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June 21, 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

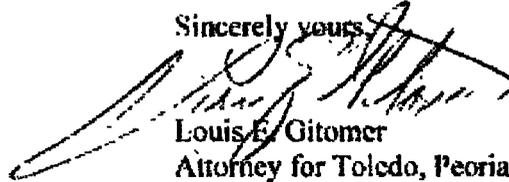
RE: Docket No. AB-6 (Sub-No. 470X), *BNSF Railway Company Discontinuance of
Trackage Rights Exemption in Peoria and Tazewell Counties, II.*

Dear Ms. Brown:

The Toledo, Peoria & Western Railroad Co. is e-filing the attached Petition for Stay

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

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

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

PETITION FOR STAY

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Attorneys for: TOLEDO, PEORIA AND
WESTERN RAILWAY CORPORATION

Dated: June 21, 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 FOR STAY

The Toledo, Peoria and Western Railway Corporation (“TP&W”) respectfully petitions the Surface Transportation Board (the “Board”) to stay the July 4, 2010 effective date of *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 requests that the Board grant a stay to remain in effect until the Board acts on TP&W’s Petition to Revoke the Petition for Exemption, which will be filed by June 29, 2010.

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

TP&W will demonstrate that there is a strong likelihood that it will prevail on the merits of the Petition to Revoke, will suffer irreparable harm in the absence of a stay, that other interested parties will not be substantially harmed, and that the public interest supports the granting of the stay.

STAY CRITERIA

The Board has recently said that:

In deciding petitions for stay, the Board follows the traditional stay criteria by requiring a party seeking a stay to establish that: (1) there is a strong likelihood that it will prevail on the merits of any challenge to the action sought to be stayed; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed; and (4) the public interest supports the granting of the stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). The party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

Norfolk Southern Railway Company—Petition for Exemption—in Baltimore City and Baltimore County, MD, STB Docket No. AB 290 (Sub-No. 311X) (STB served May 4, 2010) at 3. TP&W will demonstrate that the stay criteria have been met in this situation.

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 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.

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 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).

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 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 trackage 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 trackage 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 interchange traffic with TP&W at Darst Street. In a voice mail sent on June 16, 2010 from Mark

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*").

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).

A STAY OF THE DISCONTINUANCE EXEMPTION IS JUSTIFIED.

I. There is a strong likelihood that TP&W will prevail on the merits.

In order to prevail on the merits of a Petition to Revoke (the “Petition”), TP&W must demonstrate that regulation “is necessary to carry out the transportation policy of section 10101.” 49 U.S.C. §10502. In addition, the Board has stated that it would use revocation in the event the Board’s process had been misused or abused.⁴

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.

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*”).

TP&W will prevail on the merits because the statement made by BNSF to TP&W after the *Discontinuance Exemption* that BNSF will keep interchange operations as they currently are demonstrates both that regulation “is necessary to carry out the transportation policy” because BNSF is unwilling to agree to a competitive alternative, and that 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 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, without the predicate of alternate interchange options adopted by the Board based on the obviously misleading representations of BNSF, TP&W will be able to show that regulation is required to carry out the competitive provisions of the transportation policy at 49 U.S.C. §10101. 49 U.S.C. §10502(d).

Based on the new evidence that BNSF will not agree to direct interchange with TP&W at Peoria, TP&W will have no option but to rely on its TZPR. TP&W will have to use TZPR for interchange to 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.

Moreover, BNSF’s refusal to interchange directly with TP&W is a changed circumstance that is contrary to the rail transportation policy and that 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 Peoria-Galesburg line. Without access to BNSF's track, TP&W cannot interchange traffic directly to BNSF as the Board noted TP&W had authority to do in the *Discontinuance Exemption*.

The Board committed material error in the *Discontinuance Exemption* by relying on a representation made by BNSF that BNSF would allow TP&W to 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 and even though 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. Thus, TP&W has no means to independently switch with BNSF in Peoria. BNSF does not recognize and will not implement the competitive options proposed by the Board, contrary to competitive provisions of the transportation policy.

The Board mistakenly relied on *Delaware and Hudson Railway Company, Inc.—Discontinuance of Trackage Rights—in Susquehanna County, PA, and Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Erie, and Genesee Counties, NY*, AB-156 (Sub-No. 25X) (STB served June 19, 2005) ("*Delaware and Hudson*"). *Delaware and Hudson* is cited for the proposition that the Board will grant a discontinuance of trackage rights even though another rail carrier opposes the discontinuance because it will lose its direct interchange with the carrier seeking discontinuance authority. However, in *Delaware and Hudson*, the short line carrier opposing discontinuance did not lose its ability to interchange directly with the Delaware and Hudson Railway Company, Inc. ("D&H"). D&H entered into a haulage

agreement with the owner of the line over which D&H was discontinuing service for that carrier to move the short line's traffic in D&H's account, thus retaining the direct interchange with D&H. The Board specifically recognized that haulage rights can mitigate the impact of the trackage rights discontinuance. The Board went on to state that even without the haulage agreement there was sufficient competition in the area. In this proceeding, there is no similar haulage agreement in place to replace the trackage rights and competition is limited by TZPR's ability, as owner of the switch between BNSF's and P&PU's lines in Peoria, to limit TP&W's access to BNSF's lines. Moreover, BNSF has refused to alter the interchange arrangement as it represented to the Board.

As demonstrated above, there is a strong likelihood that TP&W will prevail on the merits. Moreover, the Board should protect the abuse of its process from representations that are made but then renounced after a Board decision is made that relies on those representations.

2. TP&W will suffer irreparable harm in the absence of a stay.

TP&W will be placed in a position where it will be forced to use TZPR as an intermediate switch provider to move cars in interchange with BNSF. Moreover, TP&W will be prohibited from exercising its rights to require BNSF to 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.

Moreover, the Board's processes will be irreparably harmed. Failure to revoke will allow a railroad to disavow a representation made in a Board proceeding to be revoked by the railroad after it receives a favorable decision from the Board that relied on the representation. But see *Milwaukee* for the Board's recent view of abuse of process.

3. A stay will not substantially harm other interested parties.

A stay will not harm BNSF. BNSF is not paying to use the trackage rights. Requiring BNSF to wait a little longer to discontinue its trackage rights will not cause substantial harm when BNSF has already waited 28 years.

4. The public interest supports the granting of the stay.

By maintaining the status quo BNSF will retain trackage rights allowing it to interchange traffic directly with TP&W at Peoria without using TZPR. This will provide shippers with a competitive alternative to the longer and more costly TZPR intermediate switch and provide TP&W with the ability to require delivery to its yard in Peoria by BNSF since BNSF has recanted its representation that there are other means of direct interchange. Protection of the Board's processes is also consistent with the public interest.

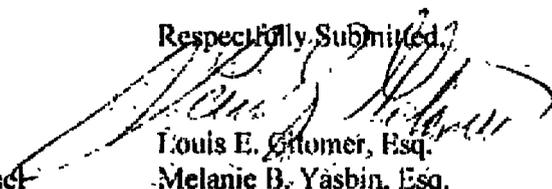
CONCLUSION

TP&W has demonstrated that a stay would be consistent with Board precedent.

Therefore, TP&W respectfully requests that the Board stay the *Discontinuance Exemption* until it rules on the Petition.

Scott G. Williams Esq.
Senior Vice President & General Counsel
RailAmerica, Inc.
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Jacksonville, FL 32256
(904) 538-6329

Respectfully Submitted,

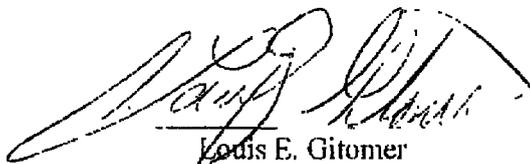

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Attorneys for: TOLEDO, PEORIA AND
WESTERN RAILWAY CORPORATION

Dated: June 21, 2010

CERTIFICATE OF SERVICE

I certify that I have this June 21, 2010 served copies of this Petition for Stay upon all parties of record in this proceeding, by electronic delivery.



Louis E. Gitomer

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

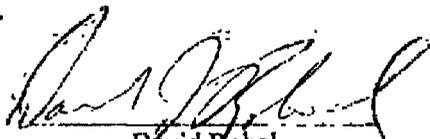
the east bound direction, TP&W would pick up traffic in BNSF's Galesburg yard and deliver it to TP&W's Peoria yard using the trackage rights granted to TP&W in the transaction that created the BNSF. For west bound traffic, TP&W proposed using the trackage rights to handle traffic from Peoria to Galesburg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