

227451

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB-6 (Sub-No. 470X)

**BNSF RAILWAY COMPANY
- DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION -
IN PEORIA AND TAZEWELL COUNTIES, ILLINOIS**

**REPLY OF TAZEWELL & PEORIA RAILROAD, INC.
TO PETITION TO REVOKE**

**ERIC M. HOCKY
THORP REED & ARMSTRONG, LLP
One Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103
(215) 640-8500
ehocky@thorpreed.com**

Dated: July 19, 2010

**Attorneys for
Tazewell & Peoria Railway, Inc.**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB-6 (Sub-No. 470X)

**BNSF RAILWAY COMPANY
- DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION -
IN PEORIA AND TAZEWELL COUNTIES, ILLINOIS**

**REPLY OF TAZEWELL & PEORIA RAILROAD, INC.
TO PETITION TO REVOKE**

This discontinuance exemption proceeding was commenced by BNSF Railway Company ("BNSF") with the filing of a petition for exemption on February 16, 2010. The exemption was granted by decision of the Board served on June 4, 2010. On June 21, 2010, Toledo, Peoria & Western Railroad Co. ("TP&W") filed a petition to stay (the "TP&W Stay Petition") the effect of the decision, and on June 29, 2010, TP&W filed a petition to revoke the exemption (the "TP&W Revocation Petition"). The Chairman denied the TP&W Stay Petition by order served July 2, 2010, and the discontinuance became effective July 4, 2010 [check]. Tazewell & Peoria Railroad, Inc. ("TZPR") now file this reply to the TP&W Revocation Petition. Because TP&W has not demonstrated that it satisfies the criteria to revoke the discontinuance exemption, the TP&W Revocation Petition should be denied.

In its Revocation Petition TP&W contends that the exemption should be revoked because regulation of the transaction is necessary to carry out the rail transportation policy of 49 USC §10101. The TP&W arguments mirror the arguments made in the Stay Petition in arguing it would be likely to succeed on the merits. The decision of the Chairman denying the Stay Petition clearly sets forth why the Revocation Petition must be denied.

Initially it should be noted that there is truly nothing new presented in the Revocation Petition – there has been no true direct interchange between BNSF and TP&W since TP&W's bridge was destroyed, and even the trackage rights connection has not been used for 28 years. Moreover, even if the trackage rights agreement had not been cancelled, the parties have been unable to use the trackage rights since at least 1997 when BNSF took the "Uptown Yard" out of service.¹ Further as noted by TP&W in its Revocation Petition, p.4, BNSF's main line from Darst Street to the Uptown Yard, and the crossover track between BNSF and TZPR, have been out of service since 2004. All of these developments have been with the full knowledge and without protest by TP&W – until now. None of these changes can be considered "new."

As noted in the July 2 decision, p.3:

In short, the central focus of the Board's June 4 decision is the statutory finding that regulation of the proposed abandonment is not necessary to protect shippers from an abuse of market power. Furthermore, the Board held that TP&W had failed to make its case that it would be harmed by the discontinuance because it had not shown that it would fare any better by interchanging directly with BNSF over the trackage rights being discontinued than it was faring under the interchange with TZPR.

In its June 29, 2010 petition to revoke as well as in the stay petition, TP&W made no effort to challenge either the Board's "abuse of market power" finding or its analysis of the likely effect of interchanging directly with BNSF over the trackage rights.

The same is true of the Revocation Petition. None of the arguments raised by TP&W related to potential direct interchange and what may be charged change the essential facts that the BNSF trackage rights agreement was terminated in 1982 as permitted in the agreement, that the parties not been operating under the trackage rights agreement for the last 28 years, and that no shippers have been harmed or have complained about the current arrangements. Indeed, while last

¹ The trackage rights agreement provided access between point A (TP&W's yard in East Peoria) and point D (BNSF's Uptown Yard).

calendar year the BNSF traffic was split almost evenly between TZPR and TP&W, in recent months (April and May) over 72% of the outbound traffic to BNSF, and over 78% of the inbound traffic from BNSF, has been with TZPR. Thus, there would be a greater harm to shippers from the change that TP&W proposes rather than leaving the status quo.

Additionally, TP&W has not demonstrated under what authority it would conduct direct interchange with BNSF even if the BNSF trackage rights were in place. As explained in TZPR's Reply to the Stay Petition, there are two potentially relevant trackage rights agreements at play in this proceeding. The first is the 1971 BNSF trackage rights agreement which BNSF has sought to discontinue, and which is part of the record. The second is the Amended and Restated Trackage Rights Agreement dated August 1, 2006, under which TP&W is permitted to operate over certain tracks of the Peoria and Pekin Union Railway Company ("PPU") now leased to TZPR, a copy of which was attached to the Reply to Stay Petition..²

Under the 2006 TP&W trackage rights amendment 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 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). It is clear that TP&W cannot use the trackage rights for other interchange traffic between itself and BNSF.

Further, while the terminated 1971 BNSF trackage rights agreement allowed BNSF to handle interchange traffic between itself in Peoria and TP&W in East Peoria, TP&W had no

² The commercial terms related to the fees have been redacted. An unredacted version can be filed under seal at the request of the Board. Under Section 15.01, TP&W was supposed to have filed with the Board for any necessary authority for the trackage rights. From a review of the Board's records on its website, it does not appear that TP&W ever filed for authority.

right to use those BNSF rights. As noted above, not only has BNSF not elected to use the trackage rights since the 1982 termination by PPU, but it has been physically unable to use them since the Uptown Yard and the related main were taken out of service.³

Accordingly for direct interchange as proposed by TP&W to occur, TP&W would be handling haulage traffic for BNSF to and from Galesburg, and BNSF would then have to put on power and a crew to move the traffic from Darst Street to TP&W in East Peoria. It is not clear based on current track arrangements in Peoria where that BNSF power and crew would be based. Clearly, this is not a simpler and more efficient routing as TP&W suggests.

Finally, the Board should not be distracted by TP&W's arguments about whether the current arrangements somehow violate the "free" interchange requirements of 49 USC §10742. The fact of the matter is that the arrangements between TP&W and BNSF have not been free since TP&W's bridge was destroyed, and it decided to take the money and not rebuild, opting instead for trackage rights arrangements over PPU to connect with BNSF. Section 4 of the BNSF trackage rights agreement required a fee to be paid to PPU, and further required that TP&W pay all such fees. Additionally, TP&W voluntarily, through the 2006 amended trackage rights agreement with TZPR, agreed to limits in the types of traffic it could handle westbound to BNSF at Darst Street, and in Section 4.08, agreed to pay fees for its use of TZPR's tracks and bridge. The use of the tracks and the fees payable are a direct result of TP&W's 1970 decision not to make repairs to its bridge. *See Toledo, Peoria & Western Railway Corp. – Trackage Rights Compensation – Peoria and Pekin Union Railway Company*, ICC Finance Docket No.

³ Despite the fact that TP&W has no direct or indirect rights to operate between Darst Street and its yard in East Peoria, and despite the grant of the discontinuance exemption and the denial of the stay, on July 12, TP&W sought authority from the TZPR dispatcher to move its BNSF haulage train from Darst Street all the way to the TP&W yard. This unilateral attempt by TP&W to implement its desired operation was denied by the TZPR dispatcher since TP&W has no such operating rights.

26476 (Sub-No. 1), served September 20, 1994, 1994 ICC LEXIS 175 (resetting the TP&W trackage rights fees when parties could not agree).

Conclusion

For all of these reasons it is clear that TP&W's Petition for Revocation should be denied.

Respectfully submitted,



ERIC M. HOCKY
THORP REED & ARMSTRONG, LLP
One Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103
(215) 640-8500
ehocky@thorpreed.com

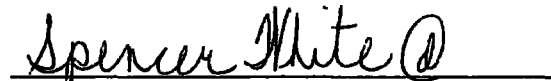
Dated: July 19, 2010

Attorneys for
Tazewell & Peoria Railway, Inc.

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 July 19, 2010.



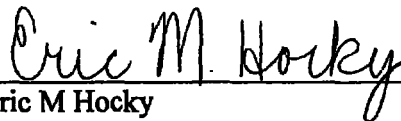
Spencer White

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 2010, I served a copy of the foregoing by email on the following:

Karl Morell
Of Counsel
Ball Janik LLP
1455 F street, NW
Suite 225
Washington DC 20005
kmorell@dc.bjllp.com

Louis E. Gitomer
Melanie B. Yasbin
Law Offices of Louis E. Gitomer
600 Baltimore Avenue
Suite 304
Towson, MD 21204
lou_gitomer@verizon.net


Eric M Hocky