

SERVICE DATE – APRIL 26, 2011

SURFACE TRANSPORTATION BOARD

DECISION

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

BNSF RAILWAY COMPANY—DISCONTINUANCE OF TRackage RIGHTS
EXEMPTION—IN PEORIA AND TAZEWell COUNTIES, ILL.

Docket No. FD 35404

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

Digest.¹ In a previous decision, the Board permitted BNSF Railway Company to stop operating over a 3-mile rail line in Illinois. In this decision, the Board finds no reason to revoke that permission. In addition, the Board finds that Toledo, Peoria & Western Railway Corp. does not have the right to free, direct interchange with BNSF Railway Company over that line.

Decided: April 21, 2011

In a decision served on June 4, 2010, the Board in Docket No. AB 6 (Sub-No. 470X) (June 2010 decision) granted an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 for BNSF Railway Company (BNSF) to discontinue overhead trackage rights over approximately 3 miles of rail line (the line) owned by Peoria and Pekin Union Railway Company (P&PU) in Peoria and Tazewell Counties, Ill. Toledo, Peoria & Western Railway Corp. (TP&W) has filed a petition requesting that the Board revoke the exemption on the grounds that full regulation of BNSF's request to discontinue these trackage rights is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101² and that BNSF has abused Board processes. In Docket No. FD 35404, TP&W has filed a petition for a declaratory order seeking a determination from the Board that TP&W is entitled to free, direct interchange with BNSF.

¹ The digest constitutes no part of the decision of the Board but has been provided for the convenience of the reader. It may not be cited to or relied upon as precedent. Statement on Plain Language Digests, EP 696 (STB served Sept. 2, 2010).

² The RTP contains a list of 15 policy goals of the Federal government in regulating rail transportation.

BNSF argues that the petition for declaratory order should be denied because the Board is deciding the same issues in TP&W's petition to revoke the trackage rights exemption. TP&W, for its part, asserts that the two petitions do not address the same issues. According to TP&W, the petition to revoke the trackage rights exemption concerns eastbound traffic, and the petition for declaratory order concerns westbound traffic. Although in its petition to revoke TP&W did not clearly limit its arguments to eastbound traffic, we accept TP&W's representation that that petition is directed at eastbound traffic only. Because the two petitions involve the same traffic (albeit in opposite directions) and location and raise similar issues and arguments, we are consolidating these proceedings for concurrent handling.

We conclude that TP&W has not justified revocation of the exemption and that TP&W is not entitled to free, direct interchange with BNSF. Accordingly, we will deny both petitions.

BACKGROUND

Until 1970, TP&W directly interchanged traffic at East Peoria with BNSF's predecessor, Burlington Northern Railroad Company (BN), via TP&W's bridge over the Illinois River. In 1970, a barge struck TP&W's bridge, damaging it extensively. TP&W chose not to repair the bridge. Consequently, in 1971, BN entered into a trackage rights agreement (the 1971 BN agreement) with P&PU and TP&W to enable BN to continue to interchange eastbound traffic directly with TP&W at TP&W's East Peoria Yard via the P&PU bridge, which runs parallel to the destroyed TP&W bridge. To maintain direct interchange deliveries from BN, TP&W agreed to pay for BN's use of the line. The 1971 BN agreement allowed any party to cancel the agreement, required BN to seek regulatory approval for any such cancellation, and provided that cancellation would take effect on the effective date of regulatory approval. Likewise, TP&W entered into a separate trackage rights agreement with P&PU to allow it to use the line to continue to interchange westbound traffic directly with BN (the 1970 TP&W agreement). The Interstate Commerce Commission (ICC), the Board's predecessor agency, authorized both trackage rights agreements.³

Subsequent Trackage Rights Developments

In 1982, P&PU notified BN that it was cancelling the 1971 BN agreement. For reasons that do not appear in the record, BN did not seek discontinuance authority from the ICC, as required by that agreement. Nevertheless, neither BN nor its successor, BNSF, has used the trackage rights since that time. Rather, since then, BN/BNSF has continued to interchange traffic with TP&W, but instead of doing so directly, pursuant to the trackage rights, it has done

³ Burlington N., Inc.—Trackage Rights—Peoria & Pekin Union Ry. Between Peoria & E. Peoria, Ill., FD 27317 (ICC served May 31, 1973) (authorizing the 1971 BN agreement); Toledo, Peoria & W. Ry.—Trackage Rights—Peoria & Pekin Union Ry., FD 26476 (ICC served June 25, 1971) (authorizing the 1970 TP&W agreement).

so indirectly via intermediate switching performed by a different rail carrier (originally by P&PU and now by Tazewell & Peoria Railroad, Inc. (TZPR), which since 2004 has leased the line from P&PU).

In 1993, P&PU cancelled the 1970 TP&W agreement and filed a petition to reopen the proceeding that had granted those trackage rights, for the purpose of adjusting the rental component of its compensation. The ICC instituted a trackage rights compensation proceeding,⁴ which was discontinued after TP&W and P&PU settled the case in 1994 by entering into a new trackage rights agreement.⁵ Under that agreement, P&PU granted TP&W overhead trackage rights over a shorter length of rail line to enable TP&W to connect its eastern rail lines terminating in East Peoria with its western rail lines terminating in Peoria. The 1994 TP&W-P&PU trackage rights agreement expressly barred TP&W from using the P&PU line “for purpose of effecting interchange to any railroad line.”⁶ As a result of various further changes to the trackage rights agreement between TP&W and P&PU, by 2001, TP&W’s trackage rights on the line allowed TP&W to use the line for all overhead traffic but limited TP&W’s right to interchange with BNSF to intermodal traffic only.⁷

In 1995, BN merged with the Atchison, Topeka and Santa Fe Railway Company to form BNSF. As a part of the settlement agreements reached between the newly formed BNSF and other carriers in conjunction with the merger, BNSF agreed to grant TP&W both haulage rights and overhead trackage rights on a BNSF line between Peoria and Galesburg, Ill. (west of the Illinois River). These rights included interchange with BNSF at both Peoria and Galesburg. Burlington N., Inc.—Control & Merger—Santa Fe Pac. Corp. (Burlington N., Inc.—Santa Fe Pac. Corp.), 10 I.C.C.2d 661, 813 (1995).

⁴ Toledo, Peoria & W. Ry.—Trackage Rights Comp.—Peoria & Pekin Union Ry. (Toledo, Peoria & W. Ry. 1994), FD 26476 (Sub-No. 1) (ICC served Sept. 20, 1994) (opening a proceeding to set compensation for the 1970 TP&W agreement, which P&PU had cancelled due to insufficient compensation).

⁵ Toledo, Peoria & W. Ry.—Trackage Rights Comp.—Peoria & Pekin Union Ry. (Toledo, Peoria & W. Ry. 1995 Trackage Rights Comp.), FD 26476 (Sub-No. 1) (ICC served Jan. 25, 1995).

⁶ Toledo, Peoria & W. Ry.—Trackage Rights—Peoria & Pekin Union Ry., FD 32654 (ICC served Feb. 6, 1995). See Notice of Exemption, Exhibit A at 5.

⁷ Toledo, Peoria & W. Ry.—Trackage Rights Exemption—Peoria & Pekin Union Ry. (Toledo, Peoria & W. Ry. 2001), FD 34009 (STB served Feb. 23, 2001). TP&W and TZPR signed a trackage rights agreement in 2006, which amended and restated the 2001 agreement between TP&W and P&PU, but this agreement was never filed with the Board. TZPR Reply to Stay Petition, Exh. A 8-9.

Following these developments, traffic that is interchanged between BNSF and TP&W in the Peoria area is handled as follows. For eastbound moves, where BNSF is the delivering carrier, either BNSF or TP&W moves traffic destined for both TP&W and TZPR from Galesburg to Peoria,⁸ where it is delivered to TZPR. TZPR sorts the traffic destined for TP&W, makes up a train, and delivers it to TP&W. For westbound moves, TP&W delivers traffic to TZPR in Peoria. TZPR sorts the traffic and delivers the cars to BNSF's Peoria-to-Galesburg line. There, either BNSF or TP&W (exercising its haulage rights) delivers the cars to Galesburg. BNSF pays TZPR's switch fee for eastbound traffic, and TP&W pays the fee for westbound traffic.

The Current Dispute

In January 2010, TZPR increased its fee for switching traffic between BNSF and TP&W. Seeking to avoid the fee entirely, TP&W requested that BNSF recommence direct interchange with TP&W pursuant to the 1971 BN agreement. According to BNSF, this request alerted BNSF to its contractual obligation to file for discontinuance authority.

In February 2010, BNSF filed a petition for exemption to discontinue its trackage rights over the line. TP&W opposed the discontinuance, and in so doing noted that it too had acquired trackage rights over the line shortly after its bridge was destroyed. Responding to TP&W's opposition, BNSF stated that the trackage rights TP&W had acquired allowed it to make a direct interchange with BNSF in Peoria and that, as far as BNSF was aware, those trackage rights were still in effect. TP&W countered by saying that a derailment had caused BNSF to reconfigure its tracks in a way that prevented TP&W from accessing BNSF's yard in Peoria. TP&W did not mention in any of its pleadings that amendments to its original trackage rights agreement with P&PU had limited TP&W's interchange rights with BNSF to intermodal traffic.

In the June 2010 decision, the Board granted BNSF authorization to discontinue its overhead trackage rights on the line. In that decision, after finding that BNSF had met the exemption criteria, the Board noted that, if TP&W wished to avoid using TP&W's switching service, TP&W appeared able to interchange directly with BNSF by using its own trackage rights over the line. Id. at 4.

Based on that language, TP&W then approached BNSF about reestablishing direct interchange between the two carriers in Peoria. When BNSF refused, TP&W unsuccessfully sought a stay of the Board's decision granting the discontinuance exemption. TP&W also filed a petition to revoke the exemption. Both BNSF and TZPR have opposed the revocation request. A decision instituting a proceeding was served on September 27, 2010.

⁸ The record is not clear on whether BNSF or TP&W (exercising its haulage rights to transport traffic for BNSF's account) performs the Galesburg-Peoria haul. As we explain later, whichever carrier performs this portion of the transportation, our conclusion does not change.

Meanwhile, on August 13, 2010, TP&W filed its petition for a declaratory order requesting that the Board institute a proceeding and find that TP&W is entitled to free, direct interchange with BNSF on westbound moves. BNSF filed a reply on September 1, 2010. On September 13, 2010, TP&W requested leave to file a reply and concurrently filed its reply to BNSF. On October 1, 2010, BNSF filed a motion to strike TP&W's reply, and TZPR filed a petition to intervene.⁹

DISCUSSION AND CONCLUSIONS

I. Petition to Revoke

Under 49 U.S.C. § 10502(d), we may revoke an exemption if we find that application of a statutory provision is necessary to carry out the RTP of 49 U.S.C. § 10101. As a general matter, only those portions of the RTP that are relevant or pertinent to the underlying statutory provision involved—here, 49 U.S.C. § 10903—are considered. See Vill. of Palestine v. ICC, 936 F.2d 1335 (D.C. Cir. 1991). The party seeking revocation has the burden of showing that full regulation is necessary to carry out the RTP, 49 C.F.R. § 1121.4(f), and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and more detailed scrutiny of the transaction is necessary. See Consol. Rail Corp.—Trackage Rights Exemption—Mo. Pac. R.R., FD 32662 (STB served June 18, 1998).

The Board has also revoked exemptions when revocation was necessary to ensure the integrity of the Board's processes. In this case, should the Board revoke the exemption as requested, either BNSF would be required to file a full application for discontinuance authority under 49 U.S.C. § 10903(a)(1)(B) or the trackage rights would remain in effect.

Rail Transportation Policy. TP&W claims that BNSF's refusal to interchange eastbound traffic directly with TP&W is contrary to the RTP, and, therefore, regulation is necessary to carry out the RTP. In their replies, BNSF and TZPR both state that TP&W does not address any of the policy goals of the RTP.

Although TP&W's petition does not identify specifically which elements of the RTP are undermined by the discontinuance of BNSF's trackage rights, we assume that it is relying on

⁹ We will accept TP&W's response and grant TZPR's petition to intervene. BNSF's motion to strike therefore is denied. Although our rules prohibit a "reply to a reply," 49 C.F.R. § 1104.13(c), it is within the Board's discretion to permit late-filed or otherwise impermissible filings, and it is appropriate to do so here. Both TP&W's and TZPR's filings provide a more complete record, clarify the arguments, will not prejudice any party, and do not unduly prolong the proceeding.

RTP factors 1, 3, 4, and 5¹⁰ in arguing that revocation would produce greater competition between rail carriers, allow effective coordination between rail carriers, and produce increased efficiency of operations. As explained below, we find these arguments unpersuasive.

First, TP&W has failed to explain how the revocation of the discontinuance exemption would promote competition between rail carriers. Reinstating the trackage rights could not possibly affect competition for westbound traffic, as the 1971 BN agreement authorized BNSF to use the line only for interchanging eastbound traffic. As for eastbound traffic, revocation would not increase competitive options for the shippers involved. Even if we were to grant the petition to revoke, none of the shippers could compel BNSF to exercise its trackage rights over the P&PU line; BNSF would be free to continue paying TZPR to provide switching service for eastbound moves in Peoria.

TP&W suggests that competition would be enhanced because the service would be less costly. The record does not support such a conclusion. As explained above, BNSF could simply choose to continue the current arrangement under which BNSF pays TZPR to perform local switching of eastbound traffic in the Peoria area. But even if, contrary to its stated preference, BNSF opted to exercise its trackage rights and interchanged this traffic with TP&W directly, a trackage rights fee would apply, which, under the 1971 BN agreement, TP&W would have to pay. And even if we assume both that this trackage rights fee would be lower than the current switching fee and that P&PU would not successfully petition for an adjustment to the rental component of the trackage rights fee, TP&W has not shown that it would pass those savings on to the shippers involved. Thus, TP&W has not shown that reinstituting the trackage rights would lower costs for the shippers involved and thereby promote competition for this traffic.

Second, TP&W has not shown that regulation is necessary to ensure effective coordination between rail carriers. The trackage rights at issue were overhead rights that have not been used in 28 years. During this time, interchange of eastbound traffic via P&PU and TZPR has gone smoothly—none of the shippers served through the intermediate switch operations have complained about the intermediate switch. Moreover, these operations will continue as before. No shippers will lose service due to the discontinuance of BNSF's overhead trackage rights on the line.

¹⁰ Under § 10101, these factors are “to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail” (factor 1); “to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board” (factor 3); “to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense” (factor 4); and “to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes” (factor 5).

Third, TP&W has not shown that regulation is needed to promote increased efficiency of rail operations. Currently, eastbound traffic destined for both TP&W and TZPR is delivered, either by BNSF or by TP&W exercising its haulage rights, to TZPR at Peoria. The traffic destined for TP&W is sorted by TZPR, which makes up a train and delivers that traffic to TP&W in East Peoria. TP&W has not shown that efficiency would be improved if BNSF were to perform the switching service in Peoria. Assuming that BNSF performs the Galesburg-to-Peoria haul, then to exercise its trackage rights in Peoria, BNSF would have to sort the traffic, make up a special train for TP&W, and deliver that traffic to TP&W in East Peoria—just as TZPR currently does. TP&W does not explain why having BNSF, rather than locally based TZPR, perform the switching service in Peoria would be more efficient. And if TP&W performs the Galesburg-to-Peoria haul, then substituting BNSF for TZPR as the switching carrier in Peoria would not only increase the number of carriers involved, but would also require BNSF to station a locomotive and crew in Peoria for the sole purpose of performing this 3-mile switch. Again, TP&W fails to show any efficiency gain.

TP&W argues that the operation would be more efficient if it carried the traffic from Galesburg to Peoria and then over P&PU's 3-mile line from Peoria to East Peoria. But TP&W does not explain under what authority it would carry BNSF's eastbound traffic over P&PU's line. P&PU leased the line to TZPR, not TP&W, and the 1971 BN agreement gave BN, not TP&W, trackage rights over the line. Moreover, in the absence of P&PU's written permission, the 1971 BN agreement specifically barred BN or its successors from assigning those rights, and the record contains no evidence that BN ever sought, or that P&PU ever agreed to, such an assignment.

For the reasons discussed above, TP&W has not met its burden under 49 U.S.C. § 10502 to revoke the exemption here.

Abuse of Process. TP&W claims that BNSF abused Board processes by first stating that alternative means of direct interchange were available to TP&W in nearby Peoria and later recanting when TP&W attempted to invoke one of those alternatives. BNSF concedes that it was mistaken about the continued existence of the 1970 TP&W agreement for all types of traffic over TZPR's line. Since the Board granted the exemption permitting discontinuance, BNSF states that it has learned that those trackage rights are no longer in effect. BNSF contends that TP&W should not have mentioned the ICC's decision authorizing the 1970 TP&W agreement in the first instance and that, having done so, it should have corrected BNSF's statement that those trackage rights appeared to remain in effect. Both BNSF and TZPR state that TP&W voluntarily gave up those trackage rights, including direct interchange with BNSF, in Peoria.¹¹

¹¹ Toledo, Peoria & W. Ry. 1994. As previously stated, TP&W also retains trackage and haulage rights over a BNSF line between Galesburg and Peoria, Ill.

The Board has declined to revoke exemptions in cases where a party made a misstatement through mistake or inadvertence.¹² In contrast, when the Board has revoked exemptions to protect the integrity of Board processes, it has found that a party has intentionally deceived the Board or that a party has used Board processes to improperly circumvent state and local laws.¹³

Here, it appears that BNSF has simply made a mistake. In opposing BNSF's request for a discontinuance exemption, TP&W referred to the 1971 ICC decision that authorized TP&W's trackage rights over the P&PU line. In a response, BNSF noted that TP&W had mentioned those trackage rights and stated guardedly that "[t]o the best of BNSF's knowledge, those trackage rights are still in effect." TP&W had the opportunity to inform BNSF and the Board that it no longer had those trackage rights but did not do so and, in fact, later cited the 1971 ICC decision authorizing the 1970 trackage rights agreement again. In opposing TP&W's request for a stay, BNSF candidly admitted that it erred when it indicated that TP&W still retained those trackage rights and could use those rights to implement direct interchange. According to BNSF, had it known that the 1970 TP&W agreement was no longer in effect, BNSF would not have made that statement. TP&W has given us no reason to believe otherwise. Therefore, we accept BNSF's statement that its reference to the availability of alternative means of direct interchange for TP&W was a mistake rather than an abuse of Board process.

¹² See General Ry. d/b/a Iowa N.W. R.R.—Exemption for Acquis. of R.R. Line—in Osceola & Dickinson Counties, Iowa, FD 34867 (STB served June 15, 2007) (denying a petition to revoke a notice of exemption to acquire a line of railroad where the acquiring party, which now sought to abandon and discontinue service over the line, had inadvertently failed to request acquisition authority in 2001, when it commenced rail operations over the line); Nev. Pac. R.R.—Lease and Operation Exemption—Rail Lines of Pan W. Corp., FD 34958 (STB served March 15, 2007) (denying a petition to reject a notice or revoke an exemption where a railroad leasing and operating over a line used an incorrect name in its original filing, which was corrected at publication).

¹³ See, e.g., The Land Conservancy of Seattle and King County—Acquis. and Operation Exemption—The Burlington N. & Santa Fe Ry., 2 S.T.B. 673 (1997) (Land Conservancy) (revoking an acquisition and operation exemption where the party acquiring a rail line had done so not to conduct rail operations but to immediately abandon and railbank it), reconsideration denied, FD 33389 (STB served May 13, 1998), petition for judicial review dismissed sub nom. The Land Conservancy of Seattle and King County v. STB, 238 F.3d 429 (9th Cir. 2000); Milwaukee Indus. Trade Ctr., LLC d/b/a Milwaukee Terminal Ry.—Acquis. and Operation Exemption—Line Owned by Milwaukee Indus. Trade Ctr., FD 35133 (STB served June 16, 2010) (MITC) (revoking an acquisition and operation exemption because the actual intent of the party seeking acquisition authority was not to conduct rail operations but to raise the sale price of the property at issue, to avoid condemnation of that property, and to obtain permits for uses of the property that were not otherwise permitted by local redevelopment plans).

BNSF's mistaken statement does not constitute the sort of deception that warrants revocation because it was not made with the intent of improperly circumventing laws or regulations. In both Land Conservancy and MITC, the Board would not have authorized the acquisitions at issue in those cases had it been aware of the acquiring parties' plans to use the lines they were acquiring for purposes other than providing common carrier rail service. In this case, even in the absence of BNSF's misstatement, we still would have authorized BNSF to discontinue its trackage rights. Our grant of discontinuance authority to BNSF through the exemption process was predicated on our finding that regulation of the discontinuance was not necessary to carry out the RTP or to protect shippers from an abuse of market power, not on the availability, or lack thereof, of TP&W's trackage rights under the 1970 TP&W agreement.

Potential Outcome if Petition were Granted. Even if TP&W's petition to revoke the exemption were granted, revocation would not immediately bring about the result that TP&W desires: free, direct interchange with BNSF. BNSF would not be required to exercise its trackage rights over TZPR on TP&W's behalf. Burlington N. R.R. v. United States, 731 F.2d 33, 38-39 (D.C. Cir. 1984) (noting that receiving railroad is not required to exercise trackage rights over line of intermediate switching carrier to provide a free, direct interchange for purposes of § 10742). Moreover, if the exemption were revoked, BNSF would have the option to file a formal application under 49 U.S.C. § 10903 if it still wished to seek authority to discontinue the trackage rights at issue here. TP&W has not shown that the outcome would be different if a full application proceeding were required.

In short, TP&W has not met its burden of proof that application of the relevant statutory provision—here, 49 U.S.C. § 10903—is necessary to carry out the RTP or that BNSF has abused Board processes. Consequently, the Board will deny TP&W's request to revoke the exemption in Docket No. AB 6 (Sub-No. 470X).

II. Petition for Declaratory Order

Under 5 U.S.C. § 554(e), the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. See Intercity Transp. Co. v. U.S., 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). The parties have already filed numerous pleadings concerning the issues involved herein. Accordingly, the Board will consider the merits of the declaratory order petition on the record already submitted.

TP&W advances three arguments as to why BNSF is required to provide it with a free, direct interchange for westbound traffic. TP&W contends that such interchange is required: (1) by statute; (2) under the 1970 trackage rights agreement; and (3) as a condition of the ICC's approval of the merger that resulted in the formation of BNSF. Because TP&W's position is contrary to law and established precedent, we will deny the relief that TP&W seeks.

Reasonable, Proper, and Equal Interchange Facilities. First, we will address whether free, direct interchange between TP&W and BNSF is required by statute. TP&W argues that railroads are required to establish through routes (including physical connections) with each other and to provide reasonable, proper, and equal facilities for interchange. TP&W further contends that, as the receiving railroad on westbound traffic, BNSF may designate the location of a physical interchange, but it also must provide a free route over its tracks. According to TP&W, this free route may consist of either a route that does not involve the intermediate switch over TZPR or a route over which TP&W is not responsible for paying the intermediate switch fee.

BNSF responds that it is not required to provide free, direct interchange to TP&W because BNSF and TP&W do not directly connect and have not done so since the TP&W bridge was destroyed. Additionally, BNSF states that, when the BNSF trackage rights pursuant to the 1971 BN agreement and the TP&W trackage rights over P&PU's line pursuant to the 1970 TP&W agreement were in effect, interchange was not free because both parties paid trackage rights fees.

As TP&W points out, 49 U.S.C. § 10703 provides that railroads are required to establish through routes (including physical connections) with one another. Under 49 U.S.C. § 10742, a rail carrier "shall provide reasonable, proper, and equal facilities that are within its power to provide for the interchange of traffic" between connecting railroads. Section 10742 requires a receiving railroad in a direct physical interchange 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 for the delivering railroad. Norfolk S. Ry.—Petition for Declaratory Order—Interchange with Reading Blue Mountain & N. R.R., NOR 42078, slip op. at 4 (STB served April 29, 2003).

Here, however, there is no direct physical connection between BNSF and TP&W, as the lines of BNSF and TP&W are physically separated by tracks owned by P&PU and leased to TP&W. When the TP&W bridge was intact, there was such a direct physical connection, and BN was obligated to provide TP&W with free, direct interchange via that route, which BN did until the TP&W bridge was destroyed. Once TP&W opted not to repair its bridge, however, its only remaining connection with BNSF was via trackage rights arrangements over a different railroad's line. Section 10742 does not require receiving railroads to provide free interchange facilities via trackage rights over the rail lines of third parties. Burlington N. R.R., 731 F.2d at 38-39. Accordingly, TP&W has not shown that it is "within [BNSF's] power to provide" the free, direct interchange that TP&W seeks.

Use of TP&W's Trackage Rights over TZPR for Interchange. In this section, we will determine whether any outstanding trackage rights agreements between TP&W and P&PU/TZPR mandate free, direct interchange between TP&W and BNSF. TP&W claims that it could interchange traffic with BNSF under the 1970 TP&W agreement because TP&W never sought authority to discontinue those trackage rights, but that BNSF refuses to allow a direct interchange to proceed. BNSF, in contrast, states that, as a result of a settlement reached between TP&W and P&PU as part of Toledo, Peoria & W. Ry. 1995 Trackage Rights Comp. and

several subsequent agreements, TP&W no longer has the right to interchange any traffic other than intermodal traffic with BNSF using its trackage rights over the P&PU/TZPR line.¹⁴ TZPR claims that by filing this petition, TP&W is trying to expand its trackage rights over that line without Board approval and without paying for such an expansion.

Terms of a trackage rights agreement remain in effect until the Board either authorizes discontinuance of those trackage rights or approves a new trackage rights agreement. See Milford-Bennington R.R.—Trackage Rights Exemption—Boston & Me. Corp. and Springfield Terminal Ry., FD 32103 (ICC served Sept. 3, 1993); Thompson v. Tex. Mexican Ry., 328 U.S. 134, 146-48 (1946). Thus, a new trackage rights agreement between two parties can replace an older trackage rights agreement between the same parties once the Board has approved that new agreement. Accordingly, the 1994 trackage rights agreement between TP&W and P&PU replaced the 1970 TP&W agreement and was in turn replaced by subsequent trackage rights agreements between TP&W and P&PU/TZPR.

The most recent trackage rights agreement approved by the Board,¹⁵ dated January 31, 2001, allows overhead trackage rights between TP&W's connections with P&PU in East Peoria and Peoria, on both sides of the Illinois River, but limits TP&W's trackage rights between TP&W's connection with P&PU in East Peoria and P&PU's connection with BNSF in Peoria to intermodal traffic only.¹⁶ Therefore, if TP&W were to interchange traffic other than intermodal traffic directly with BNSF, TP&W would violate the 2001 trackage rights agreement. TP&W knowingly entered into a trackage rights agreement that barred free, direct interchange of all traffic except intermodal traffic with BNSF. The Board will not upset that arms-length, negotiated arrangement based on the record in this proceeding.

BN-SF Merger. Finally, we will address whether a settlement agreement entered into between BN and TP&W in conjunction with the 1995 merger that resulted in BNSF's creation directs the Board to require that BNSF provide TP&W with free, direct interchange. TP&W asserts that it has direct interchange rights with BNSF at Peoria as a condition of that merger. Burlington N., Inc.—Santa Fe Pac. Corp., 10 I.C.C.2d at 813. According to TP&W, this direct interchange provision takes precedence over the trackage rights agreements between TP&W and P&PU/TZPR, including the 2001 agreement, that do not provide for direct interchange between TP&W and BNSF. TP&W claims that by denying it a direct interchange at Peoria, BNSF is unilaterally voiding a condition to a merger. In contrast, BNSF argues that the interchange

¹⁴ TZPR Reply to Stay Petition, Exh. A 8-9.

¹⁵ Toledo, Peoria & W. Ry 2001, Petition, Exh. A 1-2.

¹⁶ Id. The most recent trackage rights agreement between TP&W and TZPR, dated August 1, 2006, which renewed the 2001 agreement but was never filed with the Board, specifically provides that TP&W may not use the trackage rights over TZPR's line to effect any interchange other than that of intermodal traffic. TZPR Reply to Stay Petition, Exh. A 8-9.

provision included in the settlement agreement with TP&W in conjunction with that merger (TP&W settlement agreement) was not a condition and that the trackage and haulage rights that TP&W acquired in that agreement extend from Peoria to Galesburg but do not include trackage rights over P&PU's line between East Peoria and Peoria.

The settlement agreement was not imposed as a condition of the merger. In Burlington N., Inc.—Santa Fe Pac. Corp., the ICC explained that it would only impose as conditions those settlement agreement provisions that ameliorate reductions in competition caused by the merger, and would not impose as conditions those provisions that do not ameliorate such anti-competitive effects. Id. at 762. That decision explicitly listed the rights provided for in the TP&W settlement agreement as being among those that were not to be imposed as conditions because they would go above and beyond what was necessary to remedy the anti-competitive effects of the merger. Id. at 766.

Because the TP&W settlement agreement was not imposed as a condition to the merger, and the Board in Burlington N., Inc.—Santa Fe Pac. Corp., did not impose a provision providing for enforcement of settlement agreements that were not listed as conditions, any potential violation of that agreement that BNSF may be committing by not interchanging directly with TP&W at Peoria would not be a violation of a merger condition, but, rather, a breach of a settlement agreement between BNSF and TP&W. The Board's policy is where possible to refrain from interpreting or enforcing private contracts or settlement agreements, leaving such issues to be resolved by the parties to the contract or in court.¹⁷

Accordingly, in Docket No. FD 35404, the Board will deny TP&W's petition for declaratory order seeking the Board's determination that TP&W is entitled to free, direct interchange with BNSF.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. TP&W's request for leave to file a reply in Docket No. FD 35404 is granted.
2. BNSF's motion to strike in Docket No. FD 35404 is denied.
3. TZPR's petition to intervene in Docket No. FD 35404 is granted.

¹⁷ See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 7 (STB served May 7, 2009) (stating that the Board will not interpret or enforce a private contract between party to railroad merger and nonparty utility company).

4. TP&W's petition to revoke the exemption in Docket No. AB 6 (Sub-No. 470X) is denied.
5. TP&W's petition for declaratory order in Docket No. FD 35404 is denied.
6. These proceedings are consolidated for concurrent handling in the manner discussed in this decision.
7. This decision is effective on its service date.

By the Board, Chairman Elliott and Commissioner Mulvey.