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September 13, 2010

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

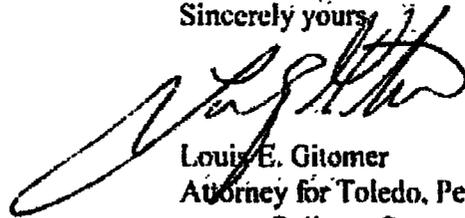
**RE: Finance Docket No. 35404, Toledo, Peoria & Western Railway Corp.—  
Petition for Declaratory Order**

Dear Ms. Brown:

Enclosed for e-filing is a Reply, including a request for leave to file the Reply.  
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  
Railway Corp.

Enclosure

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Office of Proceedings

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Part of  
Public Record

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35404

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

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REPLY

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Attorneys for: TOLEDO, PEORIA & WESTERN  
RAILWAY CORP.

Dated: September 13, 2010

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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REPLY

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Toledo, Peoria & Western Railway Corp. ("TP&W") respectfully requests leave from the Surface Transportation Board (the "Board") to file this reply to correct misstatements made by BNSF Railway Company in the inaccurate, vitriolic, and ethically challenged Reply filed on September 1, 2010.

First, the BNSF Discontinuance Proceeding<sup>1</sup> currently pending before the Board is not relevant here. TP&W is seeking a declaratory order from the Board that TP&W does not have to pay for the intermediate switching fee imposed by the Tazewell & Peoria Railroad, Inc. ("TZPR")<sup>2</sup> on traffic that TP&W moves westbound for interchange to BNSF in Peoria, IL at

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<sup>1</sup> *BNSF Railway Company-Discontinuance of Trackage Rights Exemption-in Peoria and Tazewell Counties, Ill.*, AB-6 (Sub-No. 470X).

<sup>2</sup> Peoria and Pekin Union Railway Company ("P&PU") leased its rail lines to the Tazewell & Peoria Railroad, Inc ("TZPR") in 2004. *See Tazewell & Peoria Railroad, Inc. - Lease and Operation Exemption - Peoria and Pekin Union Railway Company*, STB Finance Docket No. 34544 (STB served Sept. 28, 2004).

BNSF's direction. TP&W is only able to interchange at the location directed by BNSF because TP&W can directly connect to BNSF in Peoria, using trackage rights it received in the *Burlington Northern et al.-Merger-Santa Fe Pacific et al.*, 10 I.C.C.2d 661, 675, and 813 (1995) ("*BN-SF Merger*"), as a condition precedent to the consummation of the merger of the Burlington Northern Railroad Company ("BN") and the Atchison, Topeka and Santa Fe Railway Company ("ATSF"). In the separate proceeding to which BNSF refers in its Reply, the trackage rights where BNSF seeks to discontinue service permit BNSF to operate over the TZPR rail line for eastbound traffic, such traffic not being at issue in TP&W's present request for declaratory order applicable to only westbound traffic. While, TP&W has raised the issue of a free route in both the Petition for a Declaratory Order and the Discontinuance Proceeding, in its Reply, BNSF failed to explain to the Board that the traffic at issue in each proceeding is different.

Second, BNSF ignores both the statute and case law by claiming that in 1995 TP&W "voluntarily surrendered" the trackage rights granted in *Toledo, Peoria & Western Railroad Co.—Trackage Rights—Peoria & Pekin Union Railway Co.*, ICC Finance Docket No. 26476 (ICC served June 25, 1971) (the "*TPW Trackage Rights Order*"), which provided for direct interchange with BNSF over the TZPR.<sup>3</sup>

Acquisition by a rail carrier of trackage rights over a railroad line owned or operated by

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<sup>3</sup> In 1994, TP&W was granted overhead trackage rights by P&PU over 4.8 miles of line, between the connection with BNSF near Darst Street in Peoria and the connection with TP&W at North Main Street in East Peoria, for the purpose of enabling TP&W to connect its lines that are on opposite sides of the Illinois River (the "1994 Agreement"). This trackage rights agreement resulted from a settlement of a compensation issue concerning the *TPW Trackage Rights Order*. As part of this proceeding, P&PU erroneously claimed that the *TPW Trackage Rights Order* had terminated on February 6, 1993.

another rail carrier may be carried out only with the approval and authorization of the Board. 49 U.S.C. §11323(a)(6). TP&W was granted trackage rights and the authority to independently interchange traffic with BNSF in *TPW Trackage Rights Order*. TP&W began operations in accordance with *TPW Trackage Rights Order* in 1971. Under 49 U.S.C. §10903, after a carrier begins trackage rights operations, discontinuance of the service may not occur absent a certificate of discontinuance issued by the Board. See *Thompson v. Texas M. R. Co.*, 328 U.S. 134, 144 (1946). The trackage rights were authorized as part of an application and thus require discontinuance authorization for TP&W to discontinue service. While TP&W has not used these trackage rights for several years, at no time has TP&W sought authority to discontinue the trackage rights that were granted to it in *TPW Trackage Rights Order*. Nor has the Board, or the Interstate Commerce Commission (the "ICC") before it, authorized discontinuance of service for TP&W's use of the Line.

Third, even if TP&W could have "voluntarily surrendered" its trackage rights, which it did not, the Board granted TP&W authority to directly interchange with BNSF in Peoria in the *BN-SF Merger*. While BNSF states that TP&W has failed to refer to the Discontinuance Proceeding in the Declaratory Order request, it is telling that BNSF omits any reference to the condition imposed in the *BN-SF Merger*, which remains in effect and will remain in effect unless and until the Board reopens that proceeding and removes the condition, mandating a direct interchange between BNSF and TP&W in Peoria. Not only does BNSF omit the *BN-SF Merger*, but BNSF's own counsel in this proceeding contradicts the opinion he previously gave to TP&W when he represented TP&W (See Exhibit A), also arguing that the condition imposed in the *BN-*

*SF Merger* reinforces the requirement that a direct interchange between BNSF and TP&W exists. The BNSF-TP&W settlement agreement was imposed by the ICC as a condition precedent to the merger of BN and ATSF. In describing the agreement, the ICC stated “TP&W will have the right to interchange between the trackage rights line and BN/Santa Fe at Galesburg and Peoria. TP&W will also have the right to interchange between the trackage rights line and the Peoria and Pekin Union Railway Company.” *BN-SF Merger* at 813. The Board can preempt language in a transportation contract as part of a merger. See *CSX Corp. et al. –Control—Conrail, Inc. et al.*, 3 S.T.B. 196, 274 (1998). Thus, the condition imposed by the ICC in *BN-SF Merger* allowing for direct interchange between TP&W and BNSF on the Line preempts the 1994 Agreement preventing such interchange. The settlement was imposed well after P&PU had begun performing intermediate switching between TP&W and BN.

Finally, despite BNSF's emphatic claims to the contrary, a controversy clearly exists. It should be made clear that TP&W is *not* asking BNSF to make TZPR's track available for TP&W's use in interchange to BNSF. At BNSF's direction, TP&W delivers cars in interchange to BNSF at Peoria using trackage rights TP&W has, but must pay an intermediate switch fee to TZPR. As a result, BNSF's direction as to the location of interchange is contrary to the Board's rulings requiring the receiving carrier to provide a free route. As has been noted in other proceedings, TP&W, under authority granted by the Board, can connect directly with BNSF for

interchange purposes.<sup>4</sup> Thus, BNSF *must* provide TP&W with a free route to the interchange point. The Board has mandated an interchange in Peoria between TP&W and BNSF in *BN-SF Merger*. If the Board does not institute a declaratory order proceeding, it will allow BNSF to unilaterally void a condition imposed in the *BN-SF Merger*. The Board has previously rejected an effort by BNSF to change conditions imposed in a merger proceeding without advance Board authority. BNSF sought to expand trackage rights that it had been granted as a condition to a merger even though the Board had not approved the expansion. Once the matter was brought before the Board, the Board determined that “the Board has not approved” expansion of the condition and the original condition now remains in place.<sup>5</sup> It should be obvious that BNSF is again trying to modify a condition imposed by the Board without advance authorization from the Board.

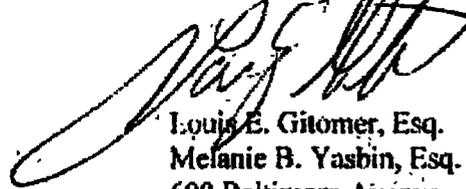
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<sup>4</sup> If TP&W cannot connect directly with BNSF, it is because BNSF failed to repair the Darst Street connection with TP&W in Peoria when it was damaged, obviously deferring repair and maintenance and instead, to use a version of BNSF’s words: “pocket ... the money.” Reply at 5.

<sup>5</sup> *Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company—Control and Merger—Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company*, Decision No. 105, STB Finance Docket No. 32760 (STB served May 1, 2008) at 6.

TP&W urges the Board to protect its processes and conditioning power by rejecting the arguments made by BNSF (which are also contrary to the advice BNSF's counsel gave TP&W when he represented TP&W) in the Reply, opening a declaratory order proceeding and granting the relief sought by TP&W.

Respectfully submitted,



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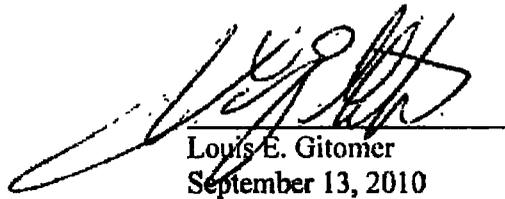
Attorneys for: TOLEDO, PEORIA & WESTERN  
RAILWAY CORP.

Dated: September 13, 2010

CERTIFICATE OF SERVICE

I certify that I have this day served a copy of this Reply upon the following representative of the BNSF Railway Company by electronic delivery.

Karl Morell  
Ball Janik, LLP  
1455 F Street, NW  
Suite 225  
Washington, DC 20005



Louis E. Gitomer  
September 13, 2010

# **EXHIBIT A**

## Houston, Kelly (SATX)

**From:** Morell, Karl [KMorell@bjllp.com]  
**Sent:** Thursday, December 07, 2000 3:40 PM  
**To:** 'Smoot, David (MNA)'; Franger, Sandy K. (SATX); Spiegel, Gary (Boca); Conklin, Joe (SATX); Sauer, Al (Boca)  
**Cc:** Houston, Kelly (SATX)  
**Subject:** RE: TPW Galesburg Trackage Rights

Dave, Section 4.02 of the Trackage Rights Agreement between PPU and TPW specifically provides that TPW may only use the PPU joint track for purposes of bridging movements between the TPW line to the east of Peoria with the TPW line to the west. In other words, TPW is not authorized by the Trackage Rights Agreement to use the PPU tracks in Peoria to connect with the BNSF line.

The BNSF-TPW Trackage Rights Agreement, however, was entered into as part of a settlement agreement between TPW and BN-Santa Fe in the BN-Santa Fe merger case and that agreement was imposed by the ICC as a condition to the merger. In describing the agreement, the ICC explained that "TP&W will have the right to interchange between the trackage rights line and BN/Santa Fe at Galesburg and Peoria. TP&W will also have the right to interchange between the trackage rights line and the [PPU]." More importantly, the BNSF-TPW Trackage Rights Agreement, which was approved by the ICC, specifically authorizes TPW to connect between the BN line running into Peoria and TPW's line in Peoria.

If PPU takes the position that the PPU-TPW Agreement precludes TPW from connecting onto the BN line in Peoria, TPW can argue that Section 4.02 of the PPU-TPW Agreement is preempted by the condition imposed by the ICC in the BN-Santa Fe merger case in favor of TPW. The fact that TPW has already performed operations between the BN and PPU lines without any objection from PPU would further support the argument that Section 4.02 was preempted.

In summary, TPW has a fairly good argument that the condition imposed by the ICC in the BN-Santa Fe merger authorizes TPW to operate between the PPU line and the BN line in Peoria and that any restriction to such operations in the prior PPU-TPW Agreement are overridden. Because the law on the scope of preemptions in merger cases is not clear, it would be very helpful to have PPU expressly acknowledge in writing that it is agreeable to the contemplated TPW operations.

If you have any questions or need additional information, please contact me.

-----Original Message-----

**From:** Smoot, David (MNA) [mailto:David.Smoot@RailAmerica.com]  
**Sent:** Thursday, December 07, 2000 9:10 AM  
**To:** Franger, Sandy K. (SATX); Spiegel, Gary (Boca); Conklin, Joe (SATX); Sauer, Al (Boca)  
**Cc:** 'Mcrcoll Karl (E-mail)'; Houston, Kelly (SATX)