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BEFORE THE
SURFACE TRANSPORTATION BOARD

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April 30, 2020
Part of
Public Record

Finance Docket No. 36396

**PETITION FOR MODIFICATION OF
A TRACKAGE RIGHTS AGREEMENT**

**UNION PACIFIC RAILROAD COMPANY'S MOTION
TO DISMISS TRI-CITY RAILROAD COMPANY, LLC'S
PETITION FOR MODIFICATION OF
A TRACKAGE RIGHTS AGREEMENT**

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Union Pacific Railroad Company (“Union Pacific”) hereby moves to dismiss the Petition for Modification of a Trackage Rights Agreement (“Petition”) filed on April 10, 2020 by Tri-City Railroad Company, LLC (“TCRY”). TCRY asks the Board to modify a trackage rights agreement¹ under which Union Pacific and its predecessors have been operating for nearly 75 years. Because TCRY’s request is fundamentally flawed, its Petition should be dismissed.

The Petition must be dismissed because TCRY lacks any standing to seek relief regarding the Trackage Rights Agreement. TCRY is not a party to the Trackage Rights Agreement.² TCRY’s request is not supported by any of the parties to the Trackage Rights Agreement. TCRY’s lack of standing is so fundamental that even the relief it seeks would do nothing to redress its alleged injury. TCRY even lacks Board authority to operate on the track covered by the Trackage Rights Agreement.³ For these reasons, TCRY’s Petition should be dismissed.

¹ The Trackage Rights Agreement is attached as appendices 1 and 2 to the Petition.

² TCRY’s only interest in the track at issue is as a lessee from the track owner, the Port of Benton County, Washington (“Port”). However, it is Union Pacific’s understanding that the Port and TCRY are in the midst of litigation to terminate that interest. The Lease Agreement is attached as appendix 5 to the TCRY Petition.

³ *Port of Benton County, Wash.—Adverse Discontinuance of Rail Service—Tri-City Railroad Company, LLC*, STB Docket AB 1270 (served October 31, 2019).

If the Board decides to proceed to the merits despite TCRY's lack of standing, Union Pacific requests that the Board hold this matter in abeyance until the ongoing state court litigation is completed and the contractual relationship between TCRY and the Port is determined by the court under state law.

I. TCRY Lacks Sufficient Standing to Pursue Claims Regarding the Trackage Rights Agreement

TCRY cannot demonstrate sufficient standing to support the relief it seeks in its Petition. While the Board does not require strict judicial standing for parties, the Board has found standing to be an instructive guide for determining whether its proceedings are legally supportable.⁴ The Board's precedent requires TCRY to demonstrate the following in support of its Petition: (1) that TCRY has suffered an injury in fact; (2) that TCRY's injury is fairly traceable to the challenged conduct; and (3) that TCRY's injury is one that may redressed through a favorable decision. *Id.* TCRY's Petition fails on all three counts.

First, under the Board's threshold test, TCRY lacks standing because it has not suffered an injury. TCRY's alleged injury is its responsibility for maintenance costs. However, TCRY voluntarily assumed that responsibility when it entered into the Lease Agreement with the Port. Petition at 8. When TCRY entered the lease, it accepted responsibility for maintenance costs and received a reduction in rental fees under its Lease Agreement with the Port. *See* Petition at 4. TCRY understood that neither Union Pacific nor BNSF Railway Company ("BNSF") were responsible for the maintenance cost obligation specified in the Lease Agreement. *Id.* TCRY

⁴ *See Riffin—Acquis. & Operation Exemption—in York Cty., Pa.*, FD 34501, *et al.*, slip op. at 5 (STB served Feb. 23, 2005).

cannot now claim an injury having knowingly and voluntarily assumed its maintenance cost obligation under the Lease Agreement in exchange for valuable consideration from the Port.⁵

Even were we to accept TCRY's allegation of an injury, that injury cannot be fairly traced to the Trackage Rights Agreement. TCRY claims its assumption of maintenance costs was not injurious at the time because Union Pacific and BNSF were compensating TCRY for switching services through privately-negotiated agreements. Petition at 4. If TCRY's alleged injury arose from its misplaced reliance on the continued use of its switching services, then TCRY's alleged injury is traceable to its own miscalculation of values in the Lease Agreement and not to any aspect of the Trackage Rights Agreement.

Finally, even assuming that TCRY has suffered an injury and that the injury is traceable to the Trackage Rights Agreement – neither of which is remotely true – the remedy TCRY is seeking from the Board will not redress its claimed injury. TCRY is unequivocally responsible for maintenance costs under the Lease Agreement. Petition at 4. TCRY's maintenance cost obligation under the Lease Agreement will remain regardless of whether the Board modifies the Trackage Rights Agreement. Moreover, the Port is the owner of the track and the landlord under the Trackage Rights Agreement. If the Board somehow were to modify the Trackage Rights Agreement to require Union Pacific and BNSF contributions to aggregate maintenance costs,

⁵ If TCRY is instead claiming that the consideration it received is insufficient or invalid, or that unforeseen (or even foreseeable) circumstances have rendered unenforceable its maintenance cost obligation, then TCRY must pursue the appropriate contract claims in court. Because the Lease Agreement is already subject to litigation in state court, TCRY's means of relief are already at hand. TCRY's request for Board modification of the Trackage Rights Agreement is, at bottom, a collateral attack on the state court's disposition of the Lease Agreement dispute.

those contributions would necessarily go to the Port, not TCRY.⁶ Even given the requested Trackage Rights Agreement modifications, there is no Lease Agreement mechanism for TCRY to receive the funds. TCRY's alleged injury cannot be redressed through the relief sought by the Petition.

II. TCRY Lacks Sufficient Interest in the Trackage Rights Agreement to Bring the Petition

TCRY's claim that it is a real party of interest to the Trackage Right Agreement is incorrect. As previously noted, by its terms, the current and only parties to the Trackage Rights Agreement are the Port, Union Pacific and BNSF. The Port is a party to the separate Lease Agreement with TCRY, and the Port is both the owner of the track and landlord under the Trackage Rights Agreement. TCRY has never been assigned any rights under the Trackage Rights Agreement and is not a third-party beneficiary of any rights conferred by the Trackage Rights Agreements. If a modification to the Trackage Rights Agreement were needed to support the proper function of the Lease Agreement, then the Port – as a party to both agreements – would be the proper party to bring a petition. TCRY has no rights or obligations under the Trackage Rights Agreement and should not be allowed to bring the Petition without support from the Port.

⁶ TCRY is not a party to the Trackage Rights Agreement and would not be entitled to payments from Union Pacific and BNSF. TCRY is apparently assuming in advance that the Port would use the newfound contributions to reduce or offset TCRY's maintenance costs. But there is no requirement under the Lease Agreement for the Port to do so. Nor does the Lease Agreement appear to give TCRY the ability to seek contribution for maintenance costs directly from Union Pacific or BNSF. For TCRY ultimately to obtain its claimed relief, the Board would have to disrupt materially the balance of obligations and considerations exchanged between BNSF, Union Pacific, and the Port by implementing a self-serving TCRY wish-list of modifications to the Trackage Rights Agreement and the Lease Agreement.

TCRY claims to have an interest in the Trackage Rights Agreement due to the Lease Agreement. That claim too is incorrect. Although TCRY accepted the Lease Agreement subject to the terms of the Trackage Rights Agreement, TCRY did so without obtaining any rights with respect to the Trackage Rights Agreement. Petition at 8. Had the Port wished to convey rights under the Trackage Rights Agreement to TCRY, the Port certainly could have done so in its Lease Agreement.⁷ TCRY cannot assert it has sufficient rights to seek modification of Trackage Rights Agreement having failed actually to negotiate those rights under the Lease Agreement.⁸

To the extent TCRY could even conceivably claim to be an interested party merely because it operated the track under the Board's jurisdiction, that interest would have ended when the Board granted the Port's adverse discontinuance application. TCRY's only connection to the track is now through its contractual rights under the Lease Agreement. TCRY no longer operates subject to the Board's exclusive and primary jurisdiction. The Board has determined that public convenience and necessity does not require TCRY's continued operation of the track. The Board should, therefore, not allow TCRY to disrupt operations on the track being carried out under the Board's jurisdiction pursuant to the Trackage Rights Agreement.

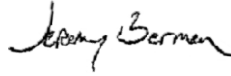
⁷ For example, compare Section 6.1 of the Lease Agreement where the Port named TCRY as the Port's "attorney-in-fact" for the purpose of paying or contesting taxes to Section 7.4 where the Port required that TCRY not take any actions to "amend, modify, terminate, or invalidate" any existing contracts between the Port and any other rail carrier, *i.e.* the Trackage Rights Agreement. Whether TCRY violated Section 7.4 when it filed the Petition is likely a matter for a court to decide.

⁸ TCRY also fails to mention that it agreed to be responsible for maintenance costs in exchange for "a significant reduction in the cost of rent" under the Lease Agreement. *Peterson v. Port of Benton Cty.*, 2020 U.S. Dist. LEXIS 25404, 2020 WL 738247, slip op. at *7 (E.D. Wash. Feb. 13, 2020)

III. Conclusion

For all of the foregoing reasons, the Board should dismiss the Petition. Alternatively, the Board should hold this matter in abeyance until TCRY and the Port have completed state court litigation regarding the Lease Agreement.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April 2020, I caused a copy of the foregoing document to be served by email on:

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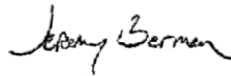
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