

BALL JANIK LLP

A T T O R N E Y S

1455 F STREET, NW, SUITE 225
WASHINGTON, D.C. 20005

www.balljanik.com

TELEPHONE 202-638-3307
FACSIMILE 202-783-6947

KARL MORELL

kmorell@dc.bjllp.com

June 29, 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
For Stay 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 FOR STAY

Kristy D. Clark
General Attorney
BNSF Railway Company
2500 Lou Menk Drive AOB-3
Fort Worth, Texas 76131

Karl Morell
Of Counsel
Ball Janik LLP
1455 F Street, N.W.
Suite 225
Washington, D.C. 20005
(202) 638-3307

Attorneys for:
BNSF Railway Company

Dated: June 29, 2010

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SURFACE TRANSPORTATION BOARD

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

REPLY TO PETITION FOR STAY

BNSF Railway Company ("BNSF") hereby replies in opposition to the Petition For Stay filed by Toledo, Peoria & Western Railroad Company ("TP&W") with the Surface Transportation Board ("Board") on June 21, 2010 ("Stay Petition"). As is demonstrated below, the stay request is procedurally defective and substantively lacking. In any event, TP&W has not, and cannot, meet the stay criteria. Consequently, the Stay Petition should be rejected on procedural grounds or denied on substantive grounds.

I. BACKGROUND

On February 16, 2010, BNSF filed with the Board a petition under 49 U.S.C. § 10502 for exemption from the provisions of 49 U.S.C. § 10903 (the "Petition") to discontinue its trackage rights over the rail line located between Bridge Junction in Peoria, IL, and P&PU Junction in East Peoria, IL (the "Line"). The Line is owned by the Peoria and Pekin Union Railway Company ("P&PU") and leased to the Tazewell & Peoria Railroad, Inc. ("TZPR").

As pointed out in the Petition, one of BNSF's predecessors, the Burlington Northern ("BN"), acquired the overhead trackage rights in 1973, to enable BN to interchange traffic with TP&W in East Peoria via the P&PU bridge over the Illinois River after the parallel bridge owned

by TP&W was damaged. See Finance Docket No. 27317, *Burlington Northern, Inc. – Trackage Rights – Peoria & Pekin Union Railway Company Between Peoria and East Peoria, Illinois* (not printed), served June 4, 1973. BN discontinued the direct interchange with TP&W in 1982 after the Trackage Rights Agreement was terminated by P&PU, and since that time the interchange has been made via P&PU, and now TZPR.

On March 29, 2010, TP&W filed its Reply in Opposition to the Petition (“Opposition Filing”). BNSF filed a response to the Opposition Filing on April 14, 2010 (“BNSF Response”). On April 26, 2010, TP&W filed a response to the BNSF Response (“TPW Response”). BNSF filed a letter response to the TP&W Response on May 4, 2010. By decision served June 4, 2010, in this proceeding, the Board exempted, from the prior approval requirements of 49 U.S.C. § 10903, the discontinuance of BNSF’s overhead trackage rights over the Line (“June 4th Decision”).

II. PRELIMINARY COMMENTS

Although not unexpected, the Stay Petition is a completely unnecessary exercise on the part of TP&W. The Board can grant a stay only to maintain the *status quo* which BNSF fully intends to do: maintaining the operating *status quo*, including continuing to use TZPR as it has for 28 years, notwithstanding TP&W’s persistent attempts to re-write history and the parties’ governing agreements.

Since TZPR raised its intermediate switch charge in January 2010, BNSF has been besieged by TP&W with proposals seeking BNSF assistance in circumventing TZPR’s intermediate switch charge at Peoria. BNSF has consistently rejected the various TP&W proposals because they would entail either unauthorized and thus unlawful operations on the part of TP&W or they would adversely impact operations in the area.

Stripped of the rhetoric, TP&W's end game is to carve P&PU/TZPR out of the route at Peoria and cobble together the BNSF rights on P&PU/TZPR with the TP&W rights on BNSF between Peoria and Galesburg, all to the perceived advantage of TP&W with no regard for any potential collateral damage to local operations. TP&W's persistent brinksmanship, however, cannot revise history or the current facts and legal status of the parties. Nor can TP&W demonstrate that its own economic self interest is superior to the public interest in ensuring a viable and efficient local operation in the Peoria area. Indeed, TP&W's recent unorthodox practice of attaching an audio file of a message from a BNSF employee further demonstrates TP&W's unrestrained zeal to achieve its own ends by questionable means. While there is nothing in the audio file that is either embarrassing to BNSF or inconsistent with the position BNSF has taken throughout this proceeding, the inclusion of the voicemail was rather surprising and unbecoming conduct.

III. REPLY

A. THE STAY PETITION IS PROCEDURALLY DEFECTIVE.

The Board's appellate procedures governing abandonment and discontinuance proceedings require that a party seeking further administrative action before the abandonment or discontinuance authorization becomes effective "**must** file its petition within 15 days after the administratively final decision is served together with a request for a stay...." 49 C.F.R. § 1152.25(e)(2)(i)(emphasis added). In its Stay Petition, TP&W indicated that it will file its petition by June 29, 2010. Because a petition to reopen can no longer be timely filed to permit Board action prior to the effective date of the June 4th Decision, the Stay Petition should be summarily rejected as procedurally defective. *See also* 49 C.F.R. § 1152.25(e)(7)(ii) ("[A] petition to reopen must be accompanied by a stay request if the party wishes the Board to have

the opportunity to consider the petition to reopen before the abandonment or discontinuance authorization becomes final”).

B. THE STAY CRITERIA HAVE NOT BEEN MET.

The standards governing disposition of a request for stay are: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)(“*Petroleum Jobbers*”). It is the movant’s obligation to justify the exercise of such an extraordinary remedy, *Cuomo v. United States Nuclear Regulatory Comm.*, 772 F.2d 972, 978 (D.C. Cir. 1985), and the movant carries the burden of persuasion on each of the four elements required for the extraordinary relief. *Canal Authority of Fla. V. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

As is demonstrated below, TP&W has failed to meet the stay criteria.

1. TP&W Is Unlikely To Prevail On The Merits.

TP&W claims that BNSF made misleading representations and that the Board’s decision was predicated on those misleading representation. BNSF concedes that it was apparently mistaken as to the scope of TP&W’s trackage rights over TZPR, but the Board’s June 4th Decision was not based on BNSF’s mistaken understanding. Moreover, a fair reading of the record in this proceeding demonstrates that if any party intentionally misled the Board in this proceeding, it was TP&W, not BNSF. TP&W’s mischaracterization of the scope of its trackage rights over TZPR is perpetuated in the Stay Petition.

In its Opposition Filing, TP&W specifically cited to the 1971 proceeding that authorized TP&W's trackage rights over 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 BN 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 were still in effect. BNSF went on to note that "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. In the TP&W Response, TP&W once again cited to its 1971 Trackage Rights. TP&W Response at 4. In so doing, TP&W intentionally failed to refute or address BNSF's mistaken belief that those Trackage Rights were still in effect and failed to explain why TP&W was not using the 1971 Trackage Rights to circumvent the 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, and instead waited to raise the matter in its Petition to Stay. TP&W has the temerity to now seek a reversal of the June 4th Decision based on its own error of omission.

It was only after the Board issued the June 4th Decision, citing to the 2001 TP&W-P&PU trackage rights decision, that BNSF became aware of the fact that the 1971 Trackage Rights were no longer in effect. BNSF has come to learn that P&PU cancelled the 1971 Trackage Rights on February 9, 1993 and requested the Board's predecessor to set the compensation for TP&W's

continued use of the trackage rights. See Finance Docket No. 26476 (Sub-No. 1), *Toledo, Peoria & Western Railway Corp. – Trackage Rights Compensation – Peoria and Pekin Union Railway Company*.

As part of the overall settlement of the compensation proceeding, it appears that TP&W agreed to increase its rental payment to P&PU. It further appears that, in return for a reduced increase in the trackage rights fee, TP&W agreed to give up its rights to interchange traffic with BN in Peoria. See Finance Docket No. 32654, *Toledo, Peoria & Western Railway Corporation – Trackage Rights Exemption – Peoria and Pekin Union Railway Company* (not printed), served February 6, 1995 (the “1995 Trackage Rights”). BNSF had no reason to be aware of the cancellation of the 1971 Trackage Rights, since the portion of those rights allowing an interchange with BNSF had not been used since 1982.

It is, of course, not surprising that TP&W would want to hide that inconvenient fact from BNSF and the Board. In the 1970’s, TP&W apparently elected to keep the insurance money for the damage to its bridge and utilize P&PU’s bridge. In 1995, TP&W voluntarily gave up its rights to interchange with BNSF in Peoria, presumably for some financial gain. Having twice reaped a financial gain, TP&W now seeks to deny that history and resurrect and borrow BNSF’s trackage rights notwithstanding the fact that those rights were terminated by P&PU in 1982 with the full knowledge and consent of TP&W.

In its Stay Petition, TP&W states that it wants a “free route” to interchange with BNSF in Peoria and that the BN trackage rights that were terminated in 1982 were for a “specific pro-competitive purpose”. Stay Petition at 5 and 4, note 2. But TP&W fails to mention that it voluntarily gave up its “free route” and alleged “pro-competitive” trackage rights in 1995.

It appears that TP&W was subsequently successful in expanding the 1995 Trackage Rights to permit TP&W to interchange with BNSF at BNSF's siding near Darst Street in Peoria ("2001 Trackage Rights"). See STB Finance Docket No. 34009, *Toledo, Peoria & Western Railway Company – Trackage Rights Exemption – Peoria and Pekin Union Railway Company* (not printed), served February 23, 2001. According to information provided to BNSF by TZPR, however, the 2001 Trackage Rights are limited to the handling of intermodal traffic. Attached as Exhibit 1 is a map illustrating the scope of TP&W's trackage rights over TZPR. According to TZPR, TP&W has overhead trackage rights between Point "A" and Point "B" for purposes of bridging TP&W's own traffic through Peoria. TP&W also has overhead trackage rights between Point "A" and Point "C" for purposes of interchanging intermodal traffic with BNSF at a BNSF siding near Darst Street. Consequently, due to TP&W's voluntary surrender of its 1971 Trackage Rights, TP&W's direct interchange with BNSF in Peoria via the TZPR line is limited to intermodal traffic.

Moreover, the Board's June 4th Decision was not premised on BNSF's misunderstanding of TP&W's trackage rights over TZPR. Rather, the Board appropriately found that "more detailed regulatory scrutiny of this proposal is not necessary to carry out the Rail Transportation Policy" since the trackage rights had not been used for 28 years. June 4th Decision, slip op. at 3. The Board went on to find that "[r]egulation of the proposed transaction is not necessary to protect shippers from an abuse of market power." In so doing, the Board noted that, since the trackage rights are overhead in nature, no shippers on the line would be adversely affected. Also, no customer served by TZPR's switch has complained. *Id.* In granting the exemption, the Board merely noted the alternatives available to TP&W. It appears clear from the June 4th

Decision that the Board would have granted the requested exemption -- validating the past 28 years of operations in the area -- even if none of the alternatives were available.¹

In its zealous quest to circumvent the TZPR switch charge, TP&W argues that “BNSF is unwilling to agree to a competitive alternative”, and that “granting the trackage rights discontinuance would reduce competitive options to shippers....” Stay Petition at 8. TP&W conveniently forgets that P&PU and now TZPR have been performing the switch in Peoria for **28 years** and that it was TP&W that voluntarily gave up its rights to interchange with BNSF in Peoria whereas BNSF’s trackage rights were terminated by P&PU.²

In summary, TP&W is unlikely to prevail on the merits.

2. Denial Of The Stay Will Not Cause TP&W Irreparable Harm.

An administrative decision is not ordinarily stayed without an appropriate showing of irreparable harm. *Permian Basin Area Rate Case*, 390 U.S. 747, 777 (1968). TP&W has failed to demonstrate that anyone will suffer irreparable harm in the absence of a stay.

TP&W claims it will be irreparably harmed in the absence of stay because “it will be forced to use TZPR as an intermediate switch provider to move cars in interchange with BNSF.” Stay Petition at 10. **But TP&W has been using TZPR as an intermediate switch carrier for 28 years**, and TP&W fails to demonstrate why (and it is inconceivable how it could, in fact) a sea change in local operations must take place immediately to avoid irreparable harm. To the

¹ It is also questionable whether the Board was misled by BNSF’s mistaken belief that the 1971 Trackage Rights were still effective since the Board cited to the 2001 trackage rights proceeding which unambiguously limited TP&W’s interchange rights via the TZPR line to intermodal traffic.

² Contrary to TP&W’s suggestion (Stay Petition at 10), BNSF did not agree to alter the interchange arrangement. Rather, BNSF specifically pointed out that, in addition to being contractually obligated to seek discontinuance authority, operations and traffic conditions had changed since 1982 and that there are operational issues “which may make a direct interchange impracticable and uneconomical.” BNSF Response at 5.

extent paying TZPR the switch charge results in some financial loss to TP&W, the “loss” is not a loss at all, but fair and reasonable consideration resulting from the arm’s length bargain struck by TP&W long ago when TP&W freely decided not to use its insurance funds to reinstall and use its own bridge over the Illinois River. As previously noted, TP&W voluntarily gave up its rights to interchange all traffic with BNSF in Peoria.³

In any event, the allegation, even if accurate, does not rise to the level of sustaining a finding of irreparable harm. See STB Finance Docket No. 34145, *Bulkmatic Railroad Corporation – Acquisition Exemption – Bulkmatic Transport Company* (not printed), served December 27, 2001. The showing of “mere injuries, however substantial, in terms of money...expended in the absence of a stay” do not constitute **irreparable** injury because adequate compensatory relief can be had at a later date. *Petroleum Jobbers*, at 925. Neither the Board nor the courts have found economic injuries of this nature to be irreparable because they are compensable through reparations. See Finance Docket No. 30965 (Sub-No. 1), *Delaware and Hudson Railway Co. – Lease and Trackage Rights Exemption – Springfield Terminal Railway Company* (not printed), served July 15, 1988.

Finally, BNSF questions TP&W’s motives in opposing the discontinuance of BNSF’s trackage rights. For example, TP&W’s latest proposal set forth in the Verified Statement of Mr. Rohal could not possibly work unless TP&W were to operate unlawfully over TZPR. Mr. Rohal seeks to use TP&W’s trackage rights over the BNSF rail line between Peoria and Galesburg. On eastbound moves he seeks to use those rights to TP&W’s yard in East Peoria. Mr. Rohal’s

³ TP&W’s argument that it will be “prohibited from exercising its rights to require BNSF to provide” reasonable interchange facilities (Stay Petition at 10) is not accurate. The only useable interchange facilities BNSF has in Peoria is the siding near Darst Street. As previously noted, TP&W gave up its right to interchange traffic with BNSF in Peoria via the TZPR line except for intermodal traffic.

proposal, however, ignores the fact that the trackage rights over the BNSF line terminate in BNSF's siding near Darst Street (Point "C" on the attached map). Mr. Rohal fails to explain how his trains would lawfully traverse the TZPR line to the TP&W yard in East Peoria for any traffic other than intermodal traffic. Moreover, BNSF currently pays the TZPR switch on eastbound traffic, so there is no switch charge to be saved by TP&W. Mr. Rohal also suggests using the trackage rights over the BNSF line between Peoria and Galesburg for westbound traffic.⁴ Mr. Rohal again fails to explain how he intends to move the TP&W traffic from its yard (Point "A") to the BNSF siding (Point "C") where TP&W's trackage rights begin. As previously noted, BNSF has rejected TP&W's proposals in large part because they cannot lawfully be implemented. BNSF will not conspire with TP&W to engage in unlawful operations even if those unlawful operations are conducted solely by TP&W.

3. A Stay Would be Detrimental to Local Operations.

Granting a stay and forcing BNSF to reinstate its trackage rights operations over TZPN to interchange with TP&W may result in harm to BNSF. First, BNSF would have to make significant operational changes which will likely be costly and potentially inefficient. Second, TZPR will almost certainly initiate a trackage rights compensation proceeding against BNSF at the Board.

4. A Stay Is Not In The Public Interest.

TP&W erroneously claims that BNSF's reinstatement of its trackage rights operations over TZPR would "provide shippers with a competitive alternative to the longer and more costly TZPR intermediate switch...." Stay Petition at 11. There would be no increase in competitive alternatives for the eastbound traffic, since the current TP&W haulage move from Galesburg to

⁴ Mr. Rohal assumes that this would be a permissible use of TP&W's rights over the BNSF line.

the TZPR interchange point and subsequent TZPR move to TP&W's yard would be replaced (as envisioned by TP&W) by a TP&W haulage move from Galesburg to BNSF's siding near Darst Street and a subsequent move by BNSF to TP&W's yard. TP&W's suggestion merely substitutes one carrier for another over a portion of the route. Also, the distance would be identical since the exact same track is traversed and the cost of the BNSF move, in substitution of the TZPR move, will, in all probability, be higher unless BNSF makes a further adjustment that would not be to TP&W's liking. If BNSF were required to reinstitute its trackage rights operations over TZPR it might be more economical for BNSF to handle its traffic straight from Galesburg to the BNSF/TZPR and BNSF/TP&W interchange points in East Peoria. BNSF's trackage rights over TZPR do not permit BNSF to handle westbound traffic.

In summary, requiring BNSF to reinstitute its trackage rights operations over TZPR, assuming that is legally possible, would not save TP&W the switch cost because BNSF pays that cost today for the eastbound traffic and BNSF is not permitted to handle the westbound traffic. Since BNSF is not permitted to haul westbound traffic over the TZPR, those operations would need to continue as they are conducted today.

Consequently, granting the stay is contrary to the public interest. Indeed, granting the stay may ultimately be contrary to TP&W's own interest. Moreover, BNSF seeks to discontinue its trackage rights that have been de facto discontinued and unused for 28 years in order to comply with a contractual commitment. Complying with contractual commitments is clearly in the public interest.

CONCLUSION

BNSF respectfully urges the Board to either reject, as procedurally defective, or deny, as substantively deficient, the Stay Petition. The Stay Petition falls woefully short of meeting the criteria for a stay.

Respectfully submitted,



Karl Morell
Of Counsel
Ball Janik LLP
1455 F Street, N.W.
Suite 225
Washington, D.C. 20005
(202) 638-3307

Kristy D. Clark
General Attorney
BNSF Railway Company
2500 Lou Menk Drive AOB-3
Fort Worth, Texas 76131

Attorneys for:
BNSF Railway Company

Dated: June 29, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June, 2010, I have caused a copy of the forgoing
Reply to be served on all parties of record by first class mail.


Karl Morell

