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October 1, 2010

E-FILE

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street S.W.  
Washington, DC 20423-0001

Re: STB Finance Docket No. 35404, Toledo, Peoria & Western  
Railway Corp.—Petition For Declaratory Order

Dear Ms. Brown:

Attached for e-filing is the Motion to Strike submitted by BNSF Railway  
Company.

If you have any questions, please contact me.

Sincerely yours,



Karl Morell

Enclosure

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB FINANCE DOCKET NO. 35404

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TOLEDO, PEORIA & WESTERN RAILWAY CORP.  
-- PETITION FOR DECLARATORY ORDER

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MOTION TO STRIKE

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Dated: October 1, 2010

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB FINANCE DOCKET NO. 35404

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TOLEDO, PEORIA & WESTERN RAILWAY CORP.  
-- PETITION FOR DECLARATORY ORDER

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MOTION TO STRIKE

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BNSF Railway Company ("**BNSF**") hereby requests the Surface Transportation ("**Board**") to strike the Reply filed by Toledo, Peoria & Western Railroad Corp. ("**TP&W**") with the Board on September 13, 2010 ("**TP&W Reply**"). The TP&W Reply responds to the Reply To Petition filed by BNSF in this proceeding on September 1, 2010 ("**BNSF Reply**"). Pursuant to 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted. *See St. Louis Southwestern Ry. Co. Compensation – Trackage Rights*, 4 I.C.C.2d 668, 673 (1987).

While the Board has on occasion permitted a reply to a reply on a showing of good cause, TP&W has failed to make such a showing. TP&W claims that it is seeking to correct misstatements made by BNSF in the BNSF Reply. As is demonstrated below, it is the TP&W Reply, and not the BNSF Reply, that contains misleading and incorrect statements.

In 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 June 4, 2010, stay request denied by decision served July 2, 2010

(“*BNSF Discontinuance*”), TP&W vigorously opposed the discontinuance of BNSF’s trackage rights over a rail line owned by Peoria and Pekin Union Railway Company (“**P&PU**”) and leased by Tazewell & Peoria Railroad, Inc. (“**TZPR**”) (the “**Line**”). In its Reply in Opposition filed on March 29, 2010, TP&W urged the Board to deny the discontinuance of BNSF’s trackage rights over the Line because the BNSF trackage rights would “enable TP&W to reinstitute the direct interchange with BNSF” and thereby circumvent the TZPR intermediate switch charge. Reply in Opposition at 5. By the time TP&W filed the Petition to Revoke on June 28, 2010, TP&W had abandoned its first theory and, instead, sought a “free route” from BNSF, which, of course, was the very issue TP&W was attempting to pursue in this proceeding until it filed the TP&W Reply.<sup>1</sup>

In the four filings made by TP&W in the *BNSF Discontinuance* proceeding, never once did TP&W state that it had the necessary trackage rights over TZPR to connect with BNSF in Peoria. In the TP&W Reply, TP&W offers two arguments to support its contention that it has the rights necessary to traverse the TZPR rail line and interchange with BNSF in Peoria.<sup>2</sup>

First, TP&W erroneously contends that it received trackage rights in *Burlington Northern Et Al. – Merger – Santa Fe Pacific Et Al.*, 10 I.C.C.2d 661 (1995)(“*BN-ATSF*

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<sup>1</sup> TP&W’s attempt to distinguish the two proceedings by claiming the *BNSF Discontinuance* proceeding involves east bound traffic and this proceeding involves west bound traffic is specious. Because TP&W does not pay the intermediate switch charge for east bound traffic, it must have been seeking to use the BNSF trackage rights for west bound traffic.

<sup>2</sup> One has to wonder why TP&W is so vigorously opposing the discontinuance of BNSF’s trackage rights if either of its arguments is correct, since TP&W could be utilizing those rights today on both east bound and west bound traffic, thereby saving both BNSF and TP&W the intermediate switch charge. TP&W would, of course, have to pay TZPR an appropriate trackage rights fee.

*Merger Proceeding*”), “as a condition precedent to the consummation of the merger...”

TP&W Reply at 4. In addressing the eight settlement agreements in the *BN-ATSF*

*Merger Proceeding*, the Interstate Commerce Commission (“**ICC**”) explained that:

We impose procompetitive conditions in a railroad consolidation proceeding only upon a finding that the conditions will ameliorate what would otherwise be the anticompetitive impacts of the transaction. The practical effect is that, in general, we will impose as a condition an operative provision of a settlement agreement only if we would have imposed that condition (or a similar condition) even without the settlement agreement.

*BN-ATSF Merger Proceeding* at 762.

The ICC went on to find that the TP&W settlement agreement did not address an anticompetitive impact of the proposed merger and, thus, the ICC declined to impose that settlement agreement as a condition to the merger. *Id.* at 762-63. In fact, the ICC specifically stated that the TP&W trackage rights “will not be imposed as [a condition] in this proceeding.” *Id.* at 766. As TP&W well knows, it obtained the trackage rights that were the subject matter of the settlement agreement in ICC Finance Docket No. 32819, *Toledo, Peoria and Western Railway Corporation – Trackage Rights Exemption – Burlington Northern Railroad Company*.<sup>3</sup>

Moreover, the trackage rights TP&W obtained are over the BNSF rail line located between Milepost 00.0, at Galesburg, IL, and Milepost 52.3, at Peoria, IL. In its Notice of Exemption in ICC Finance Docket No. 32819, TP&W explained that “TP&W is to receive bridge trackage rights over BN’s rail line between Galesburg and Peoria in order to enable TP&W to connect with BN and Santa Fe at Galesburg.” Notice at 2-3. Burlington Northern Railroad Company (“**BN**”) could not, and did not, grant TP&W trackage rights over the P&PU

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<sup>3</sup> If the ICC had imposed the TP&W settlement agreement as a condition of the merger, there would have been no need for TP&W to file for those rights in a separate proceeding. *See BN-ATSF Merger Proceeding* at 767

rail line in Peoria. Nor did the ICC grant such trackage rights to TP&W in the *BN-ATSF Merger Proceeding*.<sup>4</sup>

TP&W's argument that the "Board can preempt language in a transportation contract as part of a merger" (TP&W Reply at 6) fails because the predicate to the argument is missing: the ICC did not impose the TP&W settlement agreement as a condition to the merger.

TP&W's second argument is equally unavailing. TP&W notes that in 1971 it received trackage rights over P&PU which provided for a direct interchange with BN in Peoria. ICC Finance Docket No. 26476, *Toledo, Peoria & Western Railroad Co. – Trackage Rights – Peoria & Pekin Union Railway Co.* (not printed), served June 25, 1971 ("**1971 Trackage Rights**"). P&PU canceled the 1971 Trackage Rights in February 1993 and asked the ICC to set the compensation for the continued use of those trackage rights. See ICC Finance Docket No. 26476 (Sub-No. 1), *Toledo, Peoria & Western Railway Corp. – Trackage Rights Compensation – Peoria and Pekin Union Railway Company* (not printed), served January 25, 1995 ("**Compensation Proceeding**"). The parties subsequently reached a settlement whereby TP&W agreed to give up its rights to interchange with BN in return for a lower trackage rights fee. TP&W filed to obtain the new trackage rights (without the authority to interchange with BN) in ICC Finance Docket No. 32654, *Toledo, Peoria & Western Railway Corporation – Trackage Rights Exemption – Peoria and Pekin Union Railway Company* (not printed), served February 6, 1995 ("**1995 Trackage Rights**"). The ICC subsequently dismissed the *Compensation Proceeding*.

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<sup>4</sup> TP&W's reliance on an e-mail drafted by counsel for BNSF is misplaced. First, the e-mail does not say what TP&W claims it says. In any event, it is more appropriate to look to the ICC's decision in the *BN-ATSF Merger Proceeding* in determining what conditions were or were not imposed as a condition precedent to the consummation of the merger.

Notwithstanding the new agreement with P&PU and its filing with the ICC for the 1995 Trackage Rights, TP&W now claims that the portion of its 1971 Trackage Rights that enabled TP&W to interchange with BN in Peoria is still in existence since TP&W never filed to discontinue those rights. The theory is legally flawed and inconsistent with TP&W's contractual obligations.<sup>5</sup>

Railroads have been filing to modify existing trackage rights, including a reduction in the scope of the outstanding trackage rights, by filing a notice of exemption under 49 C.F.R. § 1180.2(d)(7), without any Board requirement that they also file to discontinue the portion of the prior rights being surrendered. *See e.g.*, STB Finance Docket No. 30868 (Sub-No. 1), *Union Pacific Railroad Company – Amendment of Trackage Rights Exemption – BNSF Railway Company* (not printed), served July 20, 2006 (the purpose of the amended trackage rights was to remove 1.09 miles of track from the agreement). The Board has also routinely granted limited term trackage rights which expired without the tenant carrier having to file for discontinuance authority. *See e.g.*, STB Finance Docket No. 34082 (Sub-No. 1), *Union Pacific Railroad Company – Trackage Rights Exemption – The Burlington Northern and Santa Fe Railway Company* (not printed), served September 13, 2001; STB Finance Docket No. 34053 (Sub-No. 1), *Union Pacific Railroad Company – Trackage Rights Exemption – The Burlington Northern and Santa Fe Railway Company* (not printed), served July 17, 2001; STB Finance Docket No. 34037 (Sub-No. 1), *The Burlington Northern and Santa Fe Railway Company – Trackage Rights Exemption – Union Pacific Railroad Company* (not printed), served June 6, 2001; STB Finance Docket No. 33657 (Sub-No. 1), *Union Pacific Railroad Company – Trackage Rights Exemption*

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<sup>5</sup> TP&W apparently believes that it has no obligation to abide by contractual commitments made by its predecessors just as it sought to have BNSF ignore BNSF's contractual commitment in the *BNSF Discontinuance* proceeding.

– *The Burlington Northern and Santa Fe Railway Company* (not printed), served November 10, 1998.

Moreover, outstanding trackage rights can be legally extinguished not only by a grant of discontinuance authority under 49 U.S.C. § 10903, but also by the approval of a new trackage rights agreement that supersedes a prior agreement. *See* ICC Finance Docket No. 32103, *Milford-Bennington Railroad Company, Inc. – Trackage Rights Exemption – Boston and Maine Corporation and Springfield Terminal Railway Company* (not printed), served September 3, 1993; *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134, 146-48 (1946) (once new trackage rights are granted they supersede the prior expired rights without need to file for discontinuance).

The 1971 Trackage Rights were canceled by P&PU in 1993. If TP&W and P&PU had taken no further action, TP&W would today be legally permitted to utilize the 1971 Trackage Rights, subject to appropriate compensation paid to TZPR. The ICC’s decision authorizing the 1995 Trackage Rights, however, legally terminated the 1971 Trackage Rights, which, of course, was the intent of the parties and the understanding of the ICC.

In summary, neither of TP&W’s arguments is correct. Therefore, TP&W has failed to show good cause for the filing of the TP&W Reply. Consequently, the TP&W Reply should be stricken as an impermissible reply to a reply.

The TP&W Reply only further illustrates the futility of TP&W’s requested relief in the BNSF Discontinuance proceeding and in this proceeding. TP&W first opposed the discontinuance of BNSF’s trackage rights because it sought to use those rights to circumvent the TZPR intermediate switch charge. After BNSF pointed out that the expired BNSF trackage rights could not be used to circumvent the switch charge, TP&W changed its theory and sought a “free route” from BNSF in both the BNSF Discontinuance proceeding and in this proceeding.

After BNSF pointed out that TP&W was not entitled to a “free route” because BNSF and TP&W do not connect in Peoria, TP&W once again changed its theory. TP&W now claims that it can utilize the long-terminated 1971 Trackage Rights to connect with BNSF in Peoria. But TP&W’s new theory undermines its first and second theory. If TP&W had trackage rights to connect with BNSF in Peoria, TP&W would have no need to utilize the expired BNSF trackage rights and it would have a free route to interchange with BNSF in Galesburg.

TP&W is hopelessly floundering about for a theory that will enable it to circumvent the TZPR intermediate switch charge. Sadly for TP&W there is none short of rebuilding its bridge in Peoria.

### CONCLUSION

BNSF respectfully urges the Board to strike the TP&W Reply.

Respectfully submitted,



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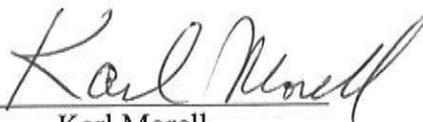
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BNSF Railway Company

Dated: October 1, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that on this 1<sup>st</sup> day of October, 2010, I have caused a copy of the forgoing Reply to be served on all parties of record by first class mail.

  
Karl Morell