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September 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

ENTERED
Office of Proceedings

SEP 1 - 2010

Part of
Public Record

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

Dear Ms. Brown:

Attached for e-filing is the Reply To Petition submitted by BNSF Railway
Company.

If you have any questions, please contact me.

Sincerely yours,



Karl Morell

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35404

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

REPLY TO PETITION

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Dated: September 1, 2010

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35404

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

REPLY TO PETITION

BNSF Railway Company ("BNSF") hereby replies in opposition to the Petition For Declaratory Order filed by Toledo, Peoria & Western Railroad Corp. ("TP&W") with the Surface Transportation Board ("Board") on August 13, 2010 ("Petition"). As is demonstrated below, the Petition is fatally flawed in several respects and should summarily be denied.

First, TP&W seeks a ruling from the Board that BNSF must provide TP&W a "free route" for interchange between the parties in the Peoria area. But that very issue is currently pending before the Board in STB Docket No. AB-6 (Sub-No. 470X) ("BNSF Discontinuance"). In BNSF Discontinuance, TP&W has tenaciously objected to BNSF's discontinuance of trackage rights over a rail line leased by Tazewell & Peoria Railroad, Inc. ("TZPR"), notwithstanding the fact that those trackage rights were cancelled in 1982 and have not been used in 28 years. What makes TP&W's opposition even more puzzling is the fact that those trackage rights would be of absolutely no benefit to TP&W since they only permit BNSF to operate over the TZPR rail line for eastbound traffic and BNSF pays TZPR's intermediate switch charge for that traffic.¹ In the

¹ If BNSF were to reinstitute the trackage rights operations, TP&W would be obligated to pay the trackage rights fee on eastbound traffic. Thus, TP&W would actually be in a worse financial situation if it had prevailed in the BNSF Discontinuance proceeding.

BNSF Discontinuance proceeding, TP&W has filed: (1) Reply in Opposition on March 29, 2010 (“TP&W Reply”) (seeking “to reinstitute a direct interchange with BNSF....” TP&W Reply at 5); (2) a Response to Sur-reply of BNSF;² (3) a Petition for Stay (“Stay Petition”) (seeking a “free route” over TZPR. Stay Petition at 5.);³ and (4) a Petition to Revoke which is currently pending before the Board.

In the Petition to Revoke, TP&W argues that it is entitled to a “free route” over TZPR which is the identical issue TP&W raises in the Petition. Interestingly, TP&W makes no mention of the BNSF Discontinuance proceeding in the Petition. Since the issue is currently pending before the Board, TP&W’s request for a declaratory order should be denied. See STB Finance Docket No. 34052, *Green Mountain Railroad Corporation – Petition For Declaratory Order* (not printed), served May 28, 2002 (requested declaratory order denied because identical issues were pending before a United States District Court); STB Finance Docket No. 34776, *National Solid Wastes Management Association, Et Al. – Petition For Declaratory Order* (not printed), served March 10, 2006. Moreover, the Board should not encourage TP&W’s abusive litigating tactics.

Second, TP&W requests the institution of a declaratory order proceeding “to terminate a controversy or remove uncertainty.” Petition at 3. There is, however, no controversy or uncertainty to terminate other than the controversy and confusion that TP&W has attempted to create in the Petition and in its filings in the BNSF Discontinuance proceeding. TZPR and its predecessor, Peoria and Pekin Union Railway Company (“P&PU”) have been providing the intermediate switch on traffic interchanged between TP&W and BNSF in the Peoria area for nearly three decades without any controversy or uncertainty. It was only after TZPR raised the

² BNSF’s Petition for Exemption was granted by the Board in a decision served June 4, 2010.

intermediate switch fee that TP&W embarked on its misguided quest for a “free route”. The fact of the matter is that TP&W has not had a “free route” since 1970, when its bridge in Peoria was damaged and it elected to pocket the insurance money rather than repair the bridge. Moreover, in 1995, TP&W voluntarily surrendered the portion of its trackage rights over P&PU that provided TP&W a direct interchange with BNSF.⁴ Facts can be stubborn things and the inconvenient fact for TP&W is that it voluntarily surrendered whatever direct access it had to BNSF in Peoria. Today, TP&W and BNSF are non-connecting carriers in Peoria, a situation that is of TP&W’s own making. Moreover, because TP&W was obligated to pay the trackage rights fees to P&PU for both east bound and west bound traffic, TP&W has not had a free route through Peoria since its bridge was damaged.

Third, much of the factual information set forth in the Petition is erroneous or misleading. For example, TP&W states that “[t]hrough its existing trackage rights over the TZPR, and its haulage arrangement with BNSF, TP&W can move cars for BNSF from TP&W’s yard to the point of interchange in Galesburg.” Petition at 4 (footnotes omitted). In fact, TP&W makes this blatantly false statement twice. See also Petition at 5. Without compunction, TP&W cites to its 1971 trackage rights. While those trackage rights provided TP&W access to BNSF in Peoria, as was brought to light in the BNSF Discontinuance proceeding, TP&W voluntarily surrendered those rights in 1995 and today its use of the TZPR tracks to interchange with BNSF are limited to intermodal traffic. TP&W conveniently ignores the evidence introduced in the BNSF

³ The Stay Petition was denied by the Chairman of the Board in a decision served July 2, 2010.

⁴ In 2001, TP&W was able to expand its trackage rights over P&PU to permit TP&W to interchange intermodal traffic directly with BNSF in Peoria. 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 (“2001 Trackage Rights”). It appears that TP&W’s trackage rights over TZPR were further amended in 2006. TP&W, however, has failed to obtain approval of those trackage rights by the Board.

Discontinuance proceeding and would have this Board mistakenly believe that TP&W has a direct interchange with BNSF in Peoria. Similarly, TP&W falsely claims that it is incurring the TZPR intermediate switch charge only because BNSF is insisting on the TZPR switch. TP&W is paying the TZPR intermediate switch charge because **TP&W has no direct connection with BNSF in Peoria.**⁵

The Board cannot possibly issue an informative declaratory order when the petitioning party misleads the Board with erroneous facts.

Fourth, having muddled the facts, TP&W proceeds to mischaracterize the well established law governing the duties of carriers to interchange traffic. TP&W relies on two cases, one of which is factually distinguishable and the other supports BNSF's, and not TP&W's, position. STB Docket No. 42078, *Norfolk Southern Railway Company – Petition for Declaratory Order – Interchange with Reading Blue Mountain & Northern Railroad Company* (not printed), served April 29, 2003 (“Reading”), simply stands for the proposition that “the receiving railroad in a **direct physical interchange** [is] to designate a point on its own line where it will receive traffic and to provide a free route over its tracks to that point of delivery for the delivering carrier.” Reading slip op. at 4 (emphases added). Reading is inapposite because **TP&W does not have a direct physical connection with BNSF in Peoria.** The only track between TP&W's yard in East Peoria and BNSF's tracks in Peoria is owned by PP&U and

⁵ TP&W also erroneously claims that its haulage rights over BNSF between Galesburg and Peoria were imposed by the Board as a condition to the merger of the Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company. The settlement agreement was simply referenced in the decision authorizing the merger. Also, TP&W incorrectly alleges that BNSF did not respond to the Board's Rail Consumer Assistance Office. BNSF responded to Director Wallen's call within two business days.

leased to TZPR. Neither BNSF nor the Board can force TZPR to allow TP&W to use the TZPR rail line, much use the TZPR rail line for free.

Burlington N.R.R. v. United States, 731 F.2d 33, 38 (D.C. Cir. 1984) ("Burlington"), acknowledges that it is customary for two non-contiguous railroads, such as BNSF and TP&W in Peoria, to utilize a switch carrier for purposes of interchanging traffic. Moreover, the Court held that no direct interchange arises even when one of the two non-contiguous carriers has trackage rights over the intermediate switch carrier. Consequently, even if BNSF had trackage rights over TZPR to handle westbound traffic, which BNSF never had, BNSF would not be obligated to utilize those rights in order to provide TP&W a free route. *See also Grand Trunk Western R. Co. v. Pere Marquette Ry. Co.*, 174 I.C.C. 427 (1931) (use of intermediate switch carrier is appropriate even when one of the non-contiguous carriers is the sole owner of the switch carrier).

TP&W's reliance on 49 U.S.C. § 10742 is misplaced. TP&W cites the portion of Section 10742 which provides that a rail carrier must provide "reasonable, proper, and equal facilities ... for the interchange of traffic...." Petition at 5. But TP&W leaves out the qualifying words "that are within its power to provide". BNSF does not have the power to make available to TP&W the TZPR tracks for purposes of interchanging traffic. TP&W's reliance on 49 U.S.C. § 10703 is equally misplaced. Citing Section 10703, TP&W claims that rail carriers are required to "establish through routes (including physical connections) with each other...." "Through routes", however are arrangements between connecting carriers. *See Thompson v. U.S.* 343 U.S. 549 (1952).

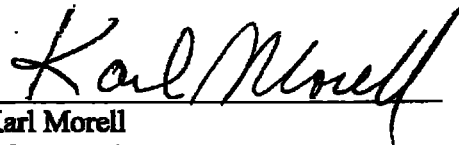
TP&W's legal arguments are unavailing and would not permit the Board to issue the declaratory order TP&W seeks. Because BNSF and TP&W do not have a physical connection in Peoria, BNSF has no legal obligation to provide TP&W with a "free route".

In order to grant the relief TP&W seeks, the Board would either have to: (1) find that TP&W and BNSF have a direct connection in Peoria; or (2) force TZPR to allow TP&W to operate over the TZPR rail line for free. The former would be contrary to the facts and the latter would be contrary to the law. *See* STB Ex Parte No. 628, *Expedited Relief for Service Inadequacies* (not printed), served May 12, 1998, slip op. at 3 ("While the Board lacks general authority to require an unwilling railroad to permit physical access over its lines to the trains and crews of another railroad, it may direct that result in certain [limited] situations....")

CONCLUSION

BNSF respectfully urges the Board to deny the Petition and put an end to this senseless litigation.

Respectfully submitted,



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Dated: September 1, 2010

CERTIFICATE OF SERVICE

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


Karl Morell