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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35404

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

PETITION TO INTERVENE
OF TAZEWELL & PEORIA RAILROAD, INC.

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Dated: October 1, 2010

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On August 13, 2010 Toledo, Peoria & Western Railway Corp. (“TP&W”) filed a petition ostensibly seeking a declaratory order relating to interchange arrangements between TP&W and BNSF Railway Company (“BNSF”) in Peoria, Illinois. BNSF filed a reply on September 1, 2010, setting forth why no declaratory order was necessary, and why no direct interchange was possible without the use of the intermediate tracks of Tazewell & Peoria Railroad, Inc. (“TZPR”). TP&W filed a reply and a request for leave to file the reply on September 13, 2010, attacking BNSF’s filing and making a number of assertions about its current operating rights in Peoria. If the Board determines to institute a proceeding, then TZPR hereby requests permission pursuant to 49 CFR §1112.4 to intervene in this proceeding to protect its interests.

In this proceeding TP&W claims that BNSF must provide it with a “free interchange” in Peoria. As has been described in great detail in STB Docket No. AB-6 (Sub-No. 470X), *BNSF Railway Company – Discontinuance of Trackage Rights Exemption – In Peoria and Tazewell Counties, Illinois*, the tracks of TP&W and BNSF no longer directly connect in Peoria, and movements between TP&W and BNSF in Peoria have been handled via an intermediate switch by TZPR (and its predecessor Peoria and Pekin Union Railway (“PPU”)) for almost 30 years. BNSF was granted authority to discontinue trackage rights eastbound to TP&W yard. (Although

its petition for stay was denied, TP&W continues to seek revocation in that proceeding.). Although TP&W also asserted in the BNSF discontinuance proceeding that it was entitled to a free interchange, it says its request in this proceeding is different, that it is only seeking a free interchange for westbound traffic which is not handled under the discontinued BNSF trackage rights which only covered eastbound traffic. TP&W Reply at 4. TP&W conveniently omits that it can only reach BNSF for westbound moves through the use of TZPR's tracks, that its rights to use the TZPR tracks are limited, that only TP&W intermodal traffic can be moved westbound for interchange with BNSF, and that there is a fee payable to TZPR for the use of its tracks. See 2006 Amended and Restated Trackage Rights Agreement ("2006 Amended Trackage Rights Agreement") between TZPR and TP&W, attached to TZPR's Reply to Petition for Stay in STB Finance Docket No. AB-6 (Sub-No. 470X). TZPR is concerned that TP&W's claims could be read as seeking expanded use of the limited trackage rights that currently exist, while simultaneously making that use "free". The 2006 Amended Trackage Rights Agreement was freely negotiated by the parties, and TP&W should not be able to change the terms over the objections of TZPR.

Standards for Intervention

Because the Board has not yet accepted the Petition or set any procedural schedule, intervention would not unduly disrupt the schedule. Nor would TZPR's participation unduly broaden the issues that will necessarily have to address TP&W's rights to use TZPR's tracks. Additionally, in accordance with 49 CFR §1112.4(b), TZPR sets forth the following:

- (1) *TZPR's interest in the proceeding.*

There has been no true direct interchange between BNSF and TP&W since TP&W's bridge was destroyed in 1970. Thus, any "free interchange" between TP&W and

BNSF must use the intermediate tracks of TZPR. That use is limited by agreement between TP&W and TZPR, and there is an agreed upon fee for that use. TP&W seems to be trying to expand the use by referring to a 1971 trackage rights order (which was superseded by a 1994 agreement which was approved by the ICC, and which in turn was amended several times, most recently in 2006). Under the 2006 Amended Trackage Rights Agreement (and its predecessors going back to at least 1994), it is clear that TP&W's operations over TZPR are limited to traffic moving between TP&W's disconnected tracks in East Peoria and its tracks in Peoria near Iowa Junction (see the map attached to the 2006 amendment), and currently also to intermodal traffic moving between its tracks in East Peoria and BNSF at Darst Street (where TP&W's trackage and haulage rights to Galesburg begin and end).¹ It is clear that TP&W cannot use the trackage rights for other interchange traffic between itself and BNSF. And it is clear that the use of the trackage rights is not free.

TP&W also claims that its settlement with BNSF in the BNSF merger case, and the ICC's merger decision somehow gave it direct interchange rights and/or superseded the trackage rights agreements with PPU/TZPR which TP&W had voluntarily entered into – both before and after the merger decision. Regardless of what the BNSF merger decision provides as to interchange between TP&W and BNSF in Peoria, it is clear that the decision did not and could not grant TP&W or BNSF expanded trackage rights over PPU's intermediate tracks. Neither the Board nor the ICC before it, has or had the power to grant trackage rights over or impose conditions on persons other than the merger applicants. *Cf.* 49 CFR §1180.1(d) (power to impose conditions on consolidations of Class I carriers). TZPR's interest in this proceeding is to

¹ The 1994 trackage rights agreement only allowed TP&W to move traffic between its disconnected lines and did not allow any interchange with BNSF.

see that the terms and conditions of the 2006 Amended Trackage Rights Agreement with TP&W are strictly enforced.

(2) *TZPR's position in the proceeding.*

TZPR supports the request of BNSF to dismiss the Petition for Declaratory Order, or if a proceeding is instituted, to find that TP&W does not have direct interchange rights with BNSF in Peoria.

(3) *TZPR's request for relief.*

If a proceeding is instituted, TZPR requests the Board declare that TP&W can only use TZPR's tracks in accordance with the terms and conditions set forth in the 2006 Amended Trackage Rights Agreement voluntarily agreed to by TP&W, and that TP&W has no other rights to use TZPR's tracks.

Conclusion

For the reasons set forth above, TZPR requests that the Board, if it institutes a declaratory order proceeding, allow TZPR to intervene.

Respectfully submitted,



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Dated: October 1, 2010

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VERIFICATION

I, Spencer White, President of Tazewell & Peoria Railroad, Inc., verify under penalty of perjury that statements contained in the foregoing document are true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file this Verification.

Executed on October 1, 2010.

A handwritten signature in black ink, appearing to read "Spencer White", written over a horizontal line.

Spencer White

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October, 2010, I served a copy of the foregoing by
email on the following:

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