

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
April 24, 2020
Part of
Public Record

TWIN CITY METALS, INC.

Complainant,

v.

KET, LLC,

Defendant.

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DOCKET NO. NOR 42168

COMPLAINT

TWIN CITY METALS, INC.
455 E. Bruneau Avenue
Kennewick, WA 99336

Complainant

Daniel Elliott
Daniel Elliott PLLC
2000 Pennsylvania Avenue NW
Suite 7000
Washington, DC 20006

Attorney for Complainant

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4. KET does not have any locomotives on its track to provide common carrier service to shippers located on its Line. KET does not employ any railroad operating employees. KET has never provided rail service to any of the shippers on the Line. Union Pacific Railroad and BNSF Railway provide all rail service on the Line.
5. TCM recently asked KET for rail service on the Line. KET said that it does not provide rail service and TCM must contact Union Pacific or BNSF for rail service. KET stated that it was not a common carrier by rail.
6. TCM is located on the Line at 455 E. Bruneau Avenue in Kennewick, WA. TCM has a spur track on its property that, prior to 2018, connected to the Line by a switch. Also, there was a railroad crossing on the Line that ran across the eastern driveway of TCM which permitted access to its facility.
7. On or about 2013, KET pushed an old locomotive onto TCM's property on its private spur track. KET President Paul Didelius soon arrived and informed TCM that it was KET's locomotive. He said he was going to leave the locomotive to charge its batteries. TCM asked Mr. Didelius to remove the locomotive from its property. Mr. Didelius said the locomotive was on track owned by the Port of Kennewick that KET had taken over, and that KET had no obligation to move it. TCM explained the locomotive was on its private spur track and, as such, KET could not leave it there. Shortly thereafter, Mr. Didelius went to the Port, and the Port confirmed that Twin City owned the track from the switch inward.

8. On May 7, 2018, workers acting on behalf of KET entered onto TCM's real property and removed part of TCM's spur track. These workers also removed the accompanying switch that connected KET's Line to the spur track on TCM's property.
9. The switch and the spur track were vital to TCM's ability to have rail service at this facility, allowing it to receive railcars arriving from the BNSF main rail line to the south via KET's line. The removed spur track and switch were TCM's property and were situated on TCM's real property.
10. KET admitted in writing that it removed the switch and spur track.
11. After May 7, 2018, workers acting on behalf of KET performed additional work on the Line along E. Bruneau St., and this work destroyed a previously existing grade crossing that allowed vehicles to cross the KET track and access TCM's property.
12. The loss of this grade crossing, spur track, and switch has caused significant disruptions to TCM's business operations.
13. KET unilaterally removed the spur track, switch, and crossing without any discussion with or notice to TCM.
14. Because of the removal of the spur track and switch, TCM cannot receive rail service from KET or any other railroad that operates on this Line.
15. TCM has asked KET to replace the spur track, switch, and crossing on numerous occasions verbally and in writing.
16. To date, KET has not replaced the spur track, switch, or crossing.
17. Based on information and belief, TCM would move approximately 7 rail cars per month if KET provided it rail service on the Line.

18. As a result, TCM felt the only avenue it had to receive rail service on the Line was to take action at the STB.

19. TCM seeks to move scrap iron and steel on the Line which is an exempt commodity under 49 C.F.R. § 1039.11.

Count 1

20. TCM hereby incorporates by reference paragraphs 1 through 19 above.

21. Pursuant to 49 U.S.C. § 11101(a), a rail carrier is required to provide transportation or service on reasonable request to TCM.

22. As described above, the actions by KET have completely eliminated TCM's ability to obtain rail service on the Line. These actions have resulted in no rail service on the Line since the spur track and switch were removed having substantial adverse effects on TCM. Discussions with KET have been unsuccessful in persuading KET to provide rail service by reconnecting the TCM spur to the Line. Moreover, KET did not provide a rate for rail service to TCM upon request and stated only BNSF and Union Pacific could provide rail service on the Line.

23. These actions of KET by removing the switch and spur track unilaterally without warning and having no ability to provide rail service constitute a violation of its common carrier obligation. Pursuant to 49 U.S.C. § 11101(a), the STB should order KET to replace the spur track and switch it removed and to provide common carrier service on the Line to TCM.

Count 2

24. TCM hereby incorporates by reference paragraphs 1 through 23 above.
25. Pursuant to 49 U.S.C. § 10702(2), a rail carrier providing transportation or service subject to the jurisdiction of the Board must establish reasonable rules and practices on matters related to such transportation or service.
26. KET has established a practice that has completely eliminated TCM's statutory right to receive common carrier rail service on the Line and hindered its ability to conduct business.
27. KET unilaterally removed a switch, spur track, and a crossing on TCM's property without any prior discussion with TCM. As such, TCM is no longer connected to the Line and cannot receive customers through its own driveway on the eastern side of its property.
28. The actions by KET constitute an unreasonable practice by unilaterally ending rail service to TCM and disrupting TCM's business operations. Pursuant to 49 U.S.C. § 10704, the Board should order KET to cease and desist such unreasonable practice and require KET to replace the switch, spur track and crossing within a reasonable time.

Count 3

29. TCM hereby incorporates by reference paragraphs 1 through 28 above.
30. Pursuant to 49 U.S.C. § 11103, a common carrier subject to the jurisdiction of the Board shall construct, maintain, and operate a switch connection to connect private side track with its railroad.

31. As described above, KET unilaterally removed the switch connection between TCM and KET on the Line. TCM has repeatedly asked KET to replace the switch connection, so it could obtain rail service. KET has refused to replace the switch connection requested by TCM.

32. The actions by KET constitute a violation of 49 U.S.C. § 11103 by refusing to provide TCM a switch connection upon request. Pursuant to 49 U.S.C. § 10704, the Board should order KET to replace the switch connection it removed.

Count 5

33. TCM hereby incorporates by reference paragraphs 1 through 32 above.

34. Pursuant to 49 U.S.C. § 10744, a rail carrier providing transportation subject to the jurisdiction of the Board may not enter a arrangement to prevent the carriage of freight from being continuous from the place of shipment to the place of destination when the stoppage is not made in good faith for a necessary purpose and with the intent of avoiding the continuous carriage.

35. As described above, KET has removed a switch and spur track that has prevented TCM from being able to ship or receive rail cars at its property.

36. The actions by KET constitute a violation of 49 U.S.C. § 10744 by preventing carriage of freight from being continuous to or from TCM's property.

Count 6

37. TCM hereby incorporates by reference paragraphs 1 through 36 above.

38. TCM seeks rail service for a commodity, iron and steel scrap (STCC 40-211), that is exempt from Board regulation under 49 C.F.R. § 1039.11. *See Rail General Exemption*

Authority – Exemption of Ferrous Recyclables, EP 346 (Sub-No. 35) (ICC served May 16, 1995) (the ICC exempted from regulation the railroad transportation of iron or steel scrap, wastes and tailings).

39. Under 49 U.S.C. 10502(d), the Board may revoke an exemption when it finds that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. § 10101. Revocation of the exemption, to the extent necessary to allow the Board to give consideration to KET's actions with respect to its removal of TCM's switch, spur track and crossing and refusal to provide rail service, is required to carry out the many provisions of the rail transportation policy favoring competition. 49 U.S.C. § 10101(1), (4), (5), (6), and (12). Revocation is also necessary to carry out the provisions to ensure the continuation of a sound rail transportation system and to encourage honest and efficient management of railroads. *Id.* at (4) and (9).

40. In particular, TCM now lacks the ability to receive rail competition at all which runs counter to the rail transportation policy of encouraging competition. Moreover, KET's unilateral actions of destroying rail property and refusing to provide service run completely counter to the rail transportation policy of supporting the US rail system.

41. Thus, TCM asks the Board to revoke partially the exemption for the rail service disputes at issue in this proceeding described above.

WHEREFORE, for the reasons stated, the Board should find that KET's unilateral elimination of rail service without notice constitutes a failure to provide adequate rail service to TCM in violation of 49 U.S.C. § 11101(a); an unreasonable practice in the matter of transportation and service in violation of 49 U.S.C. § 10702(2); a failure to

provide a switch connection in violation of 49 U.S.C. § 11103; and a failure to provide continuous carriage of freight in violation of 49 U.S.C. § 10744.

The Board is respectfully requested to partially revoke the exemption for steel and iron scrap as set forth in 49 C.F.R. § 1039.11 to the extent necessary to allow the Board to give consideration to KET's actions with respect to the rail service issues with TCM described above.

The Board is respectfully requested to order KET to cease and desist from such violations by requiring KET to restore service to TCM by replacing the switch connection and spur track it removed and to stop disrupting TCM's business by replacing the crossing it removed, and to award damages, pursuant to 49 U.S.C. § 11704(b), to TCM for such violations as may be proven in an investigation of this Complaint.

The Board is also respectfully requested to grant to TCM such other and further relief, including attorney fees, as the Board may deem proper, based on the record, and on the Board's rulings, subject to judicial review thereof.

TWIN CITY METALS, INC.
455 E. Bruneau Avenue
Kennewick, WA 99336

Complainant

/s/ Daniel Elliott
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Suite 7000
Washington, DC 20006

Attorney for Complainant

CERTIFICATE OF SERVICE

In accordance with 49 C.F.R. § 1111.4, I hereby certify that on April 24, 2020, I served a copy of this Complaint on Paul Didelius of KET by first-class mail and on its outside counsel known to represent KET in this matter by first-class mail and email as follows:

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/s/Daniel Elliott