the intermediate switch proves too costly or inefficient, TP&W could avail itself of these alternatives. Under these circumstances, we do not believe that regulation is necessary.” (footnotes omitted) I contacted Mr. Mark Schmidt at BNSF. I proposed the TP&W be allowed to use its trackage rights to provide direct interchange with BNSF. In

the east bound direction, TP&W would pick up traffic in BNSF's Galesburg yard and deliver it to TP&W's Peoria yard using the trackage rights granted to TP&W in the transaction that created the BNSF. For west bound traffic, TP&W proposed using the trackage rights to handle traffic from Peoria to Galesburg for interchange from TP&W to BNSF. See Exhibit A.

In response, Mr. Schmidt left me the voice mail message that is attached as Exhibit C. In the message, Mr. Schmidt said no to the proposal because BNSF likes the way things are. I then spoke to Mr. Schmidt on the evening of June 17, 2010. I explained that TP&W needed to know where to directly deliver BNSF cars. He said that BNSF preferred to receive cars at the TZPR yard so that TZPR could perform blocking for BNSF, and I said, "so why then should TP&W be responsible for the intermediate switch charges and the car hire? Since TZPR intermediate switching is a service for BNSF, shouldn't BNSF hold the car hire liability and be responsible for the TZPR charges?" On the morning of June 18th I forwarded an email request to Mr. Schmidt asking him to confirm the interchange location in writing (Exhibit B), and as of this moment, I have received no response.

VERIFICATION

I, David Rohal, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on June 21, 2010.



David Rohal

EXHIBIT A

Louis E. Gitomer

From: Rohal, David (GPRK) [David.Rohal@RailAmerica.com]
Sent: Wednesday, June 09, 2010 8:31 AM
To: Schmidt, R Mark (Shortline)
Cc: Putterman, Josh (GPRK); Charron, Kenneth (FECRWY)
Subject: RE: STB Decision on BNSF/TPW direct interchange

Mark –

Thank you for your call this morning confirming that you were collaborating with your service design, operating, and legal people on how to re-establish the direct interchange between BNSF and TPW. I hope, as you said, that you can develop BNSF preferences by the 16th so we can swiftly move to a more efficient operation for our mutual business.

I should have mentioned when you called, but we have notified Railinc to update the industry reference files to show Galesburg as a "normal" interchange, not just an "operating" interchange point between BNSF and TPW. Also, TPW GM Paul Crawford has reached out to your local operating folks as well as the TZPR to start coordinating a seamless transition.

From a TPW perspective, the most efficient interchange would be for us to deliver westbound cars for BNSF at Galesburg and pick up eastbound TPW and TZPR traffic at Galesburg. If BNSF cannot make a separate TPW block, the most efficient operation would be for TPW to perform switching for BNSF at Peoria to separate the TPW and TZPR traffic.

We hope that the efficiency of this direct interchange will promote an increase of business between BNSF and TPW.

From: Rohal, David (GPRK)
Sent: Tuesday, June 08, 2010 2:26 PM
To: 'Schmidt, R Mark (Shortline)'
Cc: Putterman, Josh (GPRK); Charron, Kenneth (FECRWY)
Subject: STB Decision on BNSF/TPW direct interchange

Mark –

The STB ruling this week on BNSF's filing of discontinuance of trackage rights clarified the rights of TPW and BNSF to interchange directly at Peoria and Galesburg if TPW wished to avoid the intermediate switching by TZPR.

Here's the text of the relevant paragraph of the STB decision:

Finally, if TP&W does not wish to continue using the intermediate switch, it appears to have alternative means of interchanging traffic with BNSF. P&PU granted TP&W overhead trackage rights that enable TP&W to interchange traffic directly with BNSF at a connection between BNSF's and P&PU's rail lines located near Darst Street, in Peoria.³ Additionally, TP&W has both trackage rights and haulage rights over another BNSF line between Galesburg and Peoria.⁴ If the intermediate switch proves too costly or inefficient, TP&W could avail itself of these alternatives. Under these circumstances, we do not believe that regulation is necessary.

TPW does wish to reinstate direct interchange at Peoria and establish direct interchange with BNSF at Galesburg. Our operating guys will be contacting yours directly to make appropriate arrangements for changing the current pattern of interchange between TPW and BNSF. We would appreciate a swift decision on how BNSF will direct cars bound for TPW; e.g., whether BNSF would prefer to create a TPW block at Galesburg, have TPW perform an intermediate switch of the TZPR traffic for BNSF in Peoria, or continue to use TZPR as an intermediate switching carrier.

EXHIBIT B

From: Rohal, David (GPRK)
Sent: Friday, June 18, 2010 9:11 AM
To: Schmidt, R Mark (Shortline)
Cc: Putterman, Josh (GPRK); Charron, Kenneth (GPRK)
Subject: FW: STB Decision on BNSF/TPW direct interchange

Mark –

As we discussed last night, the STB clarified that TPW has a direct interchange with BNSF, and therefore TPW needs to know where BNSF wants the interchange performed.

You indicated that BNSF desired for TPW to continue to deliver cars for BNSF to the TZPR so that they could be blocked for BNSF, rather than at the Darst St. interchange or other options. This suggests that TZPR charges affecting this interchange such as intermediate switching fees should be borne by BNSF, and TPW car hire responsibility ends when cars are delivered to TZPR.

Please confirm BNSF's desired location for TPW interchange to BNSF.

EXHIBIT C – SEE AUDIO FILE

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

VERIFIED STATEMENT OF PAUL E. CRAWFORD

My name is Paul E. Crawford, I am the General Manager of the Toledo, Peoria and Western Railway Corporation (“TP&W”). The purpose of this statement is to explain being able to provide direct interchange with BNSF Railway Company (“BNSF”) would be more competitive, more efficient, and less costly than using the Tazewell & Peoria Railroad, Inc. (“TZPR”) for intermediate switching.

Currently on east bound moves where TP&W is the receiving carrier, TP&W picks cars up from BNSF in Galesburg and delivers them to TZPR in Peoria, where an intermediate switch charge is paid to TZPR by BNSF. TZPR blocks the cars that TP&W then picks up from TZPR and takes to TP&W’s yard in Peoria.

On west bound moves from TP&W to BNSF, BNSF requires TP&W to deliver its cars to TZPR in Peoria for blocking. TP&W is required to pay the intermediate switch charge, contrary to the free route that BNSF is supposed to provide. Once the cars are delivered to TZPR, they remain in TP&W’s account for an additional day for car hire purposes. After the cars are blocked by TZPR, TP&W picks the cars up for delivery to BNSF at Galesburg. This process adds at least one day in transit time because of the time it takes to move the cars to TZPR and the time it takes for TZPR to block those cars. It also adds \$106 per car (loaded or empty) for this service. In the first 6 months of 2010, TP&W handled approximately 495 carloads of traffic to the BNSF. The intermediate switch charges for those moves would be \$104,940 ($\$106 \times 2 \times 495$). See Exhibit A (BNSF-TP&W interchange time samples).

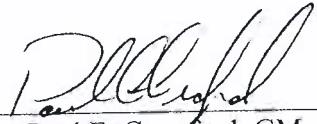
If TP&W could interchange directly with BNSF, it would not have to pay TZPR's intermediate switch fee. TP&W could also save on fuel costs and man hours because it would not have to pick up BNSF blocked cars at TZPR's yard for movement to Galesburg.

As Mr. Rohal has stated, TP&W has proposed using the trackage rights to handle traffic from Peoria to Galesburg for interchange from TP&W to BNSF. This would save TP&W significant time and money.

VERIFICATION

I, Paul E. Crawford, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on June 28, 2010.



Paul E. Crawford, GM

EXHIBIT A

Examples of Westbound movements from TP&W to Galesburg for BNSF

BNSF Haulage

Initial	Number	Arrived EPYard		Del to TZPR		Rec'd TZPR		Del to BNSF	
		Date	Time	Date	Time	Date	Time	Date	Time
UTLX	955118	05/30/10	5:35	05/30/10	15:35	06/02/10	20:00	06/03/10	1:06
BN	472251	06/03/10	11:30	06/03/10	17:50	06/04/10	20:00	06/08/10	3:11
BNSF	431760	06/03/10	11:30	06/03/10	17:50	06/04/10	20:00	06/08/10	3:11
PLMX	135559	06/03/10	11:30	06/03/10	17:50	06/04/10	20:00	06/08/10	3:11
AOK	182067	06/10/10	7:10	06/10/10	20:50	06/11/10	20:00	06/12/10	4:24

Charge of \$106 per car
 TZPR can reclaim 24 hours of car hire