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April 10, 2020

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Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

Re: Finance Docket No. 36396, *Tri-City Railroad Company, LLC -- Petition for Modification of Trackage Rights Agreement -- Port of Benton County, WA, BNSF Railway Company, and Union Pacific Railroad Company*

Dear Ms. Brown:

Hereby transmitted is a Petition For Modification Of A Trackage Rights Agreement for filing with the Board in the above referenced matter. The filing fee of \$350 was paid using Pay.gov.

Very truly yours,

/s/ Thomas F. McFarland

Thomas F. McFarland
Attorney for Tri-City Railroad Company, LLC

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FEE RECEIVED
April 10, 2020
SURFACE
TRANSPORTATION BOARD

FILED
April 10, 2020
SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

TRI-CITY RAILROAD COMPANY, LLC	)	
-- PETITION FOR MODIFICATION OF	)	FINANCE DOCKET
TRACKAGE RIGHTS AGREEMENT --	)	NO. 36396
PORT OF BENTON COUNTY, WA,	)	
BNSF RAILWAY COMPANY, AND	)	
UNION PACIFIC RAILROAD	)	
COMPANY	)	

PETITION FOR MODIFICATION OF A TRACKAGE RIGHTS AGREEMENT

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DATE FILED: April 10, 2020

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ATTACHMENTS

<u>Appendix #</u>	<u>Description</u>
1	Contract for Railroad Service No. AT-45-1-Gen-21 dated November 6, 1947
2	Amended Contract for Railroad Service No. AT-45-1-Gen-21 dated December 7, 1948
3	Decision in <i>Northern Pac. Ry. et al. Trackage Rights, Etc.</i> , ICC Finance Docket No. 15925, dated September 28, 1948
4	Indenture, effective October 1, 1998
5	Lease Agreement, effective August 1, 2002, wherein the Port leased the Southern Connection to TCRY
6	Decision in <i>BNSF Railway Co. v. Tri-City & Olympia Railroad Co.</i> , 835 F. Supp. 2d 1056, dated December 14, 2011
7	Excerpts from oral arguments in <i>BNSF Railway Co. v. Tri-City & Olympia Railroad Co.</i>

BEFORE THE
SURFACE TRANSPORTATION BOARD

TRI-CITY RAILROAD COMPANY, LLC	)	
-- PETITION FOR MODIFICATION OF	)	FINANCE DOCKET
TRACKAGE RIGHTS AGREEMENT --	)	NO. 36396
PORT OF BENTON COUNTY, WA,	)	
BNSF RAILWAY COMPANY, AND	)	
UNION PACIFIC RAILROAD	)	
COMPANY	)	

PETITION FOR MODIFICATION OF A TRACKAGE RIGHTS AGREEMENT

Pursuant to 49 U.S.C § 1322(c), 49 U.S.C. § 11327, and 49 U.S.C. § 11324(c), TRI-CITY RAILROAD COMPANY, LLC (TCRY), a Class III rail carrier, hereby respectfully petitions for modification of a Trackage Right Agreement (TRA) that is part of a Contract for Railroad Service No. AT-45-1-Gen-21, dated November 6, 1947, as amended on December 7, 1948 (the Contract). Copies of the Contract and the Amendment are attached to this Petition as Appendices 1 and 2, respectively.

I. RELIEF SOUGHT

TCRY respectfully petitions for modification of the TRA in the following respects:

(1) by vacating a provision that absolves BNSF Railway Company (BNSF) and Union Pacific Railroad Company (UP) from payment of the cost of maintaining a rail line commonly known as the Southern Connection; and

(2) by adopting in its place a provision requiring BNSF and UP to pay their fair share of maintaining the Southern Connection, as determined by their relative use of that line.

II. BACKGROUND

A. The TRA

At the conclusion of World War II, the rail line at the military complex of the United States Atomic Energy Commission (AEC) at Hanford Works, WA connected solely with a rail line of Milwaukee Road near Beverly, WA. A rail line owned by a predecessor of UP, over which a predecessor of BNSF had trackage rights, was located about 5.4 miles from the AEC facilities.^{1/} AEC and UP-BNSF desired that their rail lines connect with each other. That was accomplished by construction of the Southern Connection under the terms of the Contract, as amended.

Article X of the Contract provides that BNSF and UP would make rental payments for their right to use the Southern Connection until such time that the total of such payments equaled the cost to AEC of construction of the rail line. The TRA appears in that same Article X, viz:

After such rental payments made by the Railroads shall equal the initial actual cost to (AEC) of constructing the rail line, the railroads shall have the right during the term of this agreement to operate over the trackage without further rental payments.

The Contract does not have an expiration date. However, Article XV of the Contract provides that AEC can terminate the Contract at any time without cause on six months' written notice.

The Board's predecessor, the Interstate Commerce Commission (ICC), approved the Contract, including the TRA, in *Northern Pac. Ry. et al. Trackage Rights, Etc.*, ICC Finance Docket No. 15925, dated September 28, 1948. A copy of that decision is attached to this

^{1/} For ease of understanding, the UP and BNSF predecessors will be referred to by their present names.

Petition as Appendix 3. For 50 years thereafter, under ownership by AEC and its successor, the United States Department of Energy (DOE), BNSF and UP derived revenues from operating over the Southern Connection without paying for the associated cost of track and bridge maintenance.

B. Acquisition Of The Southern Connection By The Port

Attached to this Petition as Appendix 4 is a copy of an Indenture, effective October 1, 1998, by which DOE conveyed the Southern Connection and other property to the Port of Benton County, Washington (the Port). As here pertinent, Section VII (B) of the Indenture provided that the Port was to maintain the structures, improvements, facilities, and equipment that make up the Southern Connection “only during the useful life thereof, as determined jointly by (DOE) and (the Port)”. It does not appear that DOE and the Port determined the useful life of those materials. However, that provision was a strong indication that it was not intended that the Port maintain the rail line indefinitely into the future, but rather only during the useful life of the line’s components. It clearly was intended that BNSF and UP would be obligated to maintain the line once the track materials reached their useful lives. The Board can take notice that track materials installed in the rail line 73 years ago surely have reached their useful lives.

C. Initial Agreement By BNSF And UP To Pay Maintenance Costs

Effective October 1, 1998, the Port entered into a Maintenance and Operating Agreement with TCRY’s predecessor, Livingston Rebuild Center, Inc. (LRC), wherein the Port agreed to pay LRC a lump sum for maintenance and operation of the Southern Connection. That Agreement was subsequently assigned to TCRY.

In 2000, at the Port's urging, BNSF entered into an agreement with TCRY whereby cars were interchanged between them at Richland Junction, and BNSF paid TCRY a fee for transporting the cars to and from points on the Southern Connection. That fee included an element for the cost of maintenance of the Southern Connection. That was the first instance in which BNSF paid for the cost of maintenance.

Initially, UP refused to enter into a similar agreement. It was not until the Port threatened to invoke the termination provision in the Contract that UP entered into a Handling Carrier Agreement with TCRY under which UP compensated TCRY for maintenance costs.

D. The Port-TCRY Lease Agreement

Attached to this Petition as Appendix 5 is a copy of a Lease Agreement, effective August 1, 2002, wherein the Port leased the Southern Connection to TCRY. The Lease Agreement provides that TCRY would pay for maintenance of that rail line. However, at the time when the Lease Agreement was entered into, BNSF and UP were making payments to TCRY to offset the cost of maintaining the line. Thus, whereas TCRY was paying for the cost of maintenance, BNSF and UP were ultimately bearing that cost. The provision for TCRY's payment of maintenance costs was not harmful to TCRY as long as BNSF and UP were bearing those costs as elements of the switching fees paid to TCRY.

E. BNSF's Refusal To Pay Its Fair Share Of Maintenance Costs

In 2009, BNSF terminated its Interchange Agreement with TCRY and began to operate over the Southern Connection to serve shippers directly. TCRY strenuously opposed that action. TCRY requested that the Port terminate BNSF's TRA, as the Port had threatened in regard to UP

several years earlier. The Port refused. BNSF then sought judicial relief to confirm its right to operate over the line.

Attached to this Petition as Appendix 6 is a copy of a decision of the United States District Court for the Eastern District of Washington in *BNSF Railway Co. v. Tri-City & Olympia Railroad Co.*, 835 F. Supp. 2d 1056, dated December 14, 2011, wherein the Court held that the TRA gave BNSF the right to operate over the Southern Connection, and that TCRY was permanently enjoined from interfering with that right.

TCRY argued vociferously in Court that BNSF's action would be highly inequitable because whereas BNSF would derive substantial revenues from operating over the rail line directly, it would no longer make any payments to offset maintenance costs. Attached to this Petition as Appendix 7 are copies of excerpts from the transcript of arguments before the Court in which BNSF responded to that contention by unequivocally representing to the Court that if its operation over the line was determined to be lawful, BNSF would pay its fair share of maintenance cost, as determined by relative usage, viz:

BNSF Attorney: BNSF from the beginning has been willing to compensate for costs associated with its use of those tracks.

The Court: What does that mean?

BNSF Attorney: It means its fair share of the maintenance costs associated with those tracks. . .the railroad recognizes that the tracks have to be up kept. It didn't expect TCRY to pay for the upkeep of those tracks. (Appdx. 7 at 1).

x x x

BNSF Attorney: We've offered before in the TRO hearing and offer it again that we would expect and anticipate that we would pay our fair share of the maintenance on the tracks, and that's frequently done by just allocating the maintenance costs based on the number of carloads handled. . . (Appdx. 7 at 2).

BNSF Attorney: . . .We would agree that maintenance costs for the tracks would be allocated on a per capita basis, based on the number of cars that are operating over the track. . .*And those are all recognized railroad procedures* and that's what we would ask the Court for. . .(Appdx. 7 at 3-4, emphasis added).

Inexplicably, the Court's order did not include a requirement that BNSF bear a fair share of maintenance costs, as BNSF had clearly offered. What's more, BNSF has refused to honor its explicit undertaking voluntarily. As a consequence, for many years BNSF has derived large amounts of revenue from operating directly over the Southern Connection to provide service to shippers, while it has not paid the first dollar of the cost of maintenance during that time.

F. UP'S Refusal To Pay Its Fair Share Of Maintenance Costs

UP participated in the Court argument where it made representations similar to those made by BNSF (Appdx. 7 at 5), viz:

UP Attorney: . . .(TCRY is) entitled to be compensated for the two division ones' use (i.e. BNSF and UP). . .I don't think we can forget about TCRY's rights here, as well. It's basically a three railroad facility, and they're entitled to be treated equitably, justly, and fairly.

UP terminated the Handling Carrier Agreement with TCRY in 2017 and began to operate over the Southern Connection directly to serve shippers. UP has refused to voluntarily compensate TCRY for UP's use of the tracks in deriving revenue. As a consequence, like BNSF, UP has derived huge amounts of revenue from operating over the Southern Connection while bearing none of the associated costs.

III. JURISDICTION

The ICC has had jurisdiction over TRAs since the Transportation Act of 1940. Acquisition of trackage rights over a railroad line requires Board approval. 49 U.S.C. §

11323(a)(6). The Board is to approve a TRA if found to be “consistent with the public interest”.
49 U.S.C. § 11324(c).

If the Board has initially approved a TRA entered into after 1940, it has jurisdiction to modify the TRA due to substantially changed circumstances and/or a need for supplemental relief. 49 U.S.C. § 1322(c), 49 U.S.C. § 11327, *Thompson v. Texas Mexican Ry. Co.*, 328 US 134 (1946), *City of New Orleans v. Texas & N.O. R. Co.*, 195 F.2d 881 (5th Cir, 1952), *City of New Orleans v. Texas & Pac. Ry. Co.*, 195 F.2d 887 (5th Cir, 1952), *Delaware & H.R. Corp. -- Trackage Rights Modification*, 290 ICC 103, 111 (1953), *Chicago & North Western Transp. Co. -- Abandonment*, 354 ICC 205, 210-212 (1978), *Chicago & North Western Transp. Co. v. Peoria & Pekin Union Ry. Co.*, 360 ICC 168, 181-183 (1979).

The basis for that jurisdiction is best explained in the last cited case, 360 ICC at 181, viz:

...C&NW seeks a finding that the contract violates specific requirements of the statute which govern relationship between carriers. Such a consideration is clearly within our jurisdiction, especially where, as here, we originally approved the relationship and found the contract just and reasonable. Moreover, we are statutorily provided with a method whereby we may remedy such a situation on a proper showing. This can be accomplished by utilizing our powers under 49 U.S.C. § 11343 *et seq.* (now 49 U.S.C. § 11323, *et seq.*) which we deem necessary or appropriate. More specifically, in our (prior decision) we found that the transaction between the parties here is within the scope of section 5 (2) of the Interstate Commerce Act, as amended, that the terms and conditions proposed are just and reasonable, and that the transaction will be consistent with the public interest. If in fact, the terms of the contract as implemented...have since become unreasonable, we have the power to modify the agreement...

IV. STANDING

This Petition cannot be successfully opposed on the basis of lack of standing. The Board is not bound by the strict requirements of standing that govern judicial proceedings. *Conrail --*

Abandonment -- Portion of the 30th Street Secondary Track in New York City, NY, 1988 WL 225779 at *4 February 23, 2005.

Accordingly, the Board does not exclude interested persons from participation in Board proceedings on the basis of lack of standing. *Missouri Pac. R. Co. -- Abandonment -- in Douglas, Champaign, and Vermillion Counties, IL*, 1994 WL 597813 at *2, (October 24, 1994); *Diane del Grosso -- Petition for Declaratory Order*, 2018 WL 3588734 at *4, (July 24, 2018); cf 49 U.S.C. § 11701(b) (“The Board may not dismiss a complaint. . .because of the absence of direct damage to the complainant”.)

Even if judicial standing were applicable, this Petition satisfies its requirements. TCRY has judicial standing to seek modification of the TRA as lessee of the Port because TCRY is solely responsible for maintenance costs under its Lease Agreement with the Port. The Court in *BNSF v. Tri-City & Olympia R. Co.*, *supra*, stated that Tri-City took possession of the Southern Connection subject to BNSF and UP’s pre-existing rights. 835 F.2d at 1066. Thus, as to Southern Connection maintenance costs, TCRY, not the Port, is the real party in interest with standing to undo the unfairness of the refusal of BNSF and UP to pay their fair share of maintenance costs.

V. TIMELINESS

It is provided in 49 U.S.C. § 1322(c) that the Board may act under that statute at “any time”. The Court in *United States v. ICC*, 221 F.Supp. 584 (D, DC, 1963), held that that statutory term means what it says, at 589:

The words “any time” mean “any time”; they do not mean “within a reasonable time”. . .It is obvious that it was the intention of Congress to confer upon the Commission the flexible power to change its decisions after rehearing at any time (emphasis added).

See, also, Paramount Moving & Storage Co. -- Extension -- 25 States, 133 MCC 318, 321 (1984), 1984 WL 60949 at *4.

On the basis of those decisions, this Petition cannot be successfully opposed as untimely.

VI. ARGUMENT

1. The TRA As Implemented Is Not Consistent With The Public Interest

By statute, a TRA is required to be “consistent with the public interest”. 49 U.S.C. § 11324(c). The statute does not define that term.

In determining whether a TRA is consistent with the public interest, the Board can rely on the “reasonableness” provisions of the Interstate Commerce Act as guides (e.g., “reasonable practice” under 49 U.S.C. § 10702), even though those provisions may not attach *per se*. *Chicago & North Western Transp. Co. v. Peoria & Pekin Union Ry. Co.*, *supra*, 360 ICC at 182-183. (. . .We will utilize the statutory (reasonableness) sections as guides in determining whether the contract is just, reasonable, and non-discriminatory. . .”).

The present scenario --- in which BNSF and UP derive a large amount of revenues from operating over the Southern Connection to provide service to shippers, but pay none of the associated track and bridge maintenance cost --- is unfair, unjust, and unreasonable in the extreme.

BNSF and UP should not be heard to argue to the contrary. BNSF acknowledged in open Court that it is a “recognized railroad procedure” that maintenance costs “should be allocated on a per capita basis, based on the number of cars that are operating on the track” (Appendix 7 at 3). UP acknowledged on the record that TCRY should be compensated for use

of the rail line by BNSF and UP (*id.*). An argument for the status quo regarding maintenance costs would be irreconcilable with those public statements.

The doctrine of judicial estoppel is instructive and may be applied in the context of agency adjudication. *Pyco Industries, Inc. -- Feeder Line Application -- Lines of South Plains Switching Ltd. Co.*, 2010 WL 2353381 at *4, STB Docket No. 34890, decision served June 10, 2010. In *Delaware & H. Co. -- Lease & Trackage Rights -- Springfield Terminal Ry.*, 1995 WL 571836 at *5, ICC Docket No. 30965 (Sub-No. 4), the ICC held that a party was estopped from advocating a position directly opposite to the position it had taken earlier. Cf. *New Hampshire v. Maine*, 532 US 742, 749 (2001).

Apart from estoppel, there can be no justification for a situation whereby a rail carrier operating over a rail line of another gets all of the revenues but pays none of the costs, while the owner-lessee of the line pays all of the maintenance costs but derives none of the revenues. More than 11,000 carloads were transported over the line in 2019. Revenues from that traffic were substantial. The heavy volume of traffic resulted in extensive maintenance costs. The disparity between BNSF-UP deriving all revenues and TCRY bearing all maintenance is thus shown to be extremely harmful to TCRY.

BNSF and UP clearly acknowledged that it is a longstanding custom and practice in the railroad industry that when a rail carrier operates over tracks that it does not own in deriving revenues from providing service to shippers, that rail carrier is obligated to pay its fair share of the costs of track and bridge maintenance associated with such operation, as determined by relative usage. (“...those are all recognized railroad procedures and that’s what we [BNSF] would ask the Court for...” [Appdx. 7 at 3-4]). BNSF and UP have failed and refused to abide

by that standard industry practice. That failure and refusal are inconsistent with the public interest in violation of 49 U.S.C. § 11324(c), as informed by 49 U.S.C. § 10702(b) that prohibits unreasonable transportation practices.

In addition, the Indenture by which DOE conveyed the Southern Connection to the Port requires the Port to maintain that rail line only during the useful life of its components. That useful life was reached long ago, at which time it was intended that BNSF and UP were to assume the maintenance obligation. They have failed and refused to do so. That failure and refusal provide an additional ground to conclude that the TRA as applied is not consistent with the public interest.

2. Substantially Changed Circumstances And A Need For A Supplemental Order Compel Modification Of The TRA To Require That BNSF And UP Pay Their Fair Share Of Maintenance Costs

Inasmuch as the TRA is not consistent with the public interest as currently implemented, the TRA is required to be modified to vacate the provision that permits operation over the rail line without payment of maintenance costs, and to adopt in its place a provision that would require BNSF and UP to pay their fair share of maintenance costs. There is statutory support for that action in 49 U.S.C. § 1332(c) that permits the Board to change a prior action if warranted by substantially changed circumstances, and 49 U.S.C. § 11327 that permits the Board to issue orders supplemental to orders issued earlier.

Circumstances regarding the TRA have changed substantially since it was signed in 1947-1948 and implemented under AEC-DOE ownership of the line. AEC was willing to permit operation over the line by BNSF and UP without charge as contractual consideration for the agreement of BNSF and UP to pay all costs of construction of the line. Now, 73 years

thereafter, the track materials used in that construction have long since reached their useful lives, and, TCRY, as lessee of the line, is no longer willing to permit BNSF and UP to shirk their responsibility to pay their fair share of the cost to maintain the line. The TRA should be modified accordingly.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Board should modify the TRA in the following respects:

(1) by vacating a provision that absolves BNSF Railway Company (BNSF) and Union Pacific Railroad Company (UP) from payment of any cost of maintaining a rail line commonly known as the Southern Connection; and

(2) by adopting in its place a provision requiring BNSF and UP to pay their fair share of maintaining the Southern Connection, as determined by their relative use of that line.

Respectfully submitted,

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DATE FILED: April 10, 2020

Finance Docket No. 36396

Appendix 1

Contract for Railroad Service No. AT-45-1-Gen-21
dated November 6, 1947

Contract No. AT-45-1-Gen-21

ATOMIC ENERGY COMMISSION

CONTRACT FOR RAILROAD SERVICE

THIS CONTRACT, entered into this 6th day of November, 1947, by and between the UNITED STATES OF AMERICA (hereinafter called the "Government"), acting by and through the UNITED STATES ATOMIC ENERGY COMMISSION, created by Public Law 535, 79th Congress, approved August 1st 1946, (hereinafter called the "Commission"), NORTHERN PACIFIC RAILWAY COMPANY, a Wisconsin corporation, (hereinafter called "Pacific Company"), and OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, an Oregon corporation, and its Lessees, UNION PACIFIC RAILROAD COMPANY, a Utah corporation, (hereinafter collectively called the "Union Company"). Said railroad companies are also hereinafter collectively referred to as "Railroads".

WITNESSETH THAT:

WHEREAS, for the purposes hereinafter stated, there has been prepared a map marked Exhibit "A" dated August 25, 1947, attached hereto and made a part hereof, on which are shown in various colors certain existing and proposed lines of railway in Benton County, Washington, extending in a general northwesterly direction from Wennewick, Washington; and

WHEREAS, the Government has constructed on its property a line of railway, a portion of which is shown in green on said exhibit, extending from Hanford, Washington, southerly to a point near the north bank of the Yakima River; and

WHEREAS, the Government desires to have a direct rail connection to the south so as to interchange business with the Pacific Company and with the Union Company at an interchange facility to be constructed near the vicinity of point B on said exhibit, and in order to accomplish this purpose it is proposed:

(1) That the Commission construct the proposed line of railway shown in yellow on said exhibit between approximately point B on the north right of way line of the Union Company and point D, and also construct said interchange facilities.

The Commission proposes to authorize its prime contractor, the General Electric Company, a New York corporation (hereinafter called the "Electric Company"), to construct and maintain said line and facilities under the terms of contract numbered W-31-109-eng-52, dated May 15, 1946, between the Government and said Electric Company (hereinafter called "Prime Contract");

(2) That the Pacific Company obtain the right to operate with its employees and equipment over the existing track of the Union Company shown in red on said exhibit between point A, which is the point of connection with the line of railway of the Pacific Company, and point B, which is the point of connection with the Government trackage;

(3) That the Pacific Company and Union Company be granted the right to operate with their respective employees and equipment over said track shown on said exhibit between points B and E and to and in said interchange facilities;

NOW, THEREFORE, the parties do mutually agree as follows:

ARTICLE I.

The Commission shall procure or provide all necessary rights of way and public authority for the construction, maintenance and operation of said interchange facilities and said line of railway and appurtenances (including bridge across the Yakima River) between points B and E.

ARTICLE II.

The Commission shall forthwith locate, lay down and construct said line of railway (including said bridge) in approximately the location shown in yellow on said exhibit between points B and D. The Commission shall also forthwith construct or provide said interchange facilities and a wye in the vicinity of point E. Said line of railway, bridge, interchange facilities and wye shall be constructed in a manner suitable for the operations of the Pacific Company and the Union Company with their respective equipment.

ARTICLE III.

The Commission shall pay for all cost of right of way for and construction of said line of railway B-D, including said bridge, and for the cost of said interchange facilities and wye.

ARTICLE IV.

The Pacific Company and Union Company agree, upon the completion of the line B-D and the interchange facilities and wye, each to pay one-half of the sum of \$100,000, which sum fairly represents the cost to which the Railroads would be subjected if they constructed interchange trackage at point B. Unless otherwise directed by the Commission, said sums shall be paid to the Electric Company as prime contractor of the Commission, or to such other contractor as the Commission may designate, for application in reduction of cost of work under the terms of said prime contract or other contract. The Commission shall own said interchange facilities and wye but the Pacific Company and the Union Company shall be entitled during the term of this agreement to use the same and the connecting trackage C-E for the purpose of interchanging business with the Government free of rental or any other charge.

ARTICLE V.

The Commission hereby grants the Pacific Company and Union Company the equal joint right to operate with their respective employees and equipment over said line of railway shown on said exhibit between points B and E, and to use said interchange facilities and wye for the purpose of interchanging business with the Government. The Commission agrees that the Pacific Company and the Union Company shall each have equal rights and privileges in the transaction of their business and any right or privilege at any time granted by the Commission to one of said companies in respect to its operations shall be a right or privilege which the other company may at its option exercise in respect to its operations.

ARTICLE VI.

The Union Company agrees, by contract of even date herewith, in form and substance mutually satisfactory to the Union Company and the Pacific Company to grant to the Pacific Company the equal joint use and possession in common with the Union Company of said line of railway shown in red on said exhibit between points A and B. Such use by the Pacific Company shall be restricted to movements of its business in each direction between Kennewick and the connection with the Government trackage at point B.

ARTICLE VII.

The Pacific Company and Union Company each for itself agrees to deliver and receive at said interchange facilities all business which either is obligated to transport as a common carrier by railroad.

The Union Company and Pacific Company may from time to time by mutual agreement between them arrange for one of them to operate a joint train between points A and E in which will be moved the business of both railroads. The railroad operating such joint train shall be considered as the agent of the other company in such operation.

ARTICLE VIII.

The Commission will have the general control, management and administration of said railway between points B and E, said interchange facilities and wye, and will at all times keep the same in good condition and repair and suitable for the business of the Pacific Company and Union Company, provided if damage results to said Government trackage by reason of the negligent act or omission of the Railroads, or either of them, the one at fault will reimburse the Commission for such damage. The Railroads shall not by reason of any defect in the trackage or by reason of the failure or neglect to repair such defect, make against the Government, its employees, agents, or contractors any claim or demand for loss, damage or injury arising from such defect, neglect or failure, but should the Commission fail to repair any defect within a reasonable time after being notified so to do by the Railroads or either of them, then such Railroads or either of them may make the necessary repairs at once, the cost of which will be paid by the Commission.

ARTICLE IX

Subject to the approval of the Commission, the Pacific Company and the Union Company shall agree from time to time upon rules and regulations covering the movement of engines, cars and trains over the line E-E, and on said interchange facilities and wye. All rules, regulations and train schedules shall be equal, just and fair as between the Pacific Company and the Union Company and shall not unjustly discriminate against either.

ARTICLE X.

The Pacific Company and Union Company, each for itself, agrees to make the following payments as rental for the right to use the trackage B-C until such time as the total of such payments made by both equals the initial actual cost to the Commission of constructing said line of railway between points B-C:

(1) The Pacific Company shall pay the sum of \$4.00 for each loaded car moved in either direction over said line B-C, provided such car has received or will receive a line haul over the lines of railway of the Pacific Company. Movements from or to Pasco shall not be deemed line haul movements, provided, however, that line haul movements to and from points beyond Pasco shall not lose character as such by reason of stoppage in transit at Pasco.

(2) The Union Company shall pay the sum of \$4.00 for each loaded car moved in either direction over said line B-C, provided such car has received or will receive a line haul over the lines of railway of the Union Company. Movements from or to Kennewick shall not be deemed line haul movements, provided, however, that line haul movements to and from points beyond Kennewick shall not lose character as such by reason of stoppage in transit at Kennewick.

Unless otherwise directed by the Commission, the payments provided for in paragraphs numbered (1) and (2) of this Article shall be paid to the Electric Company as prime contractor of the Commission, or to such other contractor as the Commission may designate, for application in reduction of cost of work under the terms of said prime contract or other contract. The Pacific Company and Union Company shall make such payments on or before the 25th day of each month for all such cars so moved in the preceding month.

Upon completion of the trackage B-C the Commission shall furnish to each of the other parties a detailed statement showing the actual cost of construction of this trackage, including the right of way and bridge.

The payments to be made by the Pacific Company and Union Company as provided in this Article shall be in lieu of all other charges for the use by them or either of them, during the term of this agreement, of said line B-C.

After such rental payments made by the Railroads shall equal the initial actual cost to the Commission of constructing said line of railway between points B-C, the railroads shall continue to have the right during the term of this agree-

ment to operate over the trackage without further rental payments.

ARTICLE XII.

The Commission shall from time to time designate tracks within the interchange facilities for the purpose of interchanging cars hereunder.

All cars and contents placed on the interchange tracks shall be deemed to be in the possession of the Commission and to continue in the possession of the Commission until the Railroads shall move said cars from said interchange tracks.

The Commission shall pay to the Railroads demurrage accruing on all cars interchanged with it by the Railroads while such cars are in the possession of the Commission, but such demurrage charges shall not be made after the Commission has notified the Railroads that such cars are available for the use of the Railroads and may be removed from such interchange tracks. The Commission shall pay demurrage charges in accordance with the terms and provisions of the Association of American Railroad Freight Tariff 4-Y, I.C.C. 3968, D. T. Jones, Agent, or supplements thereto and reissues thereof.

The Commission shall be responsible for loss of or damage to cars and equipment of the Railroads and cars and equipment owned by others for which the Railroads are responsible while such cars and equipment are in the possession of the Commission, ordinary wear and tear excepted.

As engines and crews of two or more of the parties hereto will be using at the same time trackage B-E, including the interchange facilities and wyo, it is agreed that each party will assume any liability for injury to or death of any person or persons, or loss of or damage to any property caused by its sole negligence; and if such injury, death, loss or damage results from the concurring negligence of two or more of the parties hereto, the responsibility therefor shall be assumed equally by the parties at fault. If such liability results from defects of equipment of any party, or concurring of two or more parties, the cost resulting shall be divided on the same basis as loss or damage resulting from negligence of such party or parties.

ARTICLE XII.

The parties hereto, with respect to the operation of equipment and appliances on and over said Government trackage shall comply with all applicable laws and all applicable rules, regulations and orders promulgated by any Board, Commission or other public body having jurisdiction, for the protection of persons or otherwise.

ARTICLE XIII.

No members of or delegate to Congress or resident commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ARTICLE XIV.

The Railroads warrant that they have not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Railroads for the purpose of securing business.

ARTICLE XV.

Whenever an actual or potential labor dispute is delaying or threatens to delay the timely performance of this contract, the Railroads will immediately give notice thereof to the Commission. Such notice shall include all relevant information with respect to such dispute.

The Commission may terminate this agreement at any time upon six months advance notice thereof in writing being given by the Commission to the Railroads.

The financial liabilities assumed hereunder by the Commission shall be conditional upon the availability of funds for payment of any claims which may arise.

ARTICLE XVI.

The Railroads, in performing the work required by this contract, shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.

The Railroads agree that the provision of above paragraph will also be inserted in all of their subcontracts. For the purpose of this Article, a subcontract is defined as any contract entered into by the Railroads with any individual, partnership, association, corporation, estate, or trust, or other business enterprise or other legal entity, for a specific part of the work to be performed in connection with the supplies or services furnished under this contract; provided, however, that a contract for the furnishing of standard or commercial articles or raw materials shall not be considered as a subcontract.

ARTICLE XVII.

(1) It is understood that disclosure of information relating to the work contracted for hereunder to any person not entitled to receive it, or failure to safeguard all secret, confidential and restricted matter that may come to the Railroads or any person under their control in connection with the work under this contract, may subject the Railroads, their agents, employees and subcontractors to criminal liability under the laws of the United States. See Sections 10 and 16 of the Atomic Energy Act of 1946 (Public Law 585 - 79th Congress). See also Title I of an Act approved June 16, 1917, (40 Stat. 217; 50 U.S.C. 31-42) as amended by an Act approved March 28, 1940 (54 Stat., Chap. 79); and the provisions of an Act approved January 12, 1938, (52 Stat. 3; 50 U.S.C., 45-46d), as supplemented by Executive Order No. 8381, dated March 22, 1940, 5 F.R. 1147; see also, generally, the Atomic Energy Act of 1946, (Public Law 585 - 79th Congress).

(2) The Railroads agree to conform to all security regulations and requirements of the Atomic Energy Commission. Except as the Commission may authorize, in accordance with Section 10 (b)(5)(B) of the Atomic Energy Act of 1946, the Railroads agree not to permit any individual to have access to restricted data until the Federal Bureau of Investigation shall have made an investigation and report to

the Commission on the character, associations, and loyalty of such individual and the Commission shall have determined that permitting such person to have access to restricted data will not endanger the common defense or security. The term "restricted data" as used in this paragraph means all data concerning the manufacture or utilization of atomic weapons, the production of fissionable material, or the use of fissionable material in the production of power, but shall not include any data which the Commission from time to time determines may be published without adversely affecting the common defense and security. The Railroads shall insert in all subcontracts under this contract provisions similar to the text of Sections (1) and (2) of this Article.

ARTICLE XVIII.

Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise hereunder, and which are not disposed of by mutual agreement, shall be decided by a representative of the Commission duly authorized to supervise and administer performance of the work hereunder, who shall reduce his decision to writing and mail a copy thereof to the Railroads. Within thirty (30) days from this mailing, the Railroads may appeal in writing to the Commission, whose written decision thereon shall be final and conclusive. Pending decision of a dispute hereunder, the Railroads shall diligently proceed with performance under this contract. To the extent that disputes involve questions which are subject to determination by the Interstate Commerce Commission, National Railroad Adjustment Board, or other regulatory body having jurisdiction over such questions, this Article shall not apply; nor shall this Article apply to disputes between the Railroads which do not involve the Commission.

ARTICLE XIX.

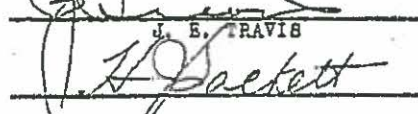
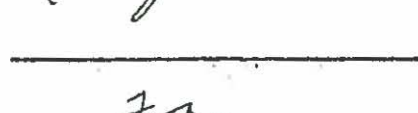
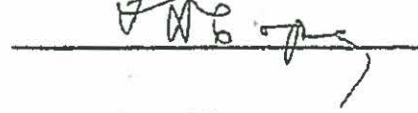
As used in this contract, the term "Commission" shall mean the United States Atomic Energy Commission, created by Public Law 585, 79th Congress, approved August 1, 1946, or the duly authorized representative or representatives of said Commission.

ARTICLE XX.

This agreement is conditioned upon the approval, if required, by the Interstate Commerce Commission of the arrangement herein contemplated whereby the Railroads will operate over trackage B-E, including the interchange facilities and ways, and whereby the Pacific Company will take use in common with the Union Company of said line of railway shown in red on Exhibit "A" between points A and B.

IN WITNESS WHEREOF, the parties have executed this contract as of the day and year first above written.

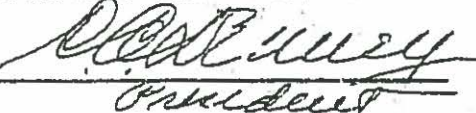
WITNESSES:


J. L. DICKSON

J. E. TRAVIS

H. SACKETT

F. W. B. [unclear]

C. W. [unclear]

UNITED STATES ATOMIC ENERGY COMMISSION

By 
C. SHUGH
MANAGER, HANFORD DIRECTED OPERATIONS
NORTHERN PACIFIC RAILWAY COMPANY

By 
[unclear]
OREGON-WASHINGTON RAILROAD & NAVIGATION
COMPANY
UNION PACIFIC RAILROAD COMPANY

By 
[unclear]
PRESIDENT

Finance Docket No. 36396

Appendix 2

Amended Contract for Railroad Service No. AT-45-1-Gen-21
dated December 7, 1948

Supplemental Agreement No. 1

Contract No. AT-45-1-Con-21

ATOMIC ENERGY COMMISSION

THIS CONTRACT, entered into this 7th day of December, 1946, by and between the UNITED STATES OF AMERICA (hereinafter called the "Government"), acting by and through the UNITED STATES ATOMIC ENERGY COMMISSION, created by Public Law 585, 79th Congress, approved August 1, 1946, (hereinafter called the "Commission"), NORTHERN PACIFIC RAILWAY COMPANY, a Wisconsin Corporation, (hereinafter called "Pacific Company"), and OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, an Oregon Corporation, and its Lessee, UNION PACIFIC RAILROAD COMPANY, a Utah Corporation (hereinafter collectively called the "Union Company"). Said railroad companies are also hereinafter collectively referred to as "Railroads".

WITNESSETH THAT:

WHEREAS, a certain contract was entered into between the parties hereto on November 6, 1947, designated as contract No. AT-45-1-Con-21; and

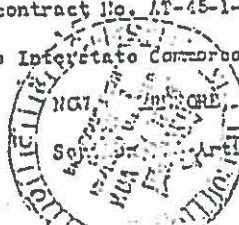
WHEREAS, by Article XX of said contract No. AT-45-1-Con-21, the same was conditioned upon approval, if required, by the Interstate Commerce Commission; and

WHEREAS, pursuant to application duly made to the Interstate Commerce Commission, which application was officially designated as Finance Docket No. 15925, and upon which application, and after hearing, the Interstate Commerce Commission issued its report, order, and certificate dated September 26, 1948; and

WHEREAS, pursuant to said report and order it is necessary to modify said contract No. AT-45-1-Con-21 in order to comply with the decision and order of the Interstate Commerce Commission;

it is mutually agreed:

That Article X of contract No. AT-45-1-Con-21 is amended and



modified to read as follows:

"ARTICLE X"

"Upon completion of the line of railway between points B-C the Commission shall furnish to each of the Railroads a detailed statement showing the cost of construction of said line of railway B-C, including the right of way and bridge.

"As rental for the right to use the line of railway between points B-C, the Pacific Company and the Union Company, each for itself, agrees to pay annually for twenty-five (25) years one-twenty-fifth (1/25) of one-half (1/2) of the initial actual cost of construction of said line of railway between points B-C, without interest.

"Unless otherwise directed by the Commission, the payments to be made by the Pacific Company and the Union Company as provided in this article shall be paid to the Electric Company as prime contractor of the Commission or to such other contractor as the Commission may designate, for application in reduction of cost of work under the terms of said prime contract or other contract. The Pacific Company and Union Company shall make their first annual payments on the first anniversary date of the final completion of the line of railway between points B-D and interchange tracks and wye tracks, and subsequent payments shall be made annually thereafter as provided in this article.

"The payments to be made by the Pacific Company and Union Company as provided in this article shall be in lieu of all other charges for use by them or either of them during the term of this agreement ~~on~~ said line B-C. After all said annual payments to be made by the Pacific Company and Union Company have been made, the Pacific Company and Union Company shall continue to have the right to operate over the trackage without further payments."

Section 2. Article XV of contract No. AT-45-1-Gen-21 is amended and modified to read as follows:

"ARTICLE XV"

"Whenever an actual or potential labor dispute is delaying or threatens to delay the timely performance of this contract, the Railroads will immediately give notice thereof to the Commission. Such notice shall include all relevant information with respect to such dispute.

X
"The Commission may terminate this agreement at any time on six month's notice in writing being given by the Commission to the Railroads. If the Commission exercises said right of termination the Railroads, and each of them, thereupon shall be relieved from any and all liability for annual payments provided for in Article X from and after the effective date of termination. In the event the effective date of termination is not the anniversary date on which an annual payment is payable, rental shall be pro rated on a pro diem basis, and shall be paid for the portion of the year during which this agreement has been in effect.

"If either the Pacific Company or Union Company shall fail to perform any of its obligations under this agreement, the Commission may terminate this agreement as to the railroad so defaulting by giving to such railroad six months' written notice of intention so to do; provided that if during such six-month period the defaulting railroad corrects said default, then this agreement shall not terminate because of such default. A default by either railroad shall not be a cause for termination of this agreement by the Commission as to the other railroad. The termination of this agreement because of default by one of the railroads shall not relieve the defaulting company from its obligation to make all annual payments as required by Article X hereof.

"If the Commission terminates the Hanford Project, or suspends operation thereof for an indefinite period which continues for one

year, the Railroads may terminate this agreement by giving the Commission six (6) months notice in writing, and upon giving of such notice to the Commission, the Railroads shall be relieved from any and all annual payments provided for in Article X from and after the date of receipt by the Commission of such notice.

If the Commission suspends operation of the Project for a fixed or determinable period of time, this agreement shall remain in effect, but the obligation of the Railroads to pay rental under Article X shall be suspended for the period during which the operations are suspended.

"The financial liabilities assumed hereunder by the Commission shall be conditional upon the availability of funds for payment of any claims which may arise."

Section 3. Except as herein specifically modified and amended, said contract No. AT-45-1-Gen-21 remains and continues in full force and effect.

IN WITNESS WHEREOF, the parties have executed this contract as of the day and year first above written.

WITNESSES:

UNITED STATES ATOMIC ENERGY COMMISSION

H. Sackett
Frank McLeod

F. W. G. O'Connell
C. W. G. O'Connell

By *David F. Shaw*
Deputy Manager, Hanford Operations Office
NORTHWEST PACIFIC RAILWAY COMPANY

By *W. B. G. O'Connell*
President

OREGON-WASHINGTON RAILROAD & NAVIGATION
COMPANY
UNION PACIFIC RAILROAD COMPANY

By *W. B. G. O'Connell*
President



Appendix 3

Decision in *Northern Pac. Ry. et al. Trackage Rights, Etc.*,
ICC Finance Docket No. 15925, dated September 28, 1948

CONFIDENTIAL--SUBJECT TO INSPECTION ONLY BY PARTIES TO THE RECORD

This report will not be printed in full in the permanent series of Interstate Commerce Commission reports.

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 15925

NORTHERN PACIFIC RAILWAY COMPANY, ET AL. TRackage RIGHTS ETC.

Submitted July 15, 1948.

Decided September 28, 1948.

- (1) Acquisition by the Northern Pacific Railway Company of trackage rights over that portion of the Yakima branch line of railroad of the Oregon-Washington Railroad & Navigation Company, Union Pacific Railroad Company, lessee, between Kennewick and a connection with tracks to be constructed by the United States of America, in Benton County, Wash., approved and authorized. Conditions prescribed.
- (2) Certificate issued authorizing operation by the Northern Pacific Railway Company and the Union Pacific Railroad Company over that portion of a line of railroad, constructed and to be constructed by the United States of America, extending from a connection with the Yakima branch of the Oregon-Washington Railroad & Navigation Company to and into an exchange yard which the United States will construct near the north bank of the Yakima River, in Benton County, Wash. Conditions prescribed.

L. B. dePonte, Conrad Olson, and F. J. Malin for applicants,
Roger I. Harris and F. A. Allan for Atomic Energy

Commission.

A. N. Whitlock, Thomas H. Kaguire, and Larry H. Dugan for
Chicago, Milwaukee, St. Paul and Pacific Railroad Company,
intervener.

J. B. Daubenspeck, H. F. Love, L. A. Eorden, A. R. Tenn,
and G. A. Robison for employees of the Chicago, Milwaukee,
St. Paul & Pacific Railroad Company.

P. K. Byers and C. W. Stevens for other railway employees.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS LEE, MAHAFFIE, AND MILLER

BY DIVISION 4:

Exceptions to the report proposed by the examiner were filed and the case was argued orally. Our conclusions differ somewhat from those recommended by him.

The Northern Pacific Railway Company, hereinafter sometimes called the Northern Pacific, and Oregon-Washington Railroad & Navigation Company, Union Pacific Railroad Company, lessee, hereinafter referred to jointly as the Union Pacific, by application filed November 25, 1947, applied for permission, under section 1(18) of the Interstate Commerce Act, to extend their operations by trackage rights and joint use over that portion of a line of railroad, constructed and to be constructed by the United States of America, from a connection with the Yakima branch of the Oregon-Washington Railroad & Navigation Company to and into an interchange yard which the

United States will construct near the north bank of the Yakima River, approximately 6.67 miles; in connection with which proposed operation the Northern Pacific Railway Company proposes to acquire, under section 5(2) of the act, trackage rights over the said Yakima branch from the point of connection with the proposed railroad to be constructed by the United States to Kennewick, approximately 4.92 miles, all in Benton County, Wash. The Atomic Energy Commission, hereinafter referred to as AEC, intervened in support of the application, and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, hereinafter referred to as the Milwaukee, intervened in opposition thereto. A hearing was held and briefs were filed. At the hearing railway employees of the Milwaukee, lines west, were represented and opposed the granting of the application. Representatives of other railway employees also entered appearances at the hearing but introduced no evidence. No representations have been made by any State authority. Unless otherwise indicated, all points hereinafter mentioned are in the State of Washington.

The sole purpose of the instant application is to provide additional rail transportation service from the south to the Hanford Engineering Works, also known as the Hanford Project, a vast area located in Benton, Grant, and Franklin Counties, comprising 640 square miles, or more than 400,000 acres. Hanford Works is used by the Government in the production of plutonium, an element which is not only vital in connection with the development of military weapons, but which also has important and far reaching peacetime applications. It is the only large-scale plutonium producing plant in the United States. Tremendous inbound tonnages of coal, chemicals and other commodities are received at the project, making continued rail service thereto essential.

Construction of Hanford Works was commenced in March 1943, and completed in February 1945. The original construction and operation was conducted by E. I. du Pont de Nemours and Company, under the supervision of the War Department, in accordance with the provisions of a "pure cost contract" under which the Government agreed to reimburse the contractor for all expenditures and losses, including transportation costs. By appropriate Congressional legislation approved August 1, 1946, and an Executive Order issued December 31, 1946, the project was transferred from the War Department to AEC. As of September 1, 1946, the General Electric Company has been operating Hanford Works pursuant to a pure cost contract substantially the same as the original duPont contract. Since the inception of Hanford Works, the contracts under which operations are conducted have been classified as "secret" by the authorities charged with the duty of its administration. The nature of the project requires that the greatest degree of security be exercised at all times because the interruption of plant production for any reason would be critical.

In connection with the original construction, the Government built a standard-gage, single track railroad line to serve the residential and operational areas. This Government-owned-and-operated railroad system is made up of approximately 180 miles of main line, industrial spurs, and classification yards, a portion of which formerly belonged to the Milwaukee. In

Finance Docket No. 14330, Chicago, M. St.P. & P. R. Co., Trustees Abandonment, 254 I.C.C. 831, decided October 15, 1943, we permitted abandonment of that portion of the Milwaukee's Hanford branch extending from a point near Vernita to Hanford, approximately 25.105 miles. Subsequently that segment was acquired by the Government for \$375,000, and it now forms a part of the Government railroad within the restricted area.

At present, the only rail service to Hanford Works is provided from the north by the Milwaukee's Hanford branch extending from Beverly Junction to a connection with the Government-owned railroad, approximately 20.79 miles. Interchange is effected at Riverland, a point approximately 1.75 miles inside the Government confine, but in the Milwaukee's tariffs the station designation is shown as Hanford. The history of the Milwaukee's line and its operational function into the project will be described below.

Richland is the residential section and the main administration area of Hanford Works. It is located in the extreme southeastern section of the reservation, about 5 miles north of the proposed connection with the Union Pacific, and approximately 48 miles by rail from the connection with the Milwaukee on the north. Richland is to be developed into a normal American community. It is a modern and permanent city with standard school facilities, stores, service establishments, theaters, churches, recreational facilities, a post office, and a bank. This community grew from approximately 250 inhabitants before the project was undertaken until now it contains sufficient housing to accommodate approximately 18,000 individuals whose family heads are engaged in the operation of Hanford Works. In addition, another community of about 5,000 construction workers is located at North Richland, approximately 2 miles north of the existing city limits of Richland. The industrial area of the project extends north, east, and west of Richland and contains several main production plants, 1 of which is not more than 4 miles from Richland. Other processing plants are located farther north, and are closer to the Milwaukee than to the proposed interchange with the applicants. Because of a current expansion program, it is anticipated that the permanent population of Richland will ultimately increase to 25,000 citizens, and that the temporary population of North Richland, during the period of the new construction, will approximate 20,000 inhabitants. The work already assigned in connection with the expansion program is sufficient to last 4 or 5 years.

In order to expedite completion of the expansion program and in the interest of economy, the authorities at Hanford Works recently have obtained the use of a major portion of the Government-owned Pasco General Depot, hereinafter sometimes referred to as the depot, located southeast of Pasco near the confluence of the Snake and Columbia Rivers. The depot is approximately 15 miles from Richland, and consists of 8 permanent type modern warehouses, each containing approximately 166,000 square feet of floor space. In addition, various other shops and service buildings, which are appurtenant to an establishment of this nature, are available. The depot area comprises 715 acres and is provided with adequate outside storage yards, roadways, unloading docks, a railroad system to meet the requirements

of the operation, and is fenced and patrolled in accordance with security regulations. It is considered a permanent facility in connection with future operations of Hanford Works. The original cost to the Government for construction of the warehouse buildings alone in 1942 was approximately \$2,535,000, and it is estimated that to duplicate these warehouses on the Hanford Project at present prices would cost the Government more than \$5,000,000, exclusive of necessary appurtenances. The depot is switched by the Northern Pacific, but the tracks of the Spokane, Portland & Seattle Railway are adjacent thereto. It is utilized for storage of various materials and equipment which must be protected from the weather, and which are now arriving for the current expansion program at Hanford Works. Between June 19, 1947, and January 26, 1948, a total of 167 carloads, or 9,384,246 pounds, of freight was received and placed in storage at the depot for ultimate use at Richland. Much of this property was received by rail, and consists principally of building materials and certain chemicals. The volume is expected to increase greatly. Storage space for chemicals shipped in tank-car lots is limited in the restricted area so that provision must be made to hold chemicals at the depot until needed. Some plumbing supplies stored at the depot were trucked in from Portland, Oreg., and other nearby points.

Negotiations for a southern rail connection to serve the project were commenced in June 1943, when the applicants were invited by army officials in charge of construction at Hanford Works to build, at the railroads' expense, a line to connect near Richland with the Government's railroad then under construction within the reservation. This the railroads refused to do. Subsequent discussions involving alternative proposals were had between the parties, culminating in an agreement reached during the first week of August 1943, under which the railroads were to contribute \$75,000 and to pay an allowance of \$2 for each loaded car handled in line-haul movement into or out of the project. Because of higher construction costs in 1947 as compared to 1943, these amounts were increased to \$100,000 and \$4 per car, respectively, in the final contract. The lump-sum contribution by the railroads was to be in lieu of the cost to them of constructing interchange tracks at the point of connection. The project authorities insisted that for security reasons the interchange yards be located within the reservation. Contracts covering the proposed construction by the Government and operation by the applicants of the southern gateway were prepared and completed in September 1943, but because of failure to obtain requisite approval of the Office of Defense Transportation such construction and operation into the project were not consummated at that time. Thereafter the matter lay dormant until the middle of 1947 when the then commanding officer of the project contacted the applicants and again broached the proposition that the railroads build a southern connection at their own expense. The applicants rejected the idea of building into the project but stated that they were willing to resume negotiations on bases similar to those existing in 1943, when the original proposal was blocked. Further discussions were had which finally resulted in execution of the two contracts covering the proposed construction and operation of the southern connection for which authority is sought in the instant application.

Both agreements are dated November 6/ 1947, and are conditioned upon our prior approval, if such approval is required. Pursuant to the terms of the first contract, the Union Pacific grants to the Northern Pacific the right to use in bridge movement that portion of the former's Yakima branch, extending from a connection at Kennewick to the junction of the Union Pacific's line with the track to be constructed by the Government, a distance of approximately 26,000 feet. As compensation for the rights granted, the Northern Pacific agrees to pay the sum of \$4,594.52 per annum, or one-half of 5 percent on an agreed book value of \$183,772.93, plus one-half of 5 percent upon the actual cost of all future additions and betterments chargeable to capital account. The Northern Pacific will also pay a per-car proportion of the actual costs incurred by the Union Pacific for maintenance and operation, including insurance and taxes. Following a test period the parties may agree upon a flat-rate per-car charge which will be subject to future charges from time to time as conditions warrant. Nothing herein is to be construed as permission to change the rent, or the basis thereof, without our prior authority. General control, management and administration of the joint trackage shall remain in the Union Pacific, but all rules, regulations, and train schedules shall be equal, just, and fair as between the parties using the line. The books and records of the Union Pacific bearing on the costs of improvements to the property, or of maintenance and operation thereof, shall be made available to the Northern Pacific for inspection at all times. Should the Northern Pacific default on any payment or fail to perform any of its covenants under the agreement, which default or failure shall continue for a period of 6 months after written notice by the Union Pacific, the latter may, at its election, terminate the agreement and exclude the former from all use of the property covered thereby. Other provisions pertaining to joint employees, damage claims for loss of property or injury to persons, negligence of workmen, clearing wrecks, and arbitration, usually embodied in instruments covering joint-facility arrangements between railroads are contained in the agreement. The contract, by its terms, is to become effective upon completion of construction of the Government track with which the Yakima branch is to connect, and continue in effect so long as the Northern Pacific shall have the right to operate over said Government track; provided that the Northern Pacific may terminate the agreement by 6 months' notice in writing at anytime after 2 years from such effective date.

The second agreement is by and between the United States of America, acting through the AEC, on the one hand, and the Northern Pacific and Union Pacific, on the other. It provides that the Government will at its sole cost and expense acquire the necessary right-of-way for, and construct a line of railroad extending from the point of connection with the existing Government line within the reservation at or near Richland to a connection with the Yakima branch of the Union Pacific, approximately 5.4 miles, including a bridge across the Yakima River; also the facilities at the interchange yard, and a wye track to be located at a point between said interchange yard and Richland. Upon completion of all such construction, the applicants shall each contribute one-half of the sum of \$100,000, which sum it is agreed fairly represents the cost to which the applicants would be subjected if they constructed interchange trackage at the point of connection with the Yakima branch. For the right to operate over the Government's line between the southern boundary

of Hanford Works, on the north bank of the Yakima River, to the connection with the Union Pacific's Yakima branch, approximately 3.4 miles, the applicants also will pay, as rental, until such time as the total of such payments made by them equals the initial actual cost to the Government of constructing that segment, the sum of \$4 for each loaded car moved in either direction over the segment, on which the haul of the Northern Pacific is beyond Pasco and that of the Union Pacific is beyond Kennewick. Stoppage in transit at Kennewick from points beyond shall not cause a shipment to lose the character of a line-haul movement. After such rental payments shall equal the cost of constructing the bridge and the segment from the bridge to the connection with the Yakima branch, the applicants shall continue to have the right, during the term of the agreement, to operate over the trackage without further rental payments. ~~No~~ rental or other charge is to be paid by the applicants for the right to operate over the segment extending from the north bank of the Yakima River to the interchange yard, for use of the facilities at the yard or the wye track. The applicants may, by mutual agreement, arrange for either of them to operate a joint train between Kennewick and the interchange yard in order to move the business of both railroads; the railroad operating such joint train shall be considered as the agent of the other company in such operation. ~~The Government may terminate the agreement at any time upon 6 months' advance notice in writing to the applicants.~~

The estimated cost of the bridge and the trackage upon which the \$4-per-car allowance is applicable amounts to ~~\$525,000~~. In addition, the Union Pacific will incur a capital expenditure of \$3,322 for construction of a connection between its Yakima branch and the Government's trackage serving the Hanford area. Construction of the Government's track will commence promptly upon our approval of the application herein. Traffic anticipated by the applicants to be handled through the southern connection during the first 5 years of operation commencing July 1, 1948, in order, is shown as 7,040, 9,940, 8,256, 8,256, and 8,256 carloads. The principal commodities expected to be handled, and the probable points of origin, are shown as follows: Cement from Lime, Oreg., Seattle and Spokane; coal from Castle Gate, Utah, and Kleenburn and Rock Springs, Wyo.; iron and steel from Seattle, Portland, Chicago, Ill., and Pittsburgh, Pa.; machinery from Chicago and Schenectady, N. Y.; and lumber and miscellaneous construction and operating materials from Portland and Tacoma. The annual average traffic for the succeeding years, after the fifth fiscal year ended June 30, 1953, is estimated at 7,266 carloads, consisting of 7,000 of coal and 266 carloads of miscellaneous materials. The foregoing estimates of traffic represent an arbitrary allocation for the combined operations of the applicants; no breakdown is made as to the respective individual business each of them anticipate handling into the project.

Coal is the bulk of the inbound tonnage to the Hanford Works, although considerable other traffic will be required in carrying out the expansion program. An estimated 40 percent of the traffic,

except coal, is expected to move through the southern connection. The coal may be handled through either connection, depending upon the source of supply, the rates applicable thereon, and other factors. Contracts are made on a BTU basis in the spring of each year for the amount of coal estimated to be needed at the project during the coming year. At the time of the hearing, some coal was being obtained from mines local to the Milwaukee and no doubt would continue to be handled by that carrier through the northern connection so long as those sources remain available. It is the opinion of responsible officers of both AEC and the prime contractor that sufficient traffic will move inbound to the project to support profitable operations by the applicants as well as the Milwaukee. An equitable and fair distribution of all shipments is contemplated, because to divert traffic from the Milwaukee to an extent that operations through the northern connection no longer would be profitable and endanger discontinuance of that gateway by abandonment of the Hanford branch would defeat the primary purpose of the plan seeking additional rail service to the project. Because of the current expansion program, the transportation superintendent of the prime contractor estimated that even with construction of the southern connection, the Milwaukee's revenues from project traffic for the next 3 or 4 years will be comparable to those received by it during the past 2 or 3 years.

Financial results of operation for the first 5 years mentioned above are shown by the applicants as follows: Gross freight revenues \$2,703,500, \$3,299,700, \$2,118,000, \$2,118,000, and \$2,118,000; operating expenses, estimated at 50 percent of gross revenues, \$1,351,750, \$1,649,850, \$1,059,000, \$1,059,000, and \$1,059,000; joint-facility rents, representing rental payments at the rate of \$4 a car as provided in the contract, \$28,160, \$39,760, \$35,024, \$33,024, and \$33,024; and net railway operating income \$1,323,590, \$1,610,090, \$1,025,976, \$1,025,976, and \$1,025,976. Corresponding figures for the annual average succeeding years are \$1,536,700, \$768,350, \$29,064, and \$759,286.

Proponents of the southern connection rely primarily on the greater degree of security, and secondarily on the operating convenience and the large savings in transportation costs that will result if such connection is made available. Concern was expressed by the present manager of Hanford Works, who is charged with the responsibility of its security, as to the rail facilities now serving the project. It is his opinion that another railroad line to the area is needed as a matter of ordinary prudence, and in order to minimize the possibility of interruption of manufacturing operations that any discontinuance of rail service to the area would entail. In his judgment the proposed connection with the Union Pacific on the south would provide, at modest expense, the most effective and practical means of obtaining additional rail transportation service to the project. Such a connection, in addition to making available completely different transcontinental rail networks of the applicants, would also be over tracks physically located at a considerable distance from the existing Milwaukee outlet. He has no fault to find with the quality of service performed by the Milwaukee during the war, but insists that the significance of Hanford Works, at that time, was virtually unknown while now its military importance is common knowledge throughout the world, and plans must be formulated on the basis that in the event of future emergency the project will be at the top of any list of national defense targets.

As to secondary reasons advocated, it is stated that the southern connection is essential for the efficient use of the Pasco storage facility. Under existing conditions, rail traffic stored at the depot must move via the Northern Pacific from Pasco to Easton, and thence over the Milwaukee for delivery to the Government railroad at Hanford, a distance of approximately 257 miles, as compared to a single line haul of 14 miles over the proposed connection to Richland. Excessive transportation costs also result. For example, a 30,000-pound carload of machinery moved over the longer rail route would result in freight charges amounting to \$360. The same shipment by common carrier truck from the depot to Hanford would cost \$99, and to Richland \$54. Cumbersome articles not readily susceptible to truck transportation now must be handled by rail over the circuitous route to Hanford. Then too, the trucking of material between the depot and Richland is not desirable because of congested traffic conditions on the highway, and the bottleneck through the Yakima valley and over the Pasco bridge. If the southern connection is authorized, all materials requiring warehousing could be shipped by rail from the depot to Richland at a nominal transit charge. The Milwaukee contends that transit arrangements at the depot would be so complicated and expensive to administer that no economical rules or practicable plan of handling traffic in that manner could be devised. The southern connection would also reduce, by more than 300 miles, the distance between the Hanford project and the Los Alamos project of the AEC near Santa Fe, N. Mex., and conceivably could result in a reduction in transit time of from 2 to 5 days on carload shipments to the project from major shipping points in California, Colorado, New Mexico, Oregon, Idaho, Wyoming and points in southern and southwestern territories.

Considerable testimony was adduced at the hearing tending to show the effect the southern connection would have on freight rates to Hanford Works. The traffic supervisor for the prime contractor testified that such rates would be on the same basis as those applying to Pasco and Kennewick, and as a result the Milwaukee would be forced to meet these rates or lose competitive traffic on which a lower rate was applicable to Pasco or Kennewick than to Hanford. Present rates on coal from Synnyside and Wattis, Utah, to Kennewick are \$1.05 a ton lower than to Hanford; and from Kleonburn, Wyo., the differential on the same commodity via the southern connection is \$1.29 a ton lower than the Milwaukee rate to Hanford. The excess rail mileages from these points via the Milwaukee and its connections to Hanford as compared to the routes over the applicants' connections to Kennewick are as follows: Kleonburn 88 miles, Wattis 240 miles, and Synnyside 186 miles. The Union Pacific's route from Kennewick to Portland is also substantially shorter than that of the Milwaukee from Hanford through Tacoma. Other comparisons of distances favorable via the proposed connection and the applicants' lines are of record, but need not be detailed herein.

In many instances proposals for adjustment of commercial class and commodity rates to and from Hanford were acted upon favorably by the carriers so that the same bases of rates are now in effect to or from Kennewick as are applicable via the

Milwaukee to or from Hanford. The traffic supervisor was told by officials of the Milwaukee that because of the geographical location of Hanford as compared to Kennewick, a complete equalization of rates could not be made, but that it was felt reductions could be effected in perhaps 90 percent of the cases upon the assurance that the southern connection would not materialize. Approval of an application under section 4 of the act may be necessary in order to effect some of the reductions contemplated. Since the filing of the instant application, however, the Milwaukee's efforts to reduce rates to the Kennewick basis have been going forward more rapidly, and at the time of the argument the program was practically completed.

Effective November 8, 1943, Milwaukee section 22 quotation No. A-4 was negotiated which afforded the same net cash land-grant rates, plus 10 cents per 100 pounds, as were applicable via the Northern Pacific between Kennewick and certain defined territories throughout the country on traffic moving to or from Hanford. It did not apply on coal from Wyoming; but did apply to United States property shipped on Government bills of lading for account of the War Department on which the War Department was entitled to reduction of rates over land-grant routes. The quotation afforded some measure of relief in payment of higher freight charges at Hanford compared with rates applicable to or from Kennewick. Nevertheless, it was estimated that from the start of the project in 1943 to October 1, 1946, the Government would have saved approximately \$1,500,000 in freight charges paid to the Milwaukee and its connections if there had been a physical connection with the applicants on the south, and land-grant rates had applied on the shipments moved into the project. Since such rates were repealed effective October 1, 1946, no savings with respect thereto would have accrued to the Government after that date. Consequently, this phase of the case need not be considered further.

For the period January 1 to December 31, 1947, savings in freight on coal shipments received at Hanford would have amounted to \$266,591, and on the actual carload movements of various other commodities to \$31,380, if a southern connection to the project had been available. The AEC believes that with the increase of future shipments as a result of the expansion program, the savings in freight charges correspondingly will be greater. The traffic supervisor for the prime contractor is concerned first of all with the rates the Government must pay on traffic to and from the project; the matter of distances the shipments must move is secondary.

Prior to 1943, the Milwaukee's rates to Hanford were not specifically designed for the traffic which developed to and from the project. However, starting in 1943, numerous and repeated requests for special rates were made by the army, the prime contractors, and others, and in those instances where concurrences with connecting carriers were obtained, favorable disposition was made with respect to practically every request. An exception would be in the case of coal to Kennewick from points in southern Wyoming local to the Union Pacific upon which that carrier now receives revenues of \$4.95 a ton. To acquiesce in a reduction of the Hanford rate to that basis would cause the Union Pacific to haul the traffic 67 miles farther to the Milwaukee connection at Marengo for \$1.24 a ton loss revenue.

Consequently, the Union Pacific refused to join in the Milwaukee's request to equalize rates on such traffic. A similar situation exists with respect to Roslyn and Ronald, local points on the Northern Pacific, and from mines in Utah from which coal is shipped to Hanford, and on which the Western Pacific Railroad is a participating carrier. The Milwaukee contends that request by the AEC for a general reduction of Hanford rates to the Kennewick bases was not officially made to it until October 20, 1947. Since the desires of AEC are now known, and because of the threatened potential competition from the applicants, the Milwaukee has embarked upon a policy of effecting rate reductions in all cases wherein the present Kennewick rate is lower than those applicable at Hanford. With the cooperation of its connections, it sees no reason why such equalization cannot be made.

The Milwaukee's Hanford branch was constructed in 1912 for the purpose of providing rail service to an irrigated area south of Vernice. It was maintained and operated at the usual branch-line standards and enjoyed very large earnings until 1933, when unfavorable market conditions caused a transition in the tributary territory from the growing of apples and pears to the production of soft fruits and early market vegetable crops. In 1938-39 the branch was operated at a deficit. Prior to 1943, train service was operated only when traffic was offered for shipment and averaged about one trip a week. The engine and crew operated out of Othello, and were also used to provide service on the Moses Lake and Marcellus branches of the Milwaukee.

That portion of the Hanford branch which produced the most traffic was requisitioned by the Government. During the 10-year period 1938-47, the total freight charges on traffic originating and terminating on the portion retained by the Milwaukee averaged only \$2,066 a year. In 1929 that portion had total freight revenues of only \$5,500 out of a total of \$219,000 produced on the entire branch. Various reports of responsible agencies unanimously conclude that the territory tributary to the Hanford branch now operated by the Milwaukee is not suitable for irrigation or other agricultural development. Studies were made by the Milwaukee in 1934, and again in 1938-39 to determine whether the Hanford branch should be abandoned.

The Hanford branch, as it now exists, follows the course of the Columbia River for a considerable distance and lies at the base of some precipitous slopes. Some raveling of banks has been experienced in the past, but no serious rock slides, causing interruption of service, have occurred during the 35 years the branch has been in operation. The branch traverses a sparsely settled area capable of being policed with a minimum of effort. It has 52 culverts, and 19 bridges consisting of 141 spans with a total length of 2,217 feet. The longest bridge has 23 spans and is 316 feet long; the highest is not over 12 or 15 feet above the water line. All bridges are of pile and timber construction and of a type that can be easily replaced in case of damage. No traffic delays have occurred because of the failure of any bridge on the branch since service to the project was instituted.

Beginning with the development of Hanford Works, the Milwaukee started an extensive improvement and rehabilitation program on its retained portion of Hanford branch. Passing tracks were extended and set-out tracks constructed. Heavier rail was laid on the curves; over 7 miles of 100-pound being substituted for 65-pound rail. Hardwood ties and guard rails were placed on the curves, and the shoulders of the track were restored by additional filling. The entire branch from the connection with the Government-owned line near Riverland to Beverly Junction was ballasted, and a wye, costing \$55,000, was installed at the latter point to facilitate rail service to the project in the event the Milwaukee's bridge across the Columbia River was incapacitated. Additional facilities for employees were provided at Beverly, and new trackage was installed at that point to handle the greatly expanded traffic to the project. The additional expense at Beverly and on the branch directly attributable to service to the project is estimated by the Milwaukee at \$418,653.

After many of these improvements had been made, the commanding general in charge of the Manhattan project, which included Hanford Works, made a personal inspection trip over the branch. At the conclusion of the trip the general stated that if the Milwaukee officials would continue to feel a personal responsibility in handling the project's traffic, and would continue to maintain the branch as they were doing, and that if certain additional safeguards, at the time discussed, were completed, he "was not going to worry about the Milwaukee Road". This inspection by, and expression of, the general occurred in December 1943, after construction of the southern connection had been blocked by the adverse ruling of ODT.

Generous assistance in the form of adequate equipment and experienced operating personnel was extended by the Milwaukee to the army and the prime contractor in providing complete and efficient service within the project during the war. Many commendations were received by the Milwaukee for the services thus rendered. The Hanford branch is adequate to handle the traffic now moving over it, and is maintained to a standard capable of handling a great amount of additional traffic. No difficulties or complications of operations have been experienced at any time. The Milwaukee maintains a general agent at Hanford who keeps in close contact not only with the regular service, but also with respect to special service that may be required from time to time. It is the opinion of the Milwaukee that adequate service and security will continue to be had with single-line operation to the project, and it is willing to comply with any request of the Government, or the prime contractor, in the way of improvements, safeguards, and service. It is also willing to reinstall the west leg of the wye which was removed with the approval of the army at the close of hostilities, and which can be replaced in a few days as the grade is still intact.

Traffic for the account of Hanford Works commenced moving over the Milwaukee's branch on April 5, 1943. Carload shipments for the period April 5 to December 31, 1943, the years 1944-46, and the period January 1 to October 31, 1947, in order, are shown by the Milwaukee as follows: Inbound, 12,816, 23,719, 7,642, 7,602, and 6,654, total 58,433 cars; outbound 5, 1,673,

2,933, 759, and 69; total 5,459 cars; or a grand total, inbound and outbound, of 63,872 cars. The inbound traffic was consigned to 93 different consignees, 5 of which were classified by the Milwaukee as being either the Government or the prime contractor, and the remaining 88 were commercial firms which paid the freight bills. The outbound shipments, starting with January 1944, were made by 45 different consignors, of which 5 were Government agencies or the prime contractors, and the remaining 40 were commercial firms. In each case, the majority of commercial firms referred to received or forwarded freight on commercial bills of lading and constituted subcontractors working for the prime contractor on the project.

During the first 9 months of 1947, the average traffic moved each month into the project consisted of 578 cars of coal and 97 cars of other commodities. For the last 3 months of 1947, the expansion program has increased the movement of the other commodities to an average of 701 cars a month. Present freight-train service is operated from Beverly to the interchange yard at Riverland daily, except Sundays. Occasional special runs are made when requested. The traffic to the Hanford area also necessitates the operation of extra trains on the Milwaukee main line. For an average of 80 carloads moving west-bound each week, an extra train involving round trips for train and engine crews in each of 6 operating subdivisions between Harlowton, Mont. and Othello, approximately 360 miles, is required. An average of 30 carloads per day moving east-bound from Tacoma and other Pacific coast points requires 2 extra trains per week, involving round trips for a complete train and engine crew in each of 2 operating subdivisions between Tacoma and Othello.

The Milwaukee is apprehensive lest the construction of the southern connection will divert the traffic it now handles into the project to such an extent that its Hanford branch, of necessity, will have to be abandoned. It points out that the contract between AEC and the applicants provides for the cost of the new trackage, estimated at \$825,000, to be repaid by the applicants at the rate of \$4 for each loaded car handled in line-haul movement over the southern outlet. On this basis, the Milwaukee notes that it will take 156,250 revenue carloads of freight to repay the full amount, and that according to the traffic estimates submitted by the applicants in the return to questionnaire, a period of 21 years will be required to furnish that amount of traffic. The Milwaukee contends that it cannot look forward to any traffic from or to the project until the Government investment is liquidated because no employee of the Government or the prime contractor could justify routing traffic over the Hanford branch when such traffic could be handled by the applicants at a lower transportation cost as a result of the \$4-per car repayment to the Government.

Employees of the Milwaukee, lines west, which includes operation of trains over the Hanford branch, are opposed to the application on the ground that construction of the southern connection will cause them to lose seniority on the work that they now are, and have been, handling since the Hanford project was started in 1943. They contend that, already having lost rights

on the 25 miles of track taken over by the Government, their right to serve the project should not be further curtailed, or taken over completely, by the employees of the applicants. They state that it would be difficult, because of age limits, for Milwaukee employees to obtain new jobs with other carriers, if granting of the application results in their services no longer being required. The employees contend that in view of the services heretofore performed, especially during the war period, and unless the welfare of the country is involved in the matter, the Milwaukee should be granted the exclusive privilege of continuing to serve the project. According to advice furnished by the Milwaukee to its employees, the shipments moving into the project furnishes regular employment to 24 men in engine and train service, for which annual wage earnings of approximately \$99,000 are paid. An additional \$30,000 in wages, making a total of approximately \$129,000 annually, would be lost to engine and train service employees in the event maintenance of the Hanford branch no longer is justified as a result of the shipments being diverted to other lines. A total of 5 clerical and station employees at Beverly, earning combined wages of \$15,827.76 a year, also would be affected if the Milwaukee traffic to the project is lost. The foregoing figures are predicated upon a loss of all Milwaukee business into the project; a partial loss of such business would result in a partial reduction in the annual wages now received.

The application herein was filed ^{to the contention} subject of the applicants that their operations over the Government's line of railroad come within the exemption provisions of section 1(18) to (22) of the act, as the proposal will not constitute an extension of the applicants' railroad but will be merely an arrangement for the joint possession and use of industrial spur and switching tracks. They state that no communities or industries other than the Government property will be served by this portion of the trackage, and that the territory is immediately tributary to the Yakima branch of the Union Pacific. Such contention is untenable. The record shows that service by the applicants over the Government line will be for the Government, the prime contractor, and subcontractors working on the development program. In addition, the applicants' common carrier services will be used by business establishments now located, or to be located, at Richland. Under the circumstances, the proposal of the applicants results in an extension of their lines of railroad for which a certificate of public convenience and necessity is required. Texas & Pacific Ry. Co. v. G. C. & S. F. Ry. Co., 270 U. S. 266, 277-9.

The magnitude and importance of Hanford Works require that rail services of the applicants through the southern connection be made available. Security alone is a sufficient ground upon which to predicate such finding; but, contrary to the contention of the Milwaukee, this record contains ample additional evidence showing that operation by the applicants into the project will be in the public interest. Complete and efficient utilization of the storage depot at Pasco can be realized only by the rail service proposed by the applicants, and such service will result in benefits to the Government in providing more direct routes and lower transportation costs on shipments moving to and from Richland. The need for the southern connection has been recognized by those charged with the management of the project since its inception. Heretofore the Commission has recognized that the interests of a shipper are matters of substantial importance in determining the question of public convenience and necessity. See

Finance Docket No. 15665, Chesapeake & Ohio Railway Company Construction, 267 I.C.C. . Considering the fact that the principal shipper in the present case is the Government, and that the essential nature of the project to be served demands that every contingency capable of disrupting continuous rail operation be perpetually anticipated, the public interest is materially enhanced.

Although the Milwaukee's exclusive service to the project during the war was adequate, the record herein clearly demonstrates that some traffic, particularly that destined to Richland, can be handled more conveniently and expeditiously through the southern connection. Such a connection should be made available, but we are not convinced that the method of defraying the cost thereof should be approved. Conceivably the 54 allowance to the Government for every carload of traffic handled by the applicants may tend to divert traffic from the Milwaukee's northern connection to the extent that the Hanford branch eventually will have to be abandoned, thereby defeating the primary object which the instant application proposes to achieve, namely, the establishment of two rail lines to the project. Irrespective of the confidence expressed by counsel for the AEC at the argument that its judgment in routing traffic to and from the project will not be questioned by the General Accounting Office, no one at the hearing was willing to guarantee the Milwaukee sufficient traffic to warrant continued operation of the Hanford branch. Consequently, our approval of this phase of the transaction will be conditioned upon payment by the applicants for the bridge and the segment of the Government's line from the bridge to the connection with the Yakima branch, or for the use of the bridge and segment, being made in periodic and regular installments. The installments should be sufficient to liquidate the cost of the bridge and segment over a period of 15 to 25 years, as agreed upon by the AEC and the applicants, without interest, and when full payment has been made, the applicants should thereafter be permitted to operate over the line without further payments. The applicants should advise us, within 30 days from the date hereof, whether the conditions imposed are acceptable to them, and if so, undertake to file with us, when completed, a certified copy of the agreement in the form in which it is executed. Copy of the modified agreement also should be furnished all parties of record. Except for the fact that the Government is involved, it is questionable whether the applicants should contribute \$100,000 toward the cost of the interchange tracks to be constructed within the project.

Operation by the Northern Pacific over that portion of the Union Pacific's Yakima branch, for which authority under section 5(2) of the act is herein sought, will not affect adequate transportation service to the public. This phase of the proposal does not contemplate a guaranty or assumption of payment of dividends or fixed charges, and no increase in the applicants' total fixed charges will result. No other railroad has sought to be included. Employees of the applicants conceivably cannot be adversely affected by the action herein taken. However, we will include, by reference, conditions for their protection similar to those prescribed in Chicago & N. W. Ry. Co. Merger, 261 I.C.C. 672. Contentions of the parties as to either fact or law not specifically discussed herein have been given consideration and are found to be without material significance or not justified.

We find that, subject to the conditions for the protection of applicants' employees referred to above, acquisition by the Northern Pacific Railway Company of trackage rights over that portion of the Yakima branch line of railroad of the Oregon-Washington Railroad & Navigation Company; Union Pacific Railroad Company, lessee, between Kennewick and a connection with tracks to be constructed by the United States of America, in Benton County, Wash., described herein, is a transaction within the scope of section 5(2) of the Interstate Commerce Act, as amended, that the terms and conditions proposed are just and reasonable; and that the transaction will be consistent with the public interest.

We further find that the present and future public convenience and necessity require operation by the Northern Pacific Railway Company and the Union Pacific Railroad Company over that portion of a line of railroad, constructed and to be constructed by the United States of America, extending from a connection with the Yakima branch of the Oregon-Washington Railroad & Navigation Company to and into an exchange yard which the United States will construct near the north bank of the Yakima River, in Benton County, Wash., described herein, upon the express condition that the agreement between the applicants and the Atomic Energy Commission, insofar as it pertains to payment for the tracks over which operation herein is authorized, shall be modified in conformity with the suggestions set forth above.

An appropriate certificate and order will be issued.

CERTIFICATE AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D.C., on the 23th day of September, A.D. 1948.

Finance Docket No. 15925

NORTHERN PACIFIC RAILWAY COMPANY, ET AL. TRUCKAGE RIGHTS ETC.

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That, subject to the conditions with respect to the protection of employees indicated in said report, acquisition by the Northern Pacific Railway Company of trackage rights over that portion of the Yakima branch line of railroad of the Oregon-Washington Railroad & Navigation Company, Union Pacific Railroad Company, lessee, between Kennewick and a connection with tracks to be constructed by the United States of America, in Benton County, Wash., described in the aforesaid report, upon the terms and conditions in said report found just and reasonable, be, and it is hereby, approved and authorized.

It is hereby certified, That the present and future public convenience and necessity require operation by the Northern Pacific Railway Company and the Union Pacific Railroad Company over that portion of a line of railroad, constructed and to be constructed by the United States of America, extending from a connection with the Yakima branch line of the Oregon-Washington Railroad & Navigation Company to and into an exchange yard which the United States will construct near the north bank of the Yakima River, in Benton County, Wash., described in the report aforesaid: Provided, however, and this certificate is issued upon the express condition that the agreement between the applicants and the Atomic Energy Commission, insofar as it pertains to payment for the bridge and a part of the tracks over which operation herein is authorized, shall be modified in conformity with the suggestions set forth in said report.

It is further ordered, That this certificate and order shall take effect and be in force from and after 40 days from its date. Tariffs applicable to the lines herein involved may be established upon notice to this Commission and to the general public by not less than 10 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

And it is further ordered, That the Northern Pacific Railway Company and the Union Pacific Railroad Company, when filing schedules establishing rates and charges applicable on said lines of railroad, shall in such schedules refer to this certificate and order by title, date, and docket number.

By the Commission, division 4.

(SEAL.)

W. P. BARTEL,
Secretary.

Finance Docket No. 36396

Appendix 4

Indenture, effective October 1, 1998

INDENTURE

STATE OF WASHINGTON §
 §
COUNTY OF BENTON §

THIS INDENTURE is effective the 1st day of October 1998, between the UNITED STATES OF AMERICA, acting by and through the U.S. DEPARTMENT OF ENERGY, (the "Grantor") and the PORT OF BENTON, acting through its Board of Commissioners, (the "Grantee") (collectively, the "Parties").

WITNESSETH:

WHEREAS, Grantor has owned and maintained certain real property and improvements thereto in or proximate to Richland, Washington known as the Hanford 1100 Area (the "Real Property") and the Hanford Rail Line, Southern Connection (the "Railroad") and certain personal property appurtenant to said real property ("Personal Property"); and

WHEREAS, Grantor has determined that it is in the best interest of the UNITED STATES OF AMERICA to convey said Real Property and Railroad to Grantee for the purpose of fostering economic development; and

WHEREAS, Grantor has the authority to sell, lease, grant, and dispose of said Real Property, Railroad, and Personal Property pursuant to the Atomic Energy Act of 1954, as amended, specifically Section 161(g) (42 U.S. Code § 2201(g)); and

WHEREAS, Grantor may need continued rail access to the Hanford Nuclear Reservation (the "Hanford Site") for so long as Grantor conducts operations at said site; and

WHEREAS, Grantee agrees to use said Real Property and Railroad to create economic and employment opportunities in the community served by the PORT OF BENTON; and

WHEREAS, Grantee agrees to provide Grantor continued rail access to the Hanford Site for as long as Grantee continues to maintain and/or operate the Railroad.

NOW THEREFORE, for the following consideration, the Parties agree as follows:

L DESCRIPTION OF PROPERTY AND CONVEYANCE

- A. Grantor owns and maintains Real Property and improvements thereto having an area of approximately 768 acres and containing 26 buildings, improved parking and other support areas, and grassy swales, which is described in Attachment A. Grantor also owns and maintains the Railroad and improvements thereto having an area of approximately 92 acres and linear track length of approximately 16 miles, which is described, in part, in Attachment B. Finally, Grantor owns Personal Property that is described in Attachment C. Grantor hereby grants, conveys, and forever quitclaims to Grantee, without warranty, either express or implied, said Real Property, Railroad, and Personal Property on an "as is" and "where is" basis and subject to certain terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and other conditions set forth in this instrument. The quitclaim deed (the "Deed") conveying said Real Property, Railroad, and Personal Property is attached (see Attachment D).
- B. The descriptions of the Real Property, Railroad, and Personal Property set forth, respectively, in Attachments to this Indenture and any other information provided herein are based on the best information available to Grantor and believed to be correct, but an error or omission, including, but not limited to, the omission of any information available to Grantor or any other Federal

agency, shall not constitute grounds or reason for noncompliance with the terms of this Indenture or for any claim by Grantee against the UNITED STATES OF AMERICA including, without limitation, any claim for allowance, refund, deduction, or payment of any kind.

- C. Grantor shall make reforms, corrections, and amendments to the Deed if necessary to correct such Deed or to conform such Deed to the requirements of applicable law.

II. CONSIDERATION

Grantor's conveyance is in consideration of the assumption by Grantee of all Grantor's maintenance obligations and its taking subject to certain terms, reservations, restrictions, licenses, easements, covenants, equitable servitudes, contracts, leases, and other conditions set forth in this instrument.

III. TITLE EVIDENCE

Grantee reserves the right to procure a title report and/or obtain a title insurance commitment issued by a licensed Washington Title insurer agreeing to issue to Grantee, upon recordation of the Deed, a standard owner's policy of title insurance insuring Grantee's good and marketable title to said Real Property and Railroad.

IV. COSTS OF RECORDATION

Grantee shall pay all taxes and fees imposed on this transfer and shall obtain at Grantee's expense and affix to the Deed such revenue and documentary stamps as may be required by Federal, State of Washington, and local laws and ordinances. The Deed and any security documents shall be recorded by Grantee in the manner prescribed by State of Washington and Benton County recording statutes.

V. EASEMENTS, RESTRICTIONS, AND LIMITATIONS

- A. Grantor retains an easement, described in the Deed found at Attachment D, on the road known as Stevens Drive that extends north from the junction of Spengler Street to Horn Rapids Road (the "Road"). Grantee shall have a right of first refusal governing any conveyance in the Road by Grantor.
- B. Grantee shall take title subject to all public utility and other easements on record, described in Attachment E, and any other zoning regulations and restrictions appearing on plats, in the Deed, or in any title report prepared to support this transfer of Real Property and the Railroad.
- C. Grantor retains an easement, described in Attachment F, for Grantor's existing infrastructure, including telecommunications infrastructure, on the Real Property and Railroad. Grantee shall reasonably negotiate and convey no-cost new easements to support access to existing or new infrastructure of any type or to improve on said infrastructure.
- D. Grantor shall have until March 31, 1999, to remove personal property not conveyed to Grantee and cultural artifacts described in Section XXIII. below from buildings on the Real Property and the Railroad and vacate any of the buildings in which it currently operates.
- E. Grantee shall take title subject to the use permit, described in Attachment F, executed between the Home Depot and Grantor.

VI. LICENSES

- A. Grantor reserves unto itself a no-cost license for whole or partial use of the buildings described in Attachment G and a parking lot for use by Grantor's Safeguards and Security Division to conduct

its "Emergency Vehicle Operations course". The term for these licenses also is listed in Attachment G, said licenses terminating upon: (i) early abandonment of licenses upon notification to Grantee; or (ii) expiration of licenses unless renewed. Renewal shall be in at Grantor's option for one-(1) year periods not to exceed a total of ten (10) periods, and Grantee shall presume that said options are exercised unless notice declining renewal is received within thirty (30) days or more of each license expiration. Grantor shall cooperate with Grantee in the event that Grantee has a commercial tenant for space licensed by Grantor, and to the extent practicable, abandon such license(s) if (i) such abandonment is in the best interest of the UNITED STATES OF AMERICA, and (ii) substitute space is made available by Grantee, if Grantor requires such space and it is not available within the Hanford Site.

- B. Grantor's operations in those buildings and the parking lot in which it retains licenses shall be: (i) conducted in a neat and orderly manner so as not to endanger personnel or property of Grantee or Grantee's other licensees, lessees, and invitees; and (ii) in compliance with all applicable laws, regulations, rules, and ordinances. In the event that the buildings licensed to Grantor become unsuitable for occupancy for any reason, including damage, destruction, or collective wear and tear, Grantor reserves the right to restore the buildings during the term of the licenses.
- C. Before expiration or prior termination of building licenses, Grantor shall restore the buildings or building interiors to the condition in which they were conveyed or to such improved condition as may have resulted from any improvement made therein by Grantee during license terms, subject to ordinary wear and tear for which Grantor is not liable hereunder.
- D. Grantor shall be responsible for all utilities and maintenance associated with operations conducted in the building under license. In the event that partial building space is used, Grantor and Grantee shall agree on a suitable prorated amount for building utilities and maintenance that Grantor shall be responsible to pay to Grantee periodically.
- E. Grantor reserves to the General Services Administration ("GSA") a license to site a double-wide trailer and use parking spaces and a portion of the parking lot for enclosed storage on the Real Property located south of building 1175 (address: 2565 Stevens Drive, Richland, Washington) to have and use until abandoned. GSA shall be responsible for all utilities and maintenance associated with operations conducted from its trailer.
- F. Grantor reserves unto itself a no-cost license providing access to the Railroad for as long as Grantee maintains and/or operates said Railroad. Grantor shall pay published tariffs as applicable.

VII. CONDITION OF REAL PROPERTY AND MAINTENANCE OF RAILROAD

- A. Grantor shall clean the Real Property to an "industrial use" standard prior to transfer under this Indenture and subsequent abandonment of licenses. All buildings, utilities, and other property conveyed will be transferred in "as is" and "where is" condition as at the signing hereof, without any warranty or guarantee, expressed or implied, of any kind or nature, except as otherwise expressly stated in this Indenture. Grantor shall not be obligated to repair, replace, or rebuild any structures if and when licenses are abandoned except when Grantor's use resulted in damages exceeding ordinary wear and tear. Except as provided for in Section VIII. below, Grantor shall not be responsible for any liability to Grantee or third persons arising from such condition of the Real Property. The failure of Grantee to inspect fully the Real Property or to be fully informed as to the condition thereof will not constitute grounds for any noncompliance with the terms of this Indenture.

- B. For so long as Grantee continues to maintain and/or operate the Railroad (or Grantee's similarly situated successor(s)), Grantee shall maintain the Railroad, including all structures, improvements, facilities and equipment in which this instrument conveys any interest, at all times in safe and serviceable condition, to assure its efficient operation and use, provided, however, that such maintenance shall be required as to structures, improvements, facilities and equipment only during the useful life thereof, as determined jointly by Grantor and Grantee.

VIII. WARRANTIES AND REPRESENTATIONS

- A. Grantor represents and warrants under its enabling legislation (the Atomic Energy Act of 1954, as amended) that: (i) it has the full capacity, power and authority to enter into this Indenture and the transactions contemplated herein; and (ii) the execution, delivery and performance by Grantor of this Indenture has been duly authorized and approved by all necessary governmental action on the part of Grantor.
- B. Grantee represents and warrants that: (i) it is a political instrumentality of the State of Washington and duly organized under laws of the State of Washington; (ii) it has full capacity, power and authority to enter into and perform this Indenture and the continuing obligations contemplated herein; and (iii) the execution, delivery and performance by Grantee of this Indenture have been duly and validly authorized and approved by all necessary action on the part of Grantee.
- C. Grantor represents that, to the best of Grantor's knowledge, there are no facts known to Grantor that materially affect the value and condition of the Real Property and Railroad that are not readily observable by Grantee or that have not been disclosed to Grantee. The Parties acknowledge that in the course of abandoning any licenses, Grantor may learn additional facts regarding the value and condition of the Real Property. Grantor shall identify such facts and disclose them to Grantee in a timely manner.
- D. Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, ("CERCLA") Section 120(h)(1) (42 U.S. Code § 9620(h)(1)), and 40 U.S. Code of Federal Regulations Part 373, Grantor has made a complete search of its records concerning the Real Property and Railroad. These records indicate that hazardous substances, as defined by CERCLA Section 101(14), have been stored, disposed, or generated on the Real Property during the time Grantor owned said Real Property. Quantities of hazardous substances were released or disposed of on the Real Property during the course of ownership by Grantor, and the Real Property was listed on the National Priorities List by the Environmental Protection Agency ("EPA"). Said Real Property was remediated and removed from the National Priorities List in September 1996. Grantor agrees to meet all CERCLA obligations associated with the transfer of the Real Property now or in the future upon notice by Grantee.
- E. All remedial actions necessary to protect human health and the environment with respect to any such hazardous substances remaining on the Real Property have been or will be taken before the date of transfer, and any additional remedial actions found to be necessary by regulatory authorities with jurisdiction over the Real Property or Railroad attributable to contamination of hazardous substances shall be conducted by Grantor at Grantor's expense.

IX. ASSIGNMENT OF LEASES AND CONTRACTS

- A. Grantor hereby assigns Parts 1, 2, and 3 of the lease dated May 1, 1996, (see Attachment H) executed between Grantor and R.H. Smith Distributing Co., Inc. ("Smith") for fuel oil distribution from building 1172A. Grantee hereby accepts the obligations of Grantor under this lease in consideration of the payments by Smith for building 1172A operations, which are assigned herewith to Grantee. Grantor shall notify Smith of assignment.

Appendix 5

Lease Agreement, effective August 1, 2002,
wherein the Port leased the Southern Connection to TCRY

RAILROAD LEASE
Port of Benton-Tri-City Railroad Company

PARTIES:

LESSOR: PORT OF BENTON, a municipal corporation of the State of Washington, hereafter "Port".

TENANT: TRI-CITY RAILROAD COMPANY, L.L.C., a Washington limited liability company hereafter "Tenant".

RECITALS:

WHEREAS, the Port acquired the Southern Connection of the Hanford Railroad from the United States Department of Energy (hereafter "DOE") to prevent the closure of the railroad and to maintain railroad operations for economic development purposes.

WHEREAS, DOE conveyed the former 1100 Area to the Port to enable the Port to generate revenues to pay the costs of operation and maintenance of the railroad.

WHEREAS, the Port entered into an Operations and Maintenance Agreement with Livingston Rebuild Company dated October 1, 1998 which has been assigned to the Tenant and this agreement requires the Port to pay certain expenses related to the railroad, including insurance premiums, in excess of \$100,000.00 per year and the Port has the responsibility for the inspection, maintenance and replacement of the bridges and overpasses.

WHEREAS, the Port has been required to pay for the replacement of a section of the railroad bridge which was destroyed by fire.

WHEREAS, the Port entered into a Building Lease with Livingston Rebuild Company for the railroad maintenance building in the Port's Manufacturing Mall (formerly DOE's 1100 Area), which Lease has been assigned to the Tenant.

WHEREAS, the parties wish to transfer the costs associated with the operation of the railroad, including the insurance and the responsibility for the inspection and maintenance of the bridges and overpasses to the Tenant.

WHEREAS, the Port has been required to respond to an inquiry by the Railroad Retirement Board concerning the Port's liability for pension payments as an railroad operator and the Port wants to avoid classification as a railroad operator.

WHEREAS, the Port wishes to transfer the responsibility for rail operations and for negotiating with major carriers to the Tenant and to relieve the Port of the responsibility for such activities; now therefore it is hereby agreed among the parties as follows:

AGREEMENTS:

1. LEASE. Port hereby leases to Tenant upon the terms, covenants and conditions contained herein, the real and personal property known as the Port of Benton Railroad Southern Connection and the 1171 Building (hereafter the "Property"). The real property is described on Attachment 1.

1.1 The Property consists of approximately 16 miles of railroad trackage and right of way extending from the Richland Connection in Kennewick, Washington to the Port of Benton's Manufacturing Mall in Richland, Washington, and generally bordered by Horn Rapids Road on the north, formerly known as the 1100 Area, including the tracks, bridges, trestles, crossings and maintenance equipment. The equipment and fixtures are more particularly described on Attachment 2 to this Agreement.

1.2 The Tenant has been operating the Port of Benton railroad and has occupied the 1171 Building since October, 1998 and is fully familiar with the Property and agrees to take the Property in its present condition, and subject to the restrictions contained in the Indenture between the United States of America and the Port, the amendments thereto, and the Quit Claim Deed from the United States of America, copies of which has been provided to the Tenant. The Tenant agrees to take the Property in its present condition without warranties. The Tenant is relying upon its own inspections of the Property to determine whether to enter into this Lease, and the Tenant is not relying upon any representation made by the Port, its employees or agents, except as specifically set forth in this Lease.

1.3 The Port may acquire trackage rights to use additional railroad tracks owned by DOE serving the Hanford Project. To the extent that the Port acquires additional trackage rights from the DOE, the Port will attempt to negotiate an agreement with the Tenant to add the track rights to this agreement, if permitted by the terms of any agreements with the United States and to the extent the terms of the agreement for trackage rights are acceptable to the Tenant. An agreement to add additional track to this agreement, may require the Tenant to pay additional fees to the Port based upon volume of traffic over the tracks. Provided, that the Port may cancel any agreement with the United States for trackage rights without any further obligation to Tenant. Provided, further, in the event the Port terminates its agreement with the United States for trackage rights, the Tenant shall be free to negotiate with the United States for the trackage rights.

1.4 The Port of Benton currently has a Memorandum of Agreement with DOE to use the track north of Horn Rapids Road to the Energy Northwest Generating Station site, which the Port agrees to allow the Tenant to utilize under the terms of this Lease, provided that the Tenant maintains the track as herein required. DOE has proposed a Memorandum of Agreement with the Port of Benton for use of the Hanford Railroad north of the Energy Northwest Generating Station. After the execution of the MOA by the Port and DOE, the Port will permit the Tenant to utilize additional track which is covered by the MOA, provided that the Tenant complies with the terms and conditions of the MOA and subject to the provisions of this Lease.

2. TERM. This lease shall run for a period of ten years commencing on the 1st day of August, 2002 and terminating on the 31st day of March, 2012.

2.1 The Tenant shall have the option to extend this Lease for two additional terms of ten years each after the expiration of the initial term and after the expiration of the first renewal term.

2.2 The option to extend this Lease shall be deemed to have been exercised unless the Tenant shall give the Port written notice of its intent not to exercise an option at least one hundred eighty (180) days prior to termination of the initial term or the expiration of the first renewal term.

2.3 The Tenant may only exercise the right to extend the term of this Lease if the Tenant is not in material default in the performance of the terms of this Lease at the time the Tenant exercises the option or at the time an option is deemed to be exercised under Section 2.2.

2.4 In the event the Tenant elects not to exercise the Lease extension as provided in this Section, then this Lease shall terminate and the Tenant shall have no further rights under the terms of the Lease.

3. RENT. Tenant shall pay rent, in advance on the first day of each month during the term of this lease, in the following amounts:

3.1 During the initial term of the lease, the parties have agreed that the monthly rental for the real property, railroad trackage, right of way and building more particularly described in Attachment 1, shall be \$2,000.00, plus the applicable leasehold tax as hereafter provided.

3.2 In addition to the rent for the real property, the Tenant shall pay \$2,000.00 per month as rent for the railroad maintenance and operation equipment owned by the Port and more particularly described on Attachment 2. The Tenant shall be responsible for the payment of any sales tax which may be payable as a result of the lease of equipment.

3.3 Rent payments shall be made payable to the Port of Benton and shall be paid at the Port offices at 3100 George Washington Way, Richland, Washington, or at such other address as the Port shall direct in writing.

3.4 In addition to the rent provided for herein, the Tenant shall pay the Leasehold Tax as required by the Revised Code of Washington Chapter 82.29A, as the statute may be hereafter amended. The Leasehold Tax shall be paid with each monthly installment of rent. The current leasehold tax rate is 12.84%.

3.5 Commencing five (5) years from the commencement date of this lease, and on every anniversary thereafter, the minimum rent set forth in sections 3.1 and 3.2 shall be increased in order to reflect the proportionate increase, if any, occurring between the commencement date and such adjustment date in the cost of living as indicated by the Consumer Price Index for Urban Consumers - Western US Average - All Items, as published by the U.S. Department of Labor's Bureau of Labor Statistics (the "Index"). Such adjustment shall be accomplished by multiplying the numerator of which shall be the Index level as of the January preceding the date of adjustment, and the denominator of which shall be the Index level as of the January preceding the Lease commencement date. Any adjustment of rent shall become effective immediately. In no event shall the rent be less than that specified in sections 3.1 and 3.2. If the index is discontinued, Landlord shall substitute a similar index of consumer prices.

3.6 Any rent payment not paid within ten days of the date upon which the Tenant receives notice that a payment is past due shall accrue interest on the unpaid rent at the rate of one and one-half percent of the late payment for each month or portion of month by which the payment is delayed.

4. CONDITION OF PROPERTY. The Tenant shall take the Property in its present condition, without warranties or representations by the Port except as set forth in this Lease. The Tenant shall be responsible for the maintenance and repair of the railroad maintenance and operation equipment owned by the Port and used by the Tenant pursuant to this Lease. In the event any of the Port equipment becomes inoperable or unusable for any reason the Port shall not be required to provide replacement equipment. If the equipment becomes obsolete or inoperable through no fault of the Tenant, the unusable equipment shall be returned to the Port and the rent shall be adjusted to account for the equipment which is no longer being used by the Tenant. This provision shall not apply to the equipment that becomes inoperable due to the Tenant's failure to properly maintain the equipment.

5. SECURITY. The Tenant shall provide a rent security in accordance with RCW 53.08.085 in an amount equal to the rent and Leasehold Tax to be paid during the initial year of this Lease.

6. TAXES AND ASSESSMENTS. Tenant shall pay all taxes assessed against the buildings and improvements owned by the Tenant and the other property of Tenant located upon the Property, promptly as the same become due. Tenant shall pay all assessments hereafter levied against the Property, or a portion thereof, during the term of this Lease, including assessments coming due to any special purpose governmental district; provided, however, if the assessment is payable in installments, whether or not interest shall accrue on the unpaid installments, the Tenant may pay the assessments in installments as they become due, provided

that the Tenant's obligation to pay the assessments levied during the term of the Lease, even though paid in installments, shall survive the termination or expiration of this Lease.

6.1 Tenant may contest the legal validity or amount of any taxes, assessments or charges which Tenant is responsible for under this Lease, and may institute such proceedings as Tenant considers necessary. If Tenant contests any such tax, assessment or charge, Tenant may withhold or defer payment or pay under protest but shall protect Port and the Property from any lien. Port appoints Tenant as Port's attorney-in-fact for the purpose of making all payments to any taxing authorities and for the purpose of contesting any taxes, assessments or charges.

7. USE. The Tenant shall use the Property for the operation and maintenance of railroad transportation facilities, for uses in conjunction with or reasonably connected to the permitted uses and for no other purposes except those approved in writing by the Port.

7.1 The Tenant's use, operations, and maintenance of the tracks shall comply with the provisions of the Quit Claim Deed and Indenture from the United States of America through which the Port acquired title to the property. In addition, the Tenant shall comply with all laws, rules and regulations applicable to the Tenant's use, operation and maintenance of the property. Any tariffs imposed upon the use of the railroad by the Tenant shall be reasonable in light of the use of the railroad and shall be subject to the review and approval of the Port, to insure compliance with the Port's agreements with the United States.

7.2 In the event the Department of Energy, or any user of the railroad files a complaint with the Port concerning the Tenant's rates, tariffs or operations, the Port will notify the Tenant of the complaint and will attempt to resolve the complaint through negotiations with the Tenant and the complainant.

7.2.1 If the complaint involves matters which are within the purview of National Surface Transportation Board (NSTB), the Port will, to the extent applicable, utilize the rules of the NSTB to resolve the dispute.

7.2.2 If the Port is unable to resolve the complaint which is within the jurisdiction of the NSTB and which the NSTB will accept for resolution, the complaint shall be referred to the NSTB, if permitted by the terms and conditions of the Indenture and the Quit Claim Deed.

7.2.3 Complaints which can not be referred to the NSTB, shall be resolved pursuant to the terms and conditions of this Lease.

7.3 The Port acquired title to the Property by conveyances from the United States of America. The Tenant covenants that it will not use the Property in any manner which would subject the Property to forfeiture under the provisions of the above-described Indenture or quit claim deed.

7.4 The Tenant shall not take any actions which will amend, modify, terminate or invalidate any existing contracts which the Port has with any other railroad carrier, without the

Port's prior written consent. The Tenant shall continue to provide railroad access to areas currently served by the railroad unless the Port and Tenant mutually agree that such access is no longer practicable.

8. MAINTENANCE OF PROPERTY. Throughout the term of this Lease, Tenant, at its sole cost and expense, shall maintain the Property and all improvements and fixtures then existing thereon in good condition and repair, subject to reasonable wear and tear, and in accordance with all applicable covenants, laws, rules, ordinances, and regulations of governmental agencies applicable to the maintenance and operation of the railroad, provided, however, that the Port shall be responsible for the maintenance of the roof and the exterior walls of the 1171 Building. The Tenant will maintain the equipment described on Attachment 2 in good working condition and repair, ordinary and usual wear and tear excepted.

8.1 Tenant will provide for regular inspections of the railroad bridges, spans and overpasses by certified personnel. The inspections will comply with the requirements of CFR 49 and any other applicable laws and regulations to maintain the railroad as a Class 3 railroad. Tenant will promptly repair any conditions which require repair or replacement in order to comply with applicable rules and regulations. The obligation to maintain the railroad shall include the maintenance, repairs or replacements of the bridges, spans and overpasses and the maintenance, repair and replacement of the tracks which cross the bridges, spans and overpasses. In the event the Port assigns trackage rights to the Tenant pursuant to agreements with DOE, and the Tenant accepts the trackage rights, the Tenant agrees to assume the obligation to maintain the additional track in accordance with the terms and conditions of the agreement which the Port has entered into with DOE.

8.2 Any repairs or maintenance which is necessary for safety or the protection of life and property shall be done as soon as possible. Tenant shall promptly report any such conditions to the Port.

8.3 Tenant will provide for regular inspections and maintenance of the railroad crossings and the crossing signals by certified personnel. The inspections will comply with CFR 49 and any applicable law and regulations. The crossings and crossing signals shall be maintained in at least their present condition.

8.4 Tenant will provide all of the labor and materials necessary to maintain, repair or replace any of the railroad as required to meet the conditions of this contract.

8.5 Tenant shall be responsible for the maintenance of the equipment during the term of this agreement and shall insure the equipment against loss or damage. Upon the termination of this agreement or if Tenant determines that the equipment is no longer needed for maintenance of the railroad, Tenant shall return the equipment to the Port in its present condition, reasonable wear and tear excepted.

8.6 In the event the equipment becomes unavailable for use due to obsolescence or for any other reason, Tenant shall provide sufficient equipment to fulfill its obligations under the terms of this agreement.

8.7 The equipment shall be used only for the maintenance and operation of the railroad and for no other purpose without the prior written consent of the Port and an use agreement which provides for payment for the use of the equipment.

8.8 The Port shall retain title to the equipment and the Port may dispose of any of the equipment which is not needed for the maintenance of the railroad.

9. CONDITIONS OF CONSTRUCTION. Before any construction, reconstruction or alteration of the improvements on the Property, except for interior improvements or non-structural modifications is commenced and before any building materials have been delivered to the Property in connection with such construction, reconstruction or alteration by Tenant or under Tenant's authority, Tenant shall comply with all the following conditions or procure Port's written waiver of the following condition or conditions:

9.1 Tenant shall deliver to Port, for its approval, one set of preliminary construction plans and specifications prepared by an architect or engineer licensed to practice as such in the State of Washington including, but not limited to, preliminary grading utility connections, locations of ingress and egress to and from public thoroughfares, curbs, gutters, parkways, street lighting, designs and locations for outdoor signs, storage areas, and landscaping, all sufficient to enable Port to make an informed judgment about the design and quality of construction. All improvements shall be constructed within the exterior property lines of the Property provided that required work beyond the Property on utilities, access, and conditional use requirements will not violate this provision. Tenant shall permit Port to use the plans without payment for purposes relevant to and consistent with this Lease.

9.2 The Port shall examine the plans and specifications for the purpose of determining reasonable compliance with the terms and conditions of this Lease, the Protective Covenants and compatibility with the overall design and use. Approval will not be unreasonably withheld. Approval or disapproval shall be communicated to the Tenant, and disapproval shall be accompanied by specification in reasonable detail of the grounds for disapproval; provided that Port's failure to disapprove the initial construction plans within fourteen (14) days or subsequent construction plans within thirty (30) days after delivery to Port shall be considered to be approval.

9.3 Tenant shall prepare final working plans and specifications substantially conforming to preliminary plans previously approved by the Port, submit them to the appropriate governmental agencies for approval, and deliver to Port one complete set as approved by the governmental agencies.

9.4 Tenant shall notify Port of its intention to commence the initial construction at least fourteen days before commencement of any such work or delivery of any

materials. The notice shall specify the approximate location and nature of the intended improvements. During the course of construction, Port shall have the right to post and maintain on the Property any notices of non-responsibility provided for under the applicable law, and to inspect the Property at all reasonable times.

9.5 Except as specifically provided in this Lease, Port makes no covenant or warranties respecting the condition of the soil or subsoil or any other condition of the Property.

9.6 Once work is begun, Tenant shall, with reasonable diligence, complete all construction of improvements. Construction required at the inception of the Lease shall be completed and ready for use within eighteen (18) months after commencement of construction, provided that the time for completion shall be extended for so long as the Tenant is prevented from completing the construction due to delays beyond the Tenant's control; but failure, regardless of cause, to commence construction within eighteen (18) months from the commencement date of the Lease shall, at Port's election exercised by thirty days written notice, terminate this Lease. All work shall be performed in a workmanlike manner, substantially comply with the plans and specifications required by this Lease, and comply with all applicable governmental permits, laws, ordinances, and regulations.

9.7 Tenant shall pay the cost and expense of all Tenant's improvements constructed on the Property. Tenant shall not permit any mechanic's, or construction liens to attach to the Property. Tenant shall not permit any mechanics', materialmen's, contractors' or subcontractors' lien arising from any work of improvement performed by or for the Tenant to be enforced against the Property, however it may arise. Tenant may withhold payment of any claim in connection with a good faith dispute over the obligation to pay, so long as Port's Property interests are not jeopardized. Tenant shall defend and indemnify Port against all liability and loss of any type arising out of the construction of improvements on the Property by Tenant. Unless caused by the Port, its agents, contractors, and invitees, Tenant shall reimburse Port for all sums paid according to this paragraph, together with the Port's reasonable attorneys' fees and costs plus interest on those sums at the legal rate.

9.8 On completion of the construction of any improvements, additions or alterations, covered by this Section 9, Tenant shall give Port notice of all structural or material changes in plans or specifications made during the course of the work and shall at that time supply Port with drawings accurately reflecting all such changes. Changes which are non-structural or which do not substantially alter the plans and specifications as previously approved by the Port do not constitute a material change.

10. OWNERSHIP OF IMPROVEMENTS. All improvements constructed on the Property by Tenant as permitted by this Lease shall be owned by Tenant until termination of this Lease. Upon the termination of this Lease for any reason, any buildings, improvements or trade fixtures installed on the Property shall become the property of the Port. Provided, however, in the event, the Tenant has failed to maintain the Property as required by this Lease, or the Property is contaminated by toxic or hazardous materials as the result of the actions of the Tenant or its successors, such that in any event the value of the improvements is less than the cost of removal,

remediation or renovation to bring the Property into compliance, then the Port may require the Tenant to remove any improvements or trade fixtures installed by the Tenant. The Tenant shall repair, at Tenant's expense, any damage to the Property resulting from such removal.

10.1 The equipment and fixtures on the property which belong to the Port shall remain the property of the Port and the Tenant shall be required to maintain the Port-owned equipment and fixtures during the term of this Agreement. The equipment and fixtures owned by the Port shall be returned to the Port upon the termination of this Agreement, reasonable wear and tear excepted.

11. ASSIGNMENT AND SUBLETTING. Tenant shall neither assign, sublet nor transfer its interest in this Lease, in whole or in part, to any person or entity, without Port's prior written consent. Each sublease for any portion of the premises in addition to the reference to Section 7 of this lease, shall specifically advise the subtenant that the sublease is subject to the reverter contained in the deed and indenture from the United States to the Port of Benton. No assignment or sublease of the Lease shall relieve the Tenant of its obligations under this Lease.

12. INSURANCE. Throughout the term, at Tenant's sole cost and expense, Tenant shall keep or cause to be kept in force, for the mutual benefit of Port and Tenant, comprehensive broad form railroad liability insurance (including a contractual liability endorsement) against claims and liability for personal injury, death or property damage arising from the use, operation, maintenance, occupancy, misuse, or condition of the Property and improvements, with limits of liability of at least \$5,000,000 and with deductibles in such amounts as may be reasonably acceptable to the Port. The Port shall be an additional insured on such policies.

12.1 RAILROAD PROPERTY INSURANCE. Throughout the term of the Lease, at Tenant's sole cost and expense, the Tenant shall keep or cause to be kept in force, for the mutual benefit of the Port and the Tenant, property insurance insuring all of the tracks, bridges, trestles, crossing and other improvements, fixtures, equipment and all of the railroad property subject to this lease against loss or damage from any cause, with the Port named as the owner of the insured property. The property shall be insured for its actual replacement value with such deductibles as are acceptable to the Port.

12.2 BUILDING PROPERTY INSURANCE. The Port shall maintain property insurance insuring the improvement known as the 1171 Building described in Attachment 1 against loss or damage from fire, flood, wind, or other natural disasters, with the Port named as the owner of the insured property. The property shall be insured for its actual replacement value with such deductibles as are acceptable to the Port. The Tenant shall maintain insurance coverage on the Tenant's property, fixtures and equipment located on the premises.

12.3 PROOF OF COMPLIANCE. The Tenant shall provide the Port with Certificates of Insurance showing the coverages and deductibles. All property insurance which the Tenant is required to maintain on the Port's property shall name the Port as the owner of the property and shall insure the Port's interest in the property. The Tenant shall deliver to Port, in the manner required for notices, a copy or certificate of all insurance policies required by this

Lease. Tenant shall include a provision in each of its insurance policies requiring the insurance carrier to give Port at least ninety (90) days prior written notice before such policy terminates. Tenant shall not substantially modify any of the insurance policies required by this Lease without giving at least ninety (90) days prior written notice to Port.

13. INDEMNIFICATION. The Tenant shall indemnify and hold the Port harmless from all liability, claims, damages, losses, or costs, including attorney fees, arising out of any claim, suit, action, or legal proceedings brought against the Port by any party alleged to have resulted from the Tenant's use, operation, maintenance or occupation of the railroad or any portion of the premises or any of Tenant's activities incidental thereto, or any breach or default in the performance of any of the terms or conditions of the Tenant's obligations under this lease agreement.

14. DEFAULT.

14.1 EVENTS OF DEFAULT. Each of the following events shall be a default by Tenant and a breach of this Lease.

14.1.1 The breach of any of the terms or conditions of the Lease Agreement

14.1.2 The failure or refusal to pay when due any installment of rent or other sum required by this Lease to be paid by Tenant, or the failure to perform as required or conditioned by any other covenant or condition of this Lease.

14.1.3 The appointment of a receiver to take possession of the Property or improvements, or of Tenant's interest in the leasehold estate or of Tenant's operations on the Property for any reason, unless such appointment is dismissed, vacated or otherwise permanently stayed or terminated within sixty days after the appointment.

14.1.4 An assignment by Tenant for the benefit of creditors or the filing of a voluntary or involuntary petition by or against Tenant under any law for the purpose of adjudicating Tenant a bankrupt; or for extending time for payment, adjustment or satisfaction of Tenant's liability; or for reorganization, dissolution, or arrangement on account of or to prevent bankruptcy or insolvency; unless the assignment or proceeding, and all consequent orders, adjudications, custodies, and supervision are dismissed, vacated, or otherwise permanently stayed or terminated within sixty days after the assignment, filing, or other initial event.

14.2 NOTICE. As a precondition to pursuing any remedy for an alleged default by Tenant, Port shall give written notice of default to Tenant, in the manner herein specified for the giving of notices. Each notice of default shall specify the alleged event of default and the intended remedy.

14.3 TENANT'S RIGHT TO CURE. If the alleged default is nonpayment of rent, taxes, or other sums to be paid by Tenant as provided in this Lease, Tenant shall have ten

(10) days after receipt of written notice to cure the default. For the cure of any other default, Tenant shall have thirty days after receipt of written notice to cure the default, provided, however, that if it takes more than thirty (30) days to cure a default, the Tenant shall not be in default if it promptly undertakes a cure and diligently pursues it.

14.4 TIME OF THE ESSENCE. Time is of the essence of this Lease, and for each and every covenant or condition which must be performed hereunder.

15. PORT'S REMEDIES. If any default by Tenant continues uncured after receipt of written notice of default and the period to cure as required by this Lease, for the period applicable to the default, subject to the provisions of Section 13, the Port has the following remedies in addition to all other rights and remedies provided by law or equity to which Port may resort cumulatively or in the alternative:

15.1 Without terminating this Lease, Port shall be entitled to recover from Tenant any amounts due hereunder, or any damages arising out of the violation or failure of Tenant to perform any covenant, condition or provision of this Lease.

15.2 Port may elect to terminate this Lease and any and all interest and claim of Tenant by virtue of such lease, whether such interest or claim is existing or prospective, and to terminate all interest of Tenant in the Property and any improvements or fixtures thereon (except trade fixtures). In the event this Lease is terminated, all obligations and indebtedness of Tenant to Port arising out of this Lease prior to the date of termination shall survive such termination. In the event of termination by Port, Port shall be entitled to recover immediately as damages the total of the following amounts:

15.2.1 The reasonable costs of re-entry and reletting, including, but not limited to, any expenses of cleaning, repairing, altering, remodeling, refurbishing, removing, Tenant's property or any other expenses incurred in recovering possession of the Property or reletting the Property, including, but not limited to, reasonable attorney's fees, court costs, broker's commissions and advertising expense.

15.2.2 The loss of rental on the Property accruing until the date when a new tenant has been or with the exercise of reasonable diligence could have been, obtained.

15.3 Port may re-enter the Property and take possession thereof and remove any persons and property by legal action or by self-help and without liability for damages, and Tenant shall indemnify and hold the Port harmless from any claim or demand arising out of such re-entry and removal of persons and property. Such re-entry by the Port shall not terminate the Lease or release the Tenant from any obligations under the Lease. In the event Port re-enters the Property for the purpose of reletting, Port may relet all or some portion of the Property, alone or in conjunction with other properties, for a term longer or shorter than the term of this Lease, upon any reasonable terms and conditions, including the granting of a period of rent-free occupancy or other rental concession, and Port may not be required to relet to any tenant which Port may reasonably consider objectionable.

15.4 In the event Port relets the Property as agent for Tenant, Port shall be entitled to recover immediately as damages the total of the following amounts.

15.4.1 An amount equal to the total rental coming due for the remainder of the term of this Lease, computed based upon the periodic rent provided for herein and without discount or reduction for the purpose of adjusting such amount to present value of anticipated future payments, less any payments thereafter applied against such total rent by virtue of the new lease.

15.4.2 The reasonable costs of re-entry and reletting, including but not limited to, any expense of cleaning, repairing, altering, remodeling, refurbishing, removing Tenant's property, or any other expenses incurred in recovering possession of the Property or reletting the Property, including, but not limited to, attorneys' fees, court costs, broker's commissions and advertising expense.

15.5 All payments received by Port from reletting shall be applied upon indebtedness and damages owing to Port from Tenant, if any, and the balance shall be remitted to Tenant.

16. WAIVER. No waiver of any default shall constitute a waiver of any other breach or default, whether of the same or any other covenant or condition. No waiver, benefit, privilege or service voluntarily given or performed by either party shall give the other any contractual right by custom, estoppel, or otherwise. The subsequent acceptance of rent pursuant to this Lease shall not constitute a waiver of any preceding default by Tenant other than default on the payment of that particular rental payment, regardless of Port's knowledge of the preceding breach at the time of accepting rent. Acceptance of rent or other payment after termination shall not constitute a reinstatement, extension or renewal of this Lease, or revocation of any notice or other act by Port.

17. ATTORNEYS' FEES. If either party brings any action or proceeding to enforce, protect or establish any right or remedy under this Lease, the prevailing party shall be entitled to recover reasonable attorneys' fees and costs from the non-prevailing party. Arbitration is an action or proceeding for the purpose of this provision. The "prevailing party" means the party determined by the court or the arbitrator to most nearly have prevailed.

18. ACCESS BY PORT. Port, or Port's representatives and agents, shall have access to the Property at reasonable times and upon reasonable notice, for the purpose of inspecting the Property; provided that Port shall exercise all reasonable efforts not to unreasonably disturb the use and occupancy of the Property by Tenant.

19. RECORDING OF LEASE. Either party to this Lease may record the Lease with the Auditor of Benton County. In lieu of recording the entire Lease either party may record a memorandum of lease setting forth the legal description of the property, the parties and the term of the Lease, together with any additional information which the party deems to be relevant, and

as long as the information in the memorandum is accurate the other party agrees to sign the memorandum of lease.

20. HOLDING OVER. In the event Tenant shall hold over after the expiration or termination of this Lease, or at the expiration of any option term, such holding over shall be deemed to create a tenancy from month-to-month on the same terms and conditions of the lease except that the rental rate shall be adjusted as provided in Section 3 and the rent shall be prorated over a 365 day year and paid by Tenant each month in advance. The tenancy may be terminated by either party giving the other party thirty days written notice of the intent to terminate.

21. SECURITY FOR TENANT'S OBLIGATIONS. In addition to the security provided for in Section 5, in order to secure the prompt, full and complete performance of all of Tenant's obligations under this Lease, including but not limited to, Tenant's obligations to protect and indemnify Port from any liability subject to the lien, if any, of the holder of the first mortgage against the property, Tenant hereby grants to Port a security interest in and assigns to Port all of Tenant's right, title and interest in and to all rents and profits from the Property, all of the materials stored on the premises, and all permanent improvements constructed thereon, to secure the Tenant's obligations under this Lease. In the event Tenant defaults in any of its obligations hereunder, Port shall have the right at any time after the period for cure provided in paragraph 15.3, without notice or demand, to collect all rents and profits directly and apply all sums so collected to satisfy Tenant's obligations hereunder, including payment to Port of any sums due from Tenant. The assignment of rents to the Port shall be subordinate to any assignment of rents to a leasehold mortgagee for security purposes. Such remedy shall be in addition to all other remedies under this Lease. This security interest will not extend to the Tenant's business receivables other than rents and profits from the property, provided that this exception will not affect the enforcement or collection of any judgment obtained against the Tenant by the Port.

22. HAZARDOUS MATERIALS. Tenant shall not take or store upon the Property any hazardous or toxic materials, as defined by the law of the State of Washington or by federal law, except in strict compliance with all applicable rules, regulations, ordinances and statutes. Tenant shall comply with the Port's Hazardous Materials Communications Policy, but shall not be subject to the notice requirements thereof in connection with the installation, use, operation, or removal of usual office equipment including, without limitation, computers and photocopiers.

22.1 Tenant shall not permit any contamination of the Property. The Tenant shall immediately remove any contaminants or pollutants and shall promptly restore the Property, subject to any condition existing prior to the commencement of this Lease, which shall be the responsibility of the Port.

22.2 Tenant shall defend Port and hold it harmless from any cost, expense, claim or litigation arising from hazardous or toxic materials on the Property or resulting from the contamination of the Property, caused by the acts or omissions of the Tenant, its subtenants, employees, agents, invitees, or licensees, during the term of this Lease.

22.3 In the event of the termination of this Lease for any reason, the obligation of the Tenant to restore the Property and the obligation to indemnify the Port set forth above, shall survive the termination.

23. GENERAL CONDITIONS.

23.1 NOTICES. Any notices required or permitted to be given under the terms of this Lease, or by law, shall be in writing and may be given by personal delivery, or by registered or certified mail, return receipt requested, or by overnight courier, directed to the parties at the following addresses, or such other address as any party may designate in writing prior to the time of the giving of such notice, or in any other manner authorized by law:

Port: Port of Benton
3100 George Washington Way
Richland, Washington 99352

Tenant: Tri-City Railroad Company, L.L.C.
2355 Stevens Drive
P.O. Box 1700
Richland, WA 99352

Any notice given shall be effective when actually received, or if given by certified or registered mail, upon the recipient's receipt of a notice from the U. S. Postal Service that the mailed notice is available for pick up.

23.2 NONMERGER. If both Port's and Tenant's estates in the Property or the improvements or both become vested in the same owner, this Lease shall nevertheless not be destroyed by application of the doctrine of merger except by the express election of the owner and the consent of the mortgagee or mortgagees under all mortgages existing upon the Property.

23.3 CAPTIONS AND TABLE OF CONTENTS. The Table of Contents of this Lease and the captions of the various paragraphs are for convenience and ease of reference only, and do not define, limit, augment or describe the scope, content or intent of this Lease or of any part or parts of this Lease.

23.4 EXHIBITS AND ADDENDA. All exhibits and addenda to which reference is made in this Lease are incorporated in the Lease by the respective references to them. References to "this Lease" includes matters incorporated by reference.

23.5 SUCCESSORS. Subject to the provisions of this Lease on assignment and subletting, each and all of the covenants and conditions of this Lease shall be binding upon and inure to the benefit of the heirs, successors, executors, administrators, assigns, and personal representatives of the respective parties. The Port agrees that if the Property is sold, assigned, or

conveyed, except for any conveyance to the United States, the Port will place a provision in any conveyance making the conveyance subject to the terms and conditions of this Lease. The Port represents, that if this Lease is recorded, any subsequent conveyance of the Property by the Port will be subject to the terms of this Lease, with the exception of any conveyance to the United States.

23.6 NO BROKERS. Each party warrants and represents that it has not dealt with any real estate brokers or agents in connection with this Lease. Each party will indemnify and hold the other harmless from any cost, expense or liability (including costs of suit and reasonable attorney fees) for any compensation, commission, or fees claimed by any broker or agent in connection with this Lease.

23.7 WARRANTY OF AUTHORITY. The persons executing and delivering this Lease on behalf of Port and Tenant each represent and warrant that each of them is duly authorized to do so and that the execution of this Lease is the lawful and voluntary act of the person on whose behalf they purport to act.

23.8 QUIET POSSESSION. The Port agrees that upon compliance with the terms and conditions of this Lease, the Tenant shall at all times have the right to the quiet use and enjoyment of the Property for the term of the Lease and any extensions.

23.9 LEASE CERTIFICATION. Upon the request of the Tenant the Port agrees to provide a written certification of the status of the Lease, to the best knowledge of the Port at the time of the certification, setting forth the following: I) whether the Lease is in full force and effect; ii) whether there have been any amendments or modifications to the Lease; iii) whether the Tenant is current in the payment of the rent and other charges under the terms of the Lease; iv) whether the Port is aware of any default or breach on the part of the Tenant.

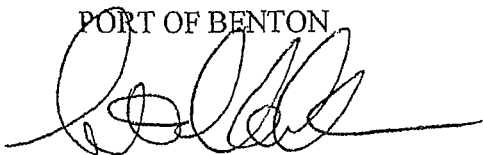
23.10 PARTIAL INVALIDITY. If any provision of this Lease is held to be invalid or unenforceable, all other provisions shall nevertheless continue in full force and effect.

23.11 CONSTRUCTION. The parties lease have reviewed this lease and have the opportunity to consult with their respective counsel. The lease shall not be deemed to be drafted by either party and the lease shall not be construed against either party as the drafter.

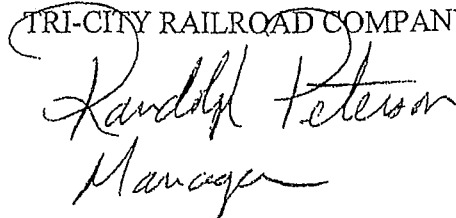
23.12 CONSENT. Whenever the consent or approval of a party to this Lease is required to be given by the terms of this Lease to the other party, such consent or approval shall not be unreasonably withheld or delayed.

DATED this 1st day of August, 2002.

PORT OF BENTON



TRI-CITY RAILROAD COMPANY, L.L.C.



Manager

By:

Executive Director

) ss.

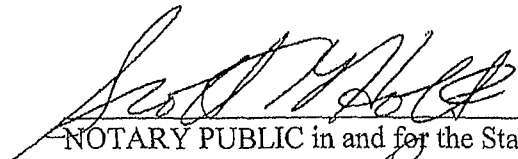
GIVEN UNDER my hand and official seal this 17 day of August, 2002.

My commission expires: June 25 2003

) SS.

On this day, before me personally appeared R. Andulph to me known to be the Manager of Tri-City Railroad Company, L.L.C., and acknowledged the said instrument to be the free and voluntary act and deed of said company for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument.

GIVEN UNDER my hand and official seal this 13th day of August, 2002.


NOTARY PUBLIC in and for the State of
Washington, residing at Porto, WA
My commission expires: Jan 25, 2003

Appendix 6

Decision in *BNSF Railway Co. v. Tri-City & Olympia Railroad Co.*, 835 F. Supp. 2d 1056, dated December 14, 2011

835 F.Supp.2d 1056
United States District Court,
E.D. Washington.

BNSF RAILWAY COMPANY, Plaintiff,
Union Pacific Railroad Company, and
Port of Benton, Plaintiff-Intervenors,
v.
TRI-CITY & OLYMPIA RAILROAD
COMPANY LLC, Defendant.

No. CV-09-5062-EFS.

|
Dec. 14, 2011.

Synopsis

Background: Railroad brought action alleging that rail and track maintenance service provider breached railroad lease agreement when it blocked railroad's access to trackage and seeking declaratory judgment recognizing its operating rights over trackage and permanent injunction compelling lessee to afford it equal access to trackage. Another railroad and rail owner intervened, and provider filed counterclaims against owner for inverse condemnation, breach of contract, breach of implied covenant of good faith and fair dealing, promissory estoppel, quantum meruit, and tortious interference with contract. Plaintiff and provider filed cross-motions for summary judgment.

Holdings: The District Court, Edward F. Shea, J., held that:

[1] railroads had right to access entirety of trackage in question, and

[2] permanent injunction barring rail and track maintenance service provider from interfering with railroads' rights to operate on trackage was warranted.

Plaintiff's motion granted.

Attorneys and Law Firms

*1057 Leland Barrett Kerr, Patrick J. Galloway,
Kerr Law Group, Kennewick, WA, Matthew R.

Brodin, Timothy R. Thornton, Briggs and Morgan, PA,
Minneapolis, MN, for Plaintiff.

Tim D. Wackerbarth, Lane Powell, P.C., Rob J. Crichton,
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Thomas A. Cowan, Jr., Cowan, Moore, Stam, Luke &
Petersen, Richland, WA, for Intervenors Plaintiffs.

David Lawrence Meyer, Morrison & Foerster, LLP,
Washington, DC, Derek F. Foran, Morrison & Foerster,
LLP, San Francisco, CA, Nicholas D. Kovarik, Dunn &
Black, PS, Spokane, WA, Paul J. Petit, Kennewick, WA,
Robert A. Dunn, Dunn & *1058 Black, PS, Spokane,
WA, Brandon L. Johnson, Minnick Hayner, P.S., Walla
Walla, WA, for Defendant.

Opinion

ORDER GRANTING BNSF'S MOTION FOR SUMMARY JUDGMENT, DENYING TCRY'S MOTION FOR SUMMARY JUDGMENT, AND DENYING ALL OTHER PENDING MOTIONS AS MOOT

EDWARD F. SHEA, District Judge.

Before the Court, without oral argument, are Plaintiff BNSF Railway Company's (hereinafter "BNSF") Motion for Summary Judgment, ECF No. 267, and Defendant Tri-City & Olympia Railroad Company LLC's (hereinafter "TCRY") Motion for Summary Judgment, ECF No. 273. Also before the Court are BNSF's Motion to Compel Discovery Propounded to Defendant Tri-City & Olympia Railroad Company, L.L.C., ECF No. 305, and TCRY's Motion for Protective Order, ECF No. 316. After reviewing the submissions of the parties and applicable authority, the Court is fully informed. For the reasons discussed below, the Court grants BNSF's Motion for Summary Judgment, denies TCRY's Motion for Summary Judgment, and denies all other pending motions as moot.

I. BACKGROUND¹

A. 1947 Agreement

On November 6, 1947, the United States, acting through the U.S. Atomic Energy Commission ("Commission"), entered into an agreement ("1947 Agreement") with several railroads to establish service to the Hanford

Nuclear Reservation ("Hanford site"). BNSF and Union Pacific Railroad Company ("UP"), the undisputed successors-in-interest to the 1947 Agreement, were granted "equal joint" operating rights over trackage beginning near Kennewick and extending north of Richland to the Hanford site ("Richland Trackage").

The 1947 Agreement identifies the rights of the parties to railway lines as shown on an August 25, 1947 map attached to the Agreement as "Exhibit A." The 1947 Agreement acknowledges that "the Government has constructed on its property a line of railway ... extending from Hanford, Washington, southerly to a point near the north bank of the Yakima River," and states as its purpose that "the Government desires to have a direct rail connection to the south so as to interchange business with [BNSF and UP's predecessors in interest]." To this end, Article V of the 1947 Agreement grants BNSF and UP's predecessors in interest the "equal joint right" to operate on the rail line and "to use said interchange facilities and wye for the purpose of interchanging business with the Government." Article VII of the Agreement states that BNSF and UP's predecessors in interest "each of itself agrees to deliver and receive at said interchange facilities all business which either is obligated to transport as a common carrier railroad." Article IX of the Agreement imposes an obligation on BNSF and UP's predecessors to "agree from time to time upon rules and regulations covering the movement of engines, cars and trains over the line B-E and on said interchange facilities."

The map attached to the 1947 Agreement identifies several points, labeled A through E. Point A is in Kennewick, and points B, C, and D extend along the rail line in a northwesterly direction toward the Hanford site. The map identifies point E as a location to the north of Richland upon which interchange tracks were to be built. The government later constructed an interchange facility at Point E, and today, Point E is TCRY's rail yard and is still operated as an interchange facility. Though the 1947 map identified a location to the south of the interchange tracks for the wye, the wye was in fact later built to the north of the interchange tracks.²

In 1948, the 1947 Agreement was the subject of a ruling by the Interstate Commerce Commission (ICC). Because the government was the only "customer" served by BNSF and UP's predecessors, the railroads sought exemption from the required public convenience and

necessity certifications for common rail carriers. The ICC's Order held that a certificate was required because the railroads would also provide common carrier services to businesses in and around Richland. The ICC's Order modified terms in the 1947 Agreement regarding payment and rights to termination, but left the remainder of the Agreement undisturbed.

B. 1961 Agreement

In 1961, the Commission entered into a second agreement ("1961 Agreement") with the Railroads. Section 1 of the 1961 Agreement leased three specified areas of track to the railroads. Section 2 of the Agreement granted "the Railroads, and the industries served by them, the right to construct additional industrial spur, set-out, and such other tracks connecting with the Government's main tracks or classification yards as may be required to provide rail service for industries." Section 3 of the 1961 Agreement states as follows:

The Commission hereby grants the Railroads the right to operate with their employees and equipment over such segments of the Government's tracks shown on Exhibit "A" as it may be necessary to use for the purpose of moving freight shipments to or from the tracks covered by this agreement.

Section 3's grant of authority was consistent with the agreement's stated purpose of allowing the railroads to operate on the United States' tracks "for the sole purpose of receiving and delivering shipments routed via the Railroads and consigned by or to shippers and receivers located on said spur or side tracks."

The rail line depicted in a 1960 map attached as Exhibit A to the 1961 Agreement begins south of Richland at the Yakima River Bridge, and extends to a Department of Energy (DOE) "barricade" roughly one thousand feet north of the wye tracks. The three segments of track leased in the 1961 Agreement are all south of the interchange facility and wye.

In 1979, the United States entered into an agreement with the railroads converting the 1961 lease agreement into a permit so that the tracks could be classified as surplus under the Federal Property and Administrative Services

Act of 1949. This agreement deleted Sections 1 and 4 of the 1961 Agreement, which detailed the terms of the lease and the railroads' maintenance obligation, but left the 1961 Agreement's other provisions "in full force and effect."

*1060 C. 1998 Indenture

In 1998, the United States, acting through the DOE, conveyed ownership of a six-mile section of track to the Port of Benton ("Port") through an Indenture, thereby assigning the DOE and Commission's rights under the 1947 and 1961 Agreements to the Port. The indenture stated that the 1947 and 1961 Agreements and the 1979 permit agreement governed access to the Railroad. The Indenture also stated that the Port, as assignee, agreed to be bound by the obligations and considerations in the United States' permit. As a result of these agreements, the Port has the right to terminate BNSF and UP's rights to use the Richland Trackage upon six months notice.

D. Interchange Agreement

On October 1, 1998, the Port entered into a Maintenance and Operation Agreement with TCRY's predecessor, Livingston Rebuild Center, Inc. ("Livingston"), under which it agreed to pay Livingston \$325,000 per year for the maintenance of the Richland Trackage. These contractual rights and obligations were subsequently assigned to TCRY.

In May 2000, BNSF and TCRY contracted to interchange cars going into the Richland Trackage ("Interchange Agreement"). They exchanged cars at the Richland Junction, and TCRY served BNSF's customers along the Richland Trackage. TCRY maintained the trackage at its own expense and began charging a per-car fee for its services. This contract specifically reserved BNSF's rights under the 1947 and 1961 Agreements.

In a September 12, 2000 letter to then-TCRY President John Haakenson, the Port's Assistant Executive Director Scott Keller acknowledged that the Port was paying TCRY to maintain the railroad under a contract that allowed TCRY to charge a fee for its railroad operations, the revenue from which would offset the cost of maintenance. Recognizing that UP was using the Richland Trackage without paying a fee, the Port directed TCRY "to give written notice to [UP] terminating its rights to use the Port of Benton track." Beginning November 14, 2000, UP could no longer continue its

unauthorized use of the Richland Trackage: it would need to establish an interchange agreement with TCRY.

From approximately April 2001 through November 2001, TCRY and BNSF continuously disagreed about BNSF's right to operate on the Richland Trackage. BNSF claimed the 1947 and 1961 Agreements allowed it to directly operate on the Richland Trackage without interchanging; TCRY maintained that BNSF could only operate on the Richland Trackage if it operated under the Interchange Agreement. This disagreement about BNSF's rights to operate on the Richland Trackage forms the essential controversy before the Court today.

E. Railroad Lease

In 2002, TCRY and the Port negotiated a lease agreement ("Railroad Lease") that authorized TCRY to provide rail and track maintenance services on the Richland Trackage. Paragraph 7.4 of the lease agreement states that TCRY "shall not take any actions which will amend, modify, terminate or invalidate any existing contracts which the Port has with any other railroad carrier, without the Port's prior written consent."

F. Legal Action

In 2009, BNSF informed TCRY that it intended to exercise its rights to directly operate on the Richland Trackage. TCRY objected, and on July 20 and 21, 2009, TCRY erected a barrier which physically prevented a BNSF locomotive from reaching *1061 BNSF customers along the Richland Trackage. A few days later, TCRY requested that the Port terminate the Richland Trackage agreements with BNSF. The Port refused.

BNSF filed this suit on July 20, 2009. ECF No. 1. UP moved to intervene on August 4, 2009, ECF No. 26, and the Court granted UP's motion. ECF No. 46. On August 12, 2009, 2009 WL 2486170, the Court granted BNSF's motion for a preliminary injunction, prohibiting TCRY from blocking BNSF's access to the Richland Trackage and requiring TCRY to charge its customary fee. ECF No. 46 & 93. TCRY filed an interlocutory appeal on September 9, 2009, which was voluntarily dismissed. ECF Nos. 67, 101, 108 & 109. Since August 15, 2009, BNSF and TCRY have been operating under the Proposed Operating Plan created to comply with the Court's preliminary injunction. ECF No. 52.

On March 8, 2010, the Court granted the Port of Benton's request to intervene. ECF No. 121. On June 2, 2010, TCRY filed a separate but related action in Benton County Superior Court against the Port, asserting claims for inverse condemnation, breach of contract, breach of implied covenant of good faith and fair dealing, promissory estoppel, and quantum meruit. ECF No. 209-1. By order dated August 20, 2010, the Superior Court stayed the state court action pending resolution of the federal claims in this Court. ECF No. 209-2.

On September 29, 2010, the Port amended its complaint, asserting that TCRY breached Railroad Lease Paragraph 7.4, which prohibits TCRY from "amend[ing], modify[ing], terminat[ing], or invalidat[ing]" other railroads' existing contractual relationships with the Port, when it temporarily blocked BNSF Railroad Company (BNSF)'s access to the Richland Trackage in July 2009. ECF No. 136. TCRY asserted several counterclaims against the Port, including inverse condemnation, breach of contract, breach of implied covenant of good faith and fair dealing, promissory estoppel, quantum meruit, and tortious interference with contract. ECF No. 165, ¶¶ 18-24.

TCRY filed a motion for summary judgment on October 20, 2010, seeking dismissal of the Port's Amended Complaint. ECF No. 142. On November 24, 2010, the Port moved for summary dismissal of TCRY's counterclaims. ECF No. 171. TCRY then moved on December 17, 2010, to remand the inverse condemnation claims to state court for determination where they were originally asserted. ECF No. 200. On July 1, 2011, 2011 WL 2607162, the Court denied TCRY's Motion for Summary Judgment and Motion for Remand. ECF No. 264. The Court's Order granted the Port's Motion for Partial Summary Judgment, dismissing TCRY's counterclaims against the Port. *Id.* In denying TCRY's Motion for Summary Judgment, the Court found that under the 1947 and 1961 Agreements, BNSF and UP have "equal joint" rights to operate directly upon the Richland Trackage, and that TCRY took its lease of the Richland Trackage subject to BNSF and UP's rights. *Id.*

TCRY and BNSF now both move for summary judgment regarding the nature and extent of BNSF and UP's rights to operate on the Richland Trackage. ECF Nos. 267 & 273. TCRY asserts that BNSF and UP's rights under the Agreements are limited to use of the trackage only up

to the interchange, or alternatively, the wye, and that BNSF may use those portions of track for interchange purposes only. BNSF argues that their right to operate directly extends to all Richland Trackage south of the old Department of Energy barricade, and is subject only to *1062 the limitation that it be used "for the purpose of moving freight shipments." After reviewing the record in this matter, the arguments of the parties, and applicable authority, the Court is fully informed. Because the 1947 and 1961 Agreements give BNSF and UP the right to operate directly on the entirety of the Richland Trackage, the Court denies TCRY's motion and grant BNSF's motion.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate if the "pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Once a party has moved for summary judgment, the opposing party must point to specific facts establishing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the nonmoving party fails to make such a showing for any of the elements essential to its case for which it bears the burden of proof, the trial court should grant the summary judgment motion. *Id.* at 322, 106 S.Ct. 2548. When considering a motion for summary judgment, the Court does not weigh the evidence or assess credibility; instead, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505. When ruling on cross-motions for summary judgment, the Court has a duty to review the record supporting the parties' motions and to determine whether there are issues of material fact precluding summary judgment. *Fair Housing Council of Riverside Cnty., Inc.*, 249 F.3d at 1136.

Here, both TCRY and BNSF have moved for summary judgment. Both parties agree that there are no genuine issues of material fact, and after reviewing the record in this matter, the Court finds that there are none. Summary judgment is thus appropriate if either party is entitled to judgment as a matter of law.

B. Applicable Law

[1] [2] When interpreting a contract under Washington law, the Court attempts to “ascertain the parties’ intentions and give effect to their intentions.” *Taylor–Edwards Warehouse & Transfer Co. of Spokane, Inc. v. Burlington N., Inc.*, 715 F.2d 1330, 1334 (9th Cir.1983) (citing *Jones v. Hollingsworth*, 88 Wash.2d 322, 326, 560 P.2d 348 (1977)). Under Washington law, extrinsic evidence is only admissible “as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties’ intent.” *Berg v. Hudesman*, 115 Wash.2d 657, 667, 801 P.2d 222 (1990). When a contract is unambiguous and its formation is undisputed, the interpretation of the contract is a question of law that is appropriate for resolution on summary judgment. *See, e.g., Mfg’d Hous. Cmty. of Wash. v. St. Paul Mercury Ins. Co.*, 660 F.Supp.2d 1208, 1212 (W.D.Wash.2009) (citing *Mayer v. Pierce Cnty. Med. Bureau*, 80 Wash.App. 416, 420, 909 P.2d 1323 (1995)).

C. The Parties’ Positions

TCRY concedes that BNSF has the right to directly on a portion of the Richland Trackage, but argues that language in the 1947 Agreement geographically restricts the United States’ grant to BNSF and UP’s predecessors to direct service between points “C” and “E” on the map attached as Exhibit A to the 1947 Agreement. Because point “E” on Exhibit A to the 1947 Agreement is the present-day site of TCry’s interchange facility, TCry argues that BNSF and UP should be enjoined *1063 from directly serving points north of the interchange facility, and should be required to interchange with TCry in order to serve customers north of the interchange facility. Alternatively, TCry argues that BNSF and UP’s operating rights should terminate at the wye built a short distance north of the interchange facility.

TCry also asserts, in an argument developed primarily in its reply memorandum, that the 1947 Agreement only grants the railroads rights to use trackage between points “C” and “E” on Exhibit A for the purpose of interchanging rail traffic with the government, and not to provide direct rail service to customers along that track. Finally, TCry argues that it would be unfair to allow BNSF and UP to directly service customers north of the interchange facility because pursuant to the 1998 Maintenance and Operation Agreement, it is charged with the sole responsibility for maintaining

the Richland Trackage. TCry requests a permanent injunction prohibiting BNSF and UP from traveling north of its interchange facility.

BNSF argues that because the wye pictured in Exhibit A to the 1947 Agreement was later built to the north of the interchange facility (instead of to the south as represented in Exhibit A), the 1947 Agreement does in fact grant the railroads operating rights north of the interchange facility. BNSF further argues that Sections 2 and 3 of the 1961 agreement extended the Railroads’ operating rights to the entirety of the Richland Trackage, limited only by the broad requirement that their operations be for the purpose of “moving freight shipments.”³ BNSF requests a declaratory judgment recognizing its operating rights over the Richland Trackage and a permanent injunction compelling TCry to afford it equal access to the Richland Trackage.

Intervenor–Plaintiff UP does not oppose BNSF’s motion, but asks that any ruling on the motion protect the “equal, just, and fair” operating rights to the Richland Trackage that it was granted by the 1947 Agreement. UP also asserts that BNSF does not have the right to provide direct rail service to the Hanford site, but that BNSF’s direct rail service rights instead terminate somewhere between TCry’s interchange facility and Hanford.

D. Analysis

i. BNSF’s Operating Rights on the Richland Trackage

[3] On close review of the underlying agreements, it is apparent that BNSF’s reading of the 1947 and 1961 Agreements is the correct one. While the 1947 Agreement’s grant to BNSF and UP’s predecessors in interest is explicitly limited to the “right to operate ... between points B and E, and to use said interchange facilities and wye for the purpose of interchanging business with the government,” ECF No. 32–2 at 13, this agreement was speculative and referenced trackage that had yet to be *1064 built. *See id.* at 12 (the Commission shall lay track in “approximately the location shown in yellow on said exhibit,” and shall build an interchange and wye “in the vicinity of point E.” (emphasis added)). At the time the 1947 Agreement was drafted, the United States was the only shipper on this section of track, and security concerns prevented private access to the Hanford site; thus, the

Agreement's reference to point "E" appears to be intended to demarcate a convenient place for interchange, rather than to provide an affirmative limitation on the railroads' later ability to service rail customers. But regardless of the exact intent behind the 1947 Agreement, the 1961 Agreement greatly expands the United States' grant to BNSF and UP.

The 1961 Agreement has the stated purpose of allowing the railroads to "receiv[e] and deliver[] shipments routed via the Railroads and consigned by or to shippers and receivers" located on spur or side tracks connecting to the United States' tracks. ECF No. 32-3 at 62. As noted above, Section 3 of the 1961 Agreement states as follows:

The Commission hereby grants the Railroads the right to operate with their employees and equipment over such segments of the Government's tracks shown on Exhibit "A" as it may be necessary to use for the purpose of moving freight shipments to or from the tracks covered by this agreement.

Id. at 63. Exhibit A to the 1961 Agreement is a detailed map depicting the entirety of the Richland Trackage, minus the subsequently-built Port trackage and spurs extending west from the wye. The above-quoted language grants BNSF and UP broad operating rights over the Richland Trackage, and bolsters BNSF's position.

TCRY makes much of Section 3's limitation that the railroads may only use such segments of the tracks as may be necessary to access "the tracks covered by this agreement." TCY argues that because Section 1 of the agreement, which contains the operative language of the lease, lists only sections of track *south* of the interchange facility, the "tracks covered by this agreement" are all south of the interchange, and thus Section 3's grant does not extend north of the interchange or wye. Section 2 of the agreement, however, also grants "the Railroads, and industries served by them," the right to construct additional "industrial spur, set-out, and such other tracks connecting with the Government's main tracks or classification yards as may be required to provide rail service for industries." *Id.* It seems readily apparent that the Port's spur tracks are "industrial spur, set-out, and such other tracks" that were constructed by "the industries served by [the railroads]" as the phrase is used in the

1961 Agreement. These subsequently-built tracks are thus "tracks covered by" the 1961 Agreement, and it follows logically that Section 3 also grants BNSF and UP the right to serve customers on these later-built sections of Port trackage and spurs extending west of the wye.

TCRY also argues that Section 3's reference to "tracks shown on Exhibit 'A'" precludes a reading of the 1961 Agreement that grants BNSF and UP rights relating to tracks built after the Agreement, because they by definition could not be shown on Exhibit A. But Section 3's reference to "tracks shown on Exhibit 'A'" relates to the section of track over which BNSF and UP are afforded rights, not the Section's later use of the phrase "tracks covered by this agreement;" these tracks are precisely the tracks over which BNSF and UP seek access. This interpretation of the 1961 Agreement is supported by its stated purpose of opening up the Richland Trackage to common carrier rail service in order to promote industrial development in *1065 the Richland area. Of course, BNSF and UP's right to use the Richland Trackage may only be "for the purpose of moving freight shipments."

Accordingly, the Court finds that the 1961 Agreement grants BNSF and UP the right to operate directly on the Richland Trackage. This right extends north of the TCY interchange facility, and includes both the spur tracks to the west of the wye and the main-line tracks north to Horn Rapids Road. Neither BNSF nor UP has a right to serve the Hanford site directly.

ii. UP's Operating Rights on the Richland Trackage

UP's position is clearly supported by the 1947 Agreement. The 1947 Agreement grants both BNSF and UP's predecessors in interest "the equal joint right" to operate on the relevant section of track. ECF No. 32-2 at 13. This grant includes the future-looking assurance that "any right or privilege at any time granted by the Commission to one of said companies in respect to its operations shall be a right or privilege which the other company may at its option exercise in respect to its operations." *Id.* Furthermore, the Agreement requires BNSF and UP's predecessors to "agree from time to time upon rules and regulations" for the use of the Richland Trackage, and requires that such rules and regulations "shall be equal, just, and fair," and "shall not unjustly discriminate against either." *Id.* at 14. These portions of the 1947 Agreement

have not been modified by later agreement, and remain in force today. As such, the Court includes UP in any declaratory or injunctive relief it affords BNSF.

E. Relief Granted

i. Declaratory Judgment

[4] Under the Declaratory Judgment Act, 28 U.S.C. § 2201, declaratory judgment is proper when one party has established that “there is a substantial controversy, between parties having adverse interest, of sufficient immediacy and reality to warrant issuance of a declaratory judgment.” *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 658 (9th Cir.2002) (quoting *Western Min. Council v. Watt*, 643 F.2d 618, 624 (9th Cir.1981)). Here, the factual background of this case unquestionably demonstrates that such a controversy exists and that declaratory judgment is proper.

BNSF requests a declaratory judgment recognizing its rights to provide direct rail service over the Richland Trackage.⁴ For the reasons discussed above, the Court grants BNSF’s request in this regard, and issues a declaratory judgment recognizing both BNSF and UP’s rights to provide direct rail service over the Richland Trackage.

ii. Permanent Injunction

BNSF also requests a permanent injunction compelling TCRY to allow it access over the Richland Trackage and requiring TCRY to coordinate train scheduling and dispatching with BNSF and UP.

[5] [6] Permanent injunctive relief is proper when a party can show “(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006). The first factor, the existence of irreparable injury, is also satisfied by a continuing and imminent threat of harm. See, e.g., *Bowler v. Home Depot USA Inc.*, No. C09–

5523 JCS, 2011 WL 166140, at *3 (N.D.Cal. January 19, 2011) (citing *Monsanto Co. v. Geertson Seed Farms*, — U.S. —, 130 S.Ct. 2743, 2760, 177 L.Ed.2d 461 (2010)). The decision to grant or deny permanent injunctive relief is within the Court’s discretion. See *eBay Inc.*, 547 U.S. at 391, 126 S.Ct. 1837 (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982)).

[7] Here, BNSF fulfills the first two factors because the percipient loss of customer goodwill that will occur if TCRY again blocks it from accessing the Richland Trackage is imminent; the loss of consumer goodwill is an irreparable injury, and legal remedies are inadequate to compensate for that injury. See *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir.1991); *Regents of Univ. of Cal. v. Am. Broad. Cos.*, 747 F.2d 511, 519–20 (9th Cir.1984). The balance of hardships between BNSF and TCRY also runs in BNSF’s favor: While TCRY is currently tasked with maintaining the Richland Trackage under the 1998 Maintenance and Operation Agreement and the 2002 Lease, as the Court has already found, TCRY took possession of the Richland Trackage subject to BNSF and UP’s pre-existing rights; the temporary hardship TCRY will suffer under its contract with the Port is outweighed by the long-term hardship BNSF and UP would suffer if their rights under the 1947 and 1961 Agreements were permanently abrogated. Finally, as the Court found in its Order granting BNSF’s motion for a preliminary injunction, ECF No. 93 at 10–11, it is in the public interest to encourage competition among the railroads and to ensure that railroad service remains efficient. Accordingly, a permanent injunction is proper.

TCRY argues that if such relief is granted, the injunction should not be “asymmetrical.” TCRY cites *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir.2010), in support of this position, but this case mentions no such consideration, and simply affirms a district court’s preliminary injunction issued under the *Winter* framework. TCRY asserts that an order enjoining only it would be unfair because it would “give[] only one party the asymmetric right to seek an order of contempt over any claim of contract breach.” ECF No. 283 at 15. However, only TCRY is in breach of the 1947 and 1961 Agreements, and BNSF has committed no harm that need be redressed with equitable relief. Furthermore, the Court’s contempt power will only be available for breach of the *injunction*, and both parties will retain the

ability to seek legal relief for breach of the underlying contract. As such, the Court denies TCRY's request for a "symmetrical" injunction.

For the reasons discussed above, the Court grants BNSF's request and issues a permanent injunction requiring TCRY 1) to allow both BNSF and UP to directly serve customers along the Richland Trackage, and 2) to coordinate train scheduling and dispatching with both BNSF and UP. The parties shall meet and confer to develop a comprehensive operational plan as detailed below.

F. Conclusion

For all of the historical complexity surrounding the Richland Trackage, the relative rights of the parties are actually quite simple: The United States granted BNSF and UP's predecessors in interest full rights to operate on the Richland Trackage, and TCRY took possession of the *1067 Richland Trackage subject to these rights. Accordingly, the Court issues a declaratory judgment recognizing BNSF and UP's operating rights, and issues a permanent injunction protecting these rights.

Accordingly, **IT IS HEREBY ORDERED:**

1. BNSF's Motion for Summary Judgment, ECF No. 273, is **GRANTED**. Both BNSF and UP shall have the right to operate directly on the Richland Trackage.

Representatives from BNSF, TCRY, and UP shall meet and confer at a mutually-convenient time and place—either by phone or in person—and draft a comprehensive operational plan (COP), consistent with the Court's ruling, that is signed and agreed upon by all three parties. A representative of the Port shall be permitted to attend and offer comments. The COP shall cover trackage from the Richland junction to Horn Rapids Road (and all spurs that spring therefrom). The proposed COP shall be filed for Court approval no later than 5:00 p.m. on December 23, 2011 unless on or before that date, BNSF, TCRY, and UP file with the Court a joint stipulation to a later date. The Port shall have seven (7) days after the filing of the proposed COP in which to file a statement with the Court stating its comments or objections to the proposed COP. The parties shall have seven (7) days after the filing of the Port's statement in which to file individual or joint reply to the Port's statement. No other responsive or reply memoranda will be considered.

2. All pending motions are **DENIED** as moot.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and distribute copies to counsel.

All Citations

835 F.Supp.2d 1056

Footnotes

- 1 In connection with their motions, the parties submitted Joint Statements of Uncontroverted Facts. ECF Nos. 281 & 294. The Court treats these facts as established consistent with Federal Rule of Civil Procedure 56(d), and sets these forth in this "Factual Background" section without reference to an ECF number. Any disputed facts are supported by a citation to the record. The Court has reviewed the record supporting the parties' cross-motions for summary judgment, and finds that there are no issues of material fact precluding summary judgment. See *Fair Housing Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir.2001) (discussing district court's duty to review the record when ruling on cross-motions for summary judgment).
- 2 A wye is a triangular arrangement of rail tracks designed to allow railway equipment to change direction by performing a "three-point turn."
- 3 BNSF also argues that TCRY's argument is foreclosed by the law of the case. However, the Court's September 28, 2009, 2009 WL 3149569, Order Granting BNSF's Motion for Preliminary Injunction expressly stated that the Court's preliminary injunction ruling was "not binding on the Court in future proceedings in this case." ECF No. 93 at 2; see also *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1423 (9th Cir.1984) (recognizing that trial court's findings regarding a party's probability of success on the merits are not binding on future stages of the case). Furthermore, while the Court's July 1, 2011 Order held that TCRY leasehold rights were "subject to UP and BNSF's continued use of the Richland Trackage, as secured by the 1947 and 1961 Agreements," ECF No. 264 at 23, the question of the exact nature and extent of the parties' rights over the Richland Trackage was not then before the Court.

- 4 TCRY argues that BNSF's requested relief must be denied because BNSF failed to name the Port and UP, who are necessary parties under Federal Rule of Civil Procedure 19. However, any argument that BNSF has improperly failed to join the Port and UP was rendered moot when they intervened in this lawsuit.

End of Document

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Excerpts from oral arguments in
BNSF Railway Co. v. Tri-City & Olympia Railroad Co.

1 MR. PETIT: That's it.

2 THE COURT: Thank you.

3 Mr. Thornton, briefly. Why don't we start with the
4 last first.

5 MR. THORNTON: BNSF from the beginning has been
6 willing to compensate for costs associated for its use of those
7 tracks.

8 THE COURT: What does that mean?

9 MR. THORNTON: It means its fair share of the
10 maintenance costs associated with those tracks. It's not
11 prepared to pay an additional fee to TCRY. TCRY took this
12 railroad subject to the reservations that the Port got it under,
13 and the Port got it under subject to reservations that the
14 Atomic Energy Commission had made and the agreements the Atomic
15 Energy Commission had made with the railroads years ago.
16 Pursuant to those agreements, the railroads paid for a
17 significant portion of the line that TCRY uses today, and the
18 government agreed that thereafter they could operate and serve
19 those customers for free. And the railroad recognizes that the
20 tracks have to be up kept. It didn't expect TCRY to pay for the
21 upkeep of those tracks, but it also doesn't think that TCRY is
22 entitled to any kind of profit on BNSF's exercise of rights that
23 it had from the beginning that have been recognized by the
24 government, that have been recognized by the Port and that are
25 recognized in TCRY's lease.

STEPHANIE SMITHSON, RMR

1 lessee of the tracks, the entity in control of the tracks, that
2 when others seek to use those tracks that some sort of
3 compensation has to be paid.

4 MR. WACKERBARTH: I would agree with that.

5 THE COURT: That's my sense of it. I wanted to make
6 sure that I'm not overlooking something here that no one's
7 talked about is once BNSF, if they're permitted to use the
8 tracks, the question is what's the compensation, how is
9 compensation worked out.

10 MR. WACKERBARTH: Well, I'll leave to Mr. Thornton to
11 address with regard to BNSF, but I seem to recall -- and I don't
12 want to speak on behalf of BNSF, but they agreed in item one to
13 recognize TCRY as the operating railroad. They agreed to --

14 THE COURT: I think they said there was some
15 compensation that had to be paid.

16 Okay. Anything else?

17 MR. WACKERBARTH: Nothing else from me, your Honor.

18 THE COURT: Thanks.

19 Mr. Thornton, before Mr. Petit. Why don't you
20 address that issue for me.

21 MR. THORNTON: We've offered before in the TRO
22 hearing and offer it again that we would expect and anticipate
23 that we would pay our fair share of the maintenance on the
24 tracks, and that's frequently done by just allocating the
25 maintenance charges based upon the number of cars handled, that

1 they have the track. And no one else can use that track.

2 BNSF accounts for more than half of the volume on the
3 track. Almost 60 percent. So we would propose a 12 and 12 hour
4 split of the block registration times. Using noon as the
5 changeover time.

6 And we would take the first 12 from midnight to noon
7 or the second 12 from 12 to midnight, leave that choice to TCRY,
8 which 12 hours they want.

9 For operations on the tracks, we would comply with, as
02:29 10 we believe it's done today, the General Code of Operating Rules
11 6.28, which has been accepted and subscribe to by most of the
12 major railroads in the United States.

13 And 6.28 in particular is for other than mainline
14 track rules operation procedures. And the most salient part of
15 that is that you need to operate at a speed that allows the
16 train to stop in half the sight distance for any obstruction,
17 any switch, anybody, anything at all.

18 And finally, we would agree that maintenance costs for
19 the tracks would be allocated on a per capita basis, based upon
02:30 20 the number of cars that are operating over the track.

21 So, for example, if there were a hundred cars
22 operating on the tracks and BNSF accounted for 60 of those, and
23 the maintenance cost was a thousand dollars, BNSF would pay \$600
24 of the maintenance costs associated with those operations.

25 And those are all recognized railroad procedures and

1 that's what we would ask the Court for. And I attempted to jot
2 it down, if the Court's interested, and would be willing to try
3 to read my handwriting, I would be happy to provide --

4 THE COURT: That's why we have the Court Reporter.

5 MR. THORNTON: I'm sorry?

6 THE COURT: That's why we have a Court Reporter.

7 MR. THORNTON: Oh, all right.

8 THE COURT: Okay. TCRY?

9 MR. JOHNSON: Your Honor, with all due respect, I
02:31 10 don't believe this adequately takes into account all of the
11 procedure and practical difficulties that will arise.

12 One issue is the scope of track. What exact scope of
13 track is the BN going to be allowed to operate on?

14 TCRY has constructed track, are they allowed to
15 operate there? Are they allowed to operate in TCRY's own yard?

16 TCRY currently operates two shifts all day long. TCRY
17 interchanges Union Pacific traffic.

18 Under the applicable rules and regulations, the BN is
19 not allowed to physically touch a Union Pacific car and vice
02:32 20 versa.

21 TCRY spots cars currently from both major railroads
22 and links them together to get them back to the Richland
23 junction. That obviously won't be happening, but the practical
24 impact is, what do we do with the UP cars that are spotted if
25 they're blocking the BN cars from getting where they think they

1 just and fair to all the parties, right?

2 MR. WACKERBARTH: That's correct.

3 THE COURT: So talk to me.

4 MR. WACKERBARTH: I do think TCRY as the lessee of
5 these tracks or the leaser of these tracks and the operating
6 railroad they are entitled to be --

7 THE COURT: The lessee.

8 MR. WACKERBARTH: Yes, the lessee. They are entitled
9 to be compensated for the two division ones' use. We have a
10 partnership with TCRY. We have a cooperative marketing
11 agreement. We've had a good working relationship with TCRY.
12 BNSF, obviously, is in a different situation in that regard.
13 But, you know, the testimony about the customers that are
14 served, they're currently being -- I would consider them to be
15 BNSF customers, but they're being served by TCRY, but they're
16 actually railroad customers. At times, Union Pacific has had
17 Lamb Weston as a customers, has been served by TCRY. TCRY is
18 the railroad that these entities deal with. And I don't think
19 we can forget -- BNSF and Union Pacific have stood in front of
20 you arguing about their rights. I don't think we can forget
21 about TCRY's rights here, as well. It's basically a three
22 railroad facility, and they're entitled to be treated equitably,
23 justly and fairly.

24 THE COURT: When you say that, you say you've got a
25 cooperative marketing agreement, that as the owner of -- the

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2020, I served the foregoing Petition For Modification Of A Trackage Rights Agreement by e-mail to Roger Nober, Esq., Chief Legal Officer of BNSF Railway Company, at *roger.nober@bnsf.com*; by e-mail to Rhonda S. Ferguson, Esq., Chief Legal Officer of Union Pacific Railroad Company, at *rsfergus@up.com*; and by e-mail to David J. Billetdeaux, Esq., Attorney for the Port of Benton at *david@portofbenton.com*.

/s/ Thomas F. McFarland

Thomas F. McFarland