

Before the
SURFACE TRANSPORTATION BOARD

ENTERED
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Public Record

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

BNSF's Motion to Dismiss Tri-City's Petition for Modification

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Dated: April 30, 2020

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BNSF’s Motion to Dismiss Tri-City’s Petition for Modification

BNSF Railway Company (“BNSF”) hereby requests that the Surface Transportation Board (“STB” or “Board”) dismiss the Petition for Modification of a Trackage Rights Agreement filed in this proceeding by Tri-City Railroad Company, LLC (“Tri-City”) on April 10, 2020 (the “Petition”).

Tri-City asks the Board to reopen a decision approving a trackage rights agreement (the “TRA” or the “Agreement”) that has been administratively final for over 70 years. The TRA governs operations by BNSF and Union Pacific Railroad Company (“Union Pacific”) over a rail line (the “Line”) owned by the Port of Benton County, Washington (the “Port”). Tri-City’s motives for seeking a reopening are unclear, as Tri-City has no cognizable interest in the TRA. Tri-City is not a party to the 70-year old TRA and it has never had any rights or obligations under the Agreement. Tri-City’s only connection to the TRA is that Tri-City was previously authorized to provide rail service over the Line. But the Board terminated Tri-City’s operating authority over the Line last year. *See Port of Benton Cty., Wash.—Adverse Discon. of Rail Service—Tri-City R.R. Co., LLC*, AB 1270 (STB served Oct. 31, 2019) (“*Tri-City Discontinuance*”). The Port is now in the process of evicting Tri-City from the line.

The STB should dismiss the Petition. A person seeking to reopen an administratively final decision bears a heavy burden to overcome the interests of finality, repose and reliance on final agency decisions. At a minimum, a party seeking reopening must show that it has a valid, significant, and cognizable interest in the matter at issue. Tri-City has no such interest here. It has no valid regulatory interest because the STB terminated its operating authority over the Line last year. Tri-City no longer has any rights or interests in the Line that are recognized by the STB. Moreover, any commercial interest that Tri-City may have in how the TRA allocates maintenance costs on the Line is on the verge of being eliminated altogether through Tri-City's eviction from the Line. If Tri-City is attempting to use its Petition to create leverage in other commercial or litigation matters, the Board should not allow its regulatory processes to be used in this way.

Because BNSF believes that the Petition should be dismissed on these procedural grounds relating to Tri-City's standing, BNSF does not address Tri-City's substantive claims that circumstances have changed in ways that would justify re-writing the terms of the original TRA. If the Board does not dismiss the Petition, BNSF requests that the Board establish a schedule for the submission of evidence on the Tri-City's substantive claims.

I. Background

The facts relating to the development of the TRA, the construction and operation of the Line, and the evolution of commercial relationships (and related disputes) between Tri-City, the Port, and BNSF and UP (and their respective predecessors) over several decades are complex. However, the procedural validity of Tri-City's Petition turns on a few relatively recent facts and developments that can be briefly summarized.

BNSF, UP, and their predecessors have operated over the Line since the late 1940s subject to the terms of the TRA, which was approved by the Board's

predecessor, the Interstate Commerce Commission (“ICC” or the “Commission”) in 1948. In 1998, the Port acquired the Line, subject to the continuing operations of BNSF and UP over the Line. *Tri-City Discontinuance*, slip op. at 2. In 2002, the Port entered into a lease with Tri-City, approved by the Board, that allowed Tri-City to also operate over the Line and required that Tri-City maintain the Line. *Id.*

Over the years during which Tri-City operated over the Line, several disputes between these parties arose. In one dispute, Tri-City sought to prevent BNSF from operating over the Line by, among other things, erecting a physical barrier to BNSF’s entry onto a portion of the Line. In 2012, a federal court issued a declaratory order confirming BNSF’s rights to operate over the Line and issued a permanent injunction protecting those rights. *BNSF Ry. Co. v. Tri-City & Olympia R.R. Co. LLC*, No. CV-09-5062-EFS, 2012 WL 12951546 (E.D. Wash. Feb. 14, 2012). Following this decision, Tri-City filed a taxpayer suit in Thurston County, Washington State against the Port, alleging that the Port’s failure to charge rent to the railroads operating on the line was an unconstitutional gift of public funds. The Washington Supreme Court recently rejected Tri-City’s claims. *Petersen v. State*, — P.3d—, 2020 WL 1888727 (Wash. Apr. 17, 2020).

Other disputes arose between the Port and Tri-City over Tri-City’s compliance with its lease obligations, including its maintenance responsibilities. Those disputes ultimately led the Port to notify Tri-City that it was in breach of its lease and that the Port intended to evict Tri-City from the Line. *Tri-City Discontinuance*, slip op. at 2. The numerous and on-going disputes with Tri-City also led the Port to ask the Board to terminate Tri-City’s regulatory authority to operate over the Line through an adverse discontinuance of that authority. The Port explained that removal of the Board’s jurisdiction over Tri-City’s operations would allow the Port to seek a remedy under state law through eviction. *Tri-City Discontinuance*, slip op. at 3. The Board granted the Port’s request, finding that discontinuance of the Board’s regulatory jurisdiction over Tri-City “would preserve

the interests of the shippers on the Line, the communities involved, the other railroads involved, and interstate commerce generally.” *Id.*, slip op. at 5.

In the meantime, Tri-City sued the Port in federal court, advancing in four different complaints a flurry of claims arising under state and federal law. Through a series of decisions, the court dismissed all of Tri-City’s federal law claims, leaving only the state law claims relating to Tri-City’s alleged breach of the lease through inadequate maintenance. On March 12, 2020, the federal court dismissed the remaining state law claims with leave to re-file those claims in state court. *Peterson v. Port of Benton Cty.*, Case No. 2:17-cv-00191-TOR (E.D. Wash. Mar. 12, 2020) (attached as Exhibit A). Following the dismissal, TCRY filed a complaint in Washington state court. *Tri-City R.R. Co., LLC v. Port of Benton Cty.*, Case No. 20-2-00649-03 (Wash.Super. filed Apr. 9, 2020) (attached as Exhibit B). At para. 59-60 of the complaint, TCRY acknowledges that the Port has begun the eviction process by serving TCRY with a Notice to Comply or Vacate for failure to maintain the Line.

II. The Board should dismiss the Petition.

Tri-City asks the STB to reopen the ICC’s 1948 approval of the TRA governing operations by the predecessors of BNSF and UP on the Line. Reopening such a long-final decision would be an extraordinary remedy that should not be entertained by the Board unless the petitioner can demonstrate a valid, substantial, and cognizable interest in the decision. Tri-City has no such interest, and therefore the Board should dismiss its Petition on standing grounds.

A. Tri-City has not met its “heavy burden” to justify the reopening of a long-final decision.

The STB has repeatedly stated that a petitioner seeking to reopen an administratively final decision “bears a heavy burden” to justify a reopening. *See, e.g., Can. Nat’l Ry. Co., et al—Control—Ill. Central Corp., et al*, FD 33556, Dec. No. 40, slip op. at 4 (STB served Dec. 23, 2002). The rationale for this standard is

straightforward. Numerous parties rely on, and conform their commercial practices to accommodate, administrative actions and decisions. The interests of administrative repose and reliance on agency decisions therefore weigh strongly against reopening final decisions in the absence of compelling circumstances. *See, e.g., Tongue River R.R. Co., Inc.—Constr. & Oper.—W. Alignment*, FD 30186 (Sub-No. 3), slip op. at 5 (STB served June 15, 2011) (discussing STB and U.S. Supreme Court precedent on administrative finality). Moreover, “[c]oncerns of detrimental reliance and the need for administrative repose become greater the longer the time between our decision in a case and the time a petition for reopening is filed.” *Id.*, slip op. at 5.

The “heavy burden” that a petitioner bears to reopen a final decision is usually discussed in relation to the strength and quality of evidence of changed circumstances or new evidence that the petitioner must present to justify reopening. But the same reasons that demand compelling evidence of changed circumstances also demand a compelling showing that the party seeking to reopen an administratively final decision have a valid, substantial, and cognizable interest in the matter to be reopened. The interests of finality and repose would be undermined just as much by allowing persons without a valid or direct interest in the matter to create uncertainty by seeking to reopen final decisions as they are by reopening decisions without compelling evidence.

There is a statutory basis for such a substantial interest requirement. Under 49 U.S.C. § 1322(c), only an “interested” party may request that the STB reopen a final Board decision. And given the “heavy burden” to justify the reopening of a long-final decision, that interest should be valid and substantial. The Board should not allow its administrative processes to be used by parties whose interest in an administrative result is tenuous or non-existent, particularly when the Board is being asked to reopen decisions that have long been in place and to re-write commercial agreements that have long been relied upon.

The Board’s standing requirement supports this approach. As Tri-City points out in the Petition at 7-8, the Board is not strictly bound by the standing principles developed by the courts. However, a showing of standing is required and the Board is guided by the principles used by courts to assess a party’s standing to pursue relief. *See, e.g., Publication Requirements for Agricultural Products, et al*, EP 528 (Sub-No. 1), *et al*, slip op. at 7 (STB served Dec. 29, 2016) (citing STB precedent in a licensing proceeding for applying the courts’ well-established standing test of “whether the complainant has suffered an injury in fact, whether the injury is fairly traceable to the defendant’s challenged conduct, and whether the injury is one likely to be redressed through a favorable decision.”).

The Board has used a number of different qualifiers in past cases to describe the degree of interest that a party must have to invoke Board action. Thus, standing has been described in a trackage rights case as having a “substantial stake in the outcome,” *N.C. R.R.—Pet. to Set Trackage Comp. & Other Terms & Conditions—Norfolk S. Ry.*, FD 33134, slip op. at 3 (STB served May 29, 1997); in a complaint proceeding as a “sufficient interest” in the outcome, *W. Coal Traffic League v. Union Pac. R.R. Co.*, FD 33726, slip op. at 1 (STB served Apr. 22, 1999); and in an adverse discontinuance case as a “proper interest,” *State of S.D.—Adverse Discon. of Oper. Auth.—Napa-Platte Reg’l R.R. Auth.*, AB 1253, slip op. at 3 (STB served June 27, 2018) (citations omitted). Here, Tri-City has not demonstrated, and cannot show, that it has *any* cognizable interest that would justify the extraordinary reopening of the 70-year-old trackage rights decision.

B. Tri-City has no valid interest that would support its Petition.

Tri-City complains that BNSF and UP derive revenues from operating over the line at issue but do not contribute to the maintenance costs of the line. Petition at 3. But Tri-City never explains why, in light of Tri-City’s current regulatory and contractual status, this allegation, even if accurate, would have any impact on it or

any relevance to the STB's regulatory mission. If Tri-City's objective is merely to create leverage for obtaining some unspecified commercial advantage or advantage in some unrelated litigation, it is clearly abusing the Board's regulatory authority. *See Consol. Rail Corp.—Aband. Exemption—In Hudson Cty., NJ, et al*, AB 167 (Sub-No. 1189X), *et al*, slip op. at 10 (STB served Apr. 28, 2017) (seeking to harass, delay or force commercial settlements are improper purposes for seeking Board action).

In fact, it is abundantly clear that Tri-City has no valid regulatory interest in operations over the Line or the costs of maintaining it. The Board extinguished Tri-City's regulatory interests last year when it granted the Port's request for adverse discontinuance of Tri-City's operating authority over the Line. From the perspective of the Board, Tri-City no longer has any rights, obligations or interests in the Line arising under the regulatory regime that the STB administers.

Furthermore, to the extent Tri-City has any commercial interests in the Line, those interests would not support the extraordinary regulatory action that Tri-City seeks from the Board. When Tri-City argued last year to the Board that its commercial interests supported Tri-City's continued regulatory authority to operate on the line, the Board concluded that Tri-City's "contractual right to operate on the Line, contractual obligation to pay maintenance costs, or just compensation for maintenance costs as described by Tri-City can and should be litigated in the appropriate court rather than before the Board." *Tri-City Discontinuance*, slip op. at 6. Nothing has changed in the last six months that would justify Tri-City seeking to pursue its commercial interests now before the Board rather than in court.

Moreover, even if the existence of a valid *commercial* interest in the line could theoretically support a request for *regulatory* action by the Board, it would be premature to conclude that Tri-City had such a valid commercial interest while Tri-City and the Port continue to engage in litigation over those commercial interests.

The Port is seeking to evict Tri-City from the Line and thereby terminate any commercial arrangement with Tri-City involving the Line. If the Port is successful, it will be even clearer that Tri-City has no interest at all, regulatory or commercial, in the allocation of maintenance responsibilities set forth in the TRA. Therefore, any alleged injury suffered by Tri-City resulting from the TRA could not be “redressed through a favorable decision” with respect to the Petition. *Publication Requirements for Agricultural Products, et al*, EP 528 (Sub-No. 1), *et al*, slip op. at 7 (STB served Dec. 29, 2016).

III. If the Board does not dismiss the Petition on procedural grounds, the Board should set a procedural schedule to address the substance of the Petition.

In this Motion to Dismiss, BNSF has not addressed the substance of Tri-City’s allegations that changed circumstances have affected the validity or fairness of the TRA. BNSF’s Motion focuses on procedural questions related to standing. For the reasons explained above, BNSF does not believe that Tri-City’s Petition belongs at the Board. BNSF believes that the Board should not allow a person without a valid interest in the TRA, like Tri-City, to force the parties that do have a valid interest to address the merits of the long-final decision approving those trackage rights. The Board should therefore dismiss Tri-City’s Petition on procedural grounds.

If the Board nevertheless concludes that Tri-City has satisfied the procedural requirements for seeking a reopening, the Board should set a procedural schedule that would give the parties an opportunity to address the adequacy of Tri-City’s claims as to changed circumstances.

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Respectfully submitted,

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Attorneys for BNSF Railway Company

Dated: April 30, 2020

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RANDOLPH PETERSON and TRI-
CITY RAILROAD COMPANY LLC,

Plaintiffs,

v.

PORT OF BENTON COUNTY,

Defendant.

NO. 2:17-CV-0191-TOR

ORDER OF DISMISSAL

BEFORE THE COURT are the parties' responses to the Court's Order to Show Cause. The Court has reviewed the record and files herein, and is fully informed. ECF Nos. 348, 349. For the reasons discussed below, the Court hereby **dismisses** the remaining state law claims with leave to re-file pursuant to 28 U.S.C. § 1367.

BACKGROUND

This case arises out of a dispute over the use and management of railroad tracks and surrounding property owned by Defendant and leased by Plaintiffs. The

1 Court has summarized the factual history of this case in several prior orders. *See*
2 ECF Nos. 85, 108, 196, 198, 249, 307, 310. Plaintiffs' Fourth Amended
3 Complaint, which is the current operative Complaint, alleges federal question
4 jurisdiction is present based on Plaintiffs' *qui tam* and 42 U.S.C. § 1983 claims.
5 ECF No. 167. However, this Court has dismissed all of Plaintiffs' federal claims.
6 ECF Nos. 196, 198, 237, 249, 307, 310, 335. Because this case has been narrowed
7 to only state law claims, the Court ordered the parties to show cause why this
8 matter should not be dismissed with leave to re-file the remaining matters in state
9 court. ECF No. 335. The parties timely responded. ECF Nos. 348, 349.

10 DISCUSSION

11 A. Supplemental Jurisdiction

12 “Federal courts are courts of limited jurisdiction.” *Kokkonen v. Guardian*
13 *Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). A federal court may exercise
14 original jurisdiction over cases involving a question of federal law or between
15 parties of diverse citizenship. 28 U.S.C. §§ 1331, 1332. A federal court may also
16 exercise supplemental jurisdiction over pendent claims “that are so related to the
17 claims in the action within such original jurisdiction that they form part of the
18 same case or controversy.” 28 U.S.C. § 1367(a). However, if a district court has
19 dismissed all of the claims over which it has original jurisdiction, it may decline to
20 exercise supplemental jurisdiction over a related claim. 28 U.S.C. § 1367(c)(3).

1 The Ninth Circuit has reaffirmed the discretionary nature of a district court's
2 exercise of supplemental jurisdiction. *Acri v. Varian Assocs., Inc.*, 114 F.3d 999,
3 1000 (9th Cir. 1997), *supplemented*, 121 F.3d 714 (9th Cir. 1997), *as amended*,
4 (Oct. 1, 1997). "[A] federal court should consider and weigh ... the values of
5 judicial economy, convenience, fairness, and comity in order to decide whether to
6 exercise jurisdiction over a case brought in that court involving pendent state-law
7 claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988), *superseded*
8 *by statute on other grounds as stated in Stanford v. MemberWorks, Inc.*, 625 F.3d
9 550, 561 (9th Cir. 2010) (citing *United Mine Workers of America v. Gibbs*, 383
10 U.S. 715 (1966)). "[I]n the usual case in which all federal-law claims are
11 eliminated before trial, the balance of factors to be considered under the pendent
12 jurisdiction doctrine ... will point toward declining to exercise jurisdiction over the
13 remaining state-law claims." *Carnegie-Mellon*, 484 U.S. at 350 n.7.

14 **B. Remaining Claims**

15 As an initial matter, it is unclear whether the Court could exercise
16 supplemental jurisdiction over the current breach of contract claims. To support
17 supplemental jurisdiction, "state and federal claims must derive from a common
18 nucleus of operative fact." *Gibbs*, 383 U.S. at 725. As Defendant accurately notes
19 in its Response, Plaintiffs' claims have been ambiguously pled and argued, and
20 their factual theory of the case has evolved several times. ECF No. 349 at 6-7.

1 Plaintiffs' federal claims involved factual issues of tax collection practices, third-
2 parties' usage of the railroad tracks at issue, terminated parties' actions taken on
3 adjacent property, and the receipt and use of state grant money. The current breach
4 of contract claims center on the meaning of a term in the maintenance provision of
5 the contract. While these claims involve the same parties and the same railroad
6 tracks, they do not clearly derive from the same common nucleus of operative fact.

7 Even if the Court can properly exercise supplemental jurisdiction over the
8 breach of contract claims, values of judicial economy, comity, fairness, and
9 convenience weigh in favor of allowing the state court to resolve these claims.
10 This case has not yet proceeded to trial and therefore falls among the "usual cases"
11 in which a federal court should decline to exercise supplemental jurisdiction over
12 remaining state law claims. *Carnegie-Mellon*, 484 U.S. at 350 n.7.

13 Defendant objects to dismissal on the grounds that this case "is literally at
14 the one-yard line," with the trial date one month away. ECF No. 349 at 2.
15 Although the calendar date is approaching, much work remains to be done in this
16 case. Plaintiffs' breach of contract claim is currently subject to Defendant's
17 pending motion for summary judgment. ECF No. 337. Defendant's breach of
18 contract counterclaim is currently subject to Defendant's own pending motion for
19 summary judgment, ECF No. 275, and Plaintiffs' motion for partial summary
20 judgment on statute of limitations grounds, ECF No. 272. Plaintiffs have also

1 raised twelve affirmative defenses to Defendant's counterclaim, eleven of which
2 are currently the subject of Defendant's pending motion for summary judgment.
3 ECF No. 278. These pending motions will involve substantial application of state
4 law and are better suited for resolution in state court.

5 Defendant also objects to dismissal on the grounds that this Court has
6 invested significant resources into this case already and the parties will be
7 burdened if required to start again in state court. ECF No. 349 at 11-13. While
8 Defendant is correct that this Court has disposed of several claims in this case, it is
9 also true that these claims are largely unrelated, legally and factually, to the current
10 breach of contract claims. Indeed, this case has been reduced to a relatively
11 narrow set of questions: (1) what obligations are imposed by the maintenance
12 provision of the parties' contract; (2) whether those obligations are being met; and
13 (3) what damages, if any, have resulted from noncompliance. That this Court has
14 extensive familiarity with the circumstances of Plaintiffs' separate *qui tam* and
15 takings claims does not put it in a better position than the state court to resolve
16 these contract questions. Additionally, the work the parties have already done on
17 the breach of contract claims can be re-submitted in state court with relative ease.

18 Finally, Defendant objects to dismissal on the grounds that the railroad
19 tracks at issue in this case are deteriorating, which Defendant argues poses safety
20 risks. ECF No. 349 at 13. However, Defendant has the option to pursue

1 immediate relief in state court, which could potentially address these concerns
2 sooner than the current federal trial date.

3 On balance, values of judicial economy, comity, fairness, and convenience
4 weigh in favor of allowing the state court to resolve the breach of contract claims.
5 This Court declines to exercise supplemental jurisdiction over the parties' breach
6 of contract claims.

7 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 8 1. The remaining state law claims are **DISMISSED** without prejudice and
9 with leave to re-file in state court pursuant to 28 U.S.C. § 1367(d).
10 2. All currently pending motions are **DENIED AS MOOT**. All hearings
11 and other deadlines, including the trial date, are **STRICKEN**.
12 3. The District Court Executive is directed to enter this Order, furnish
13 copies to counsel, and **CLOSE** the file.

14 **DATED** March 12, 2020.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
Chief United States District Judge

JOSIE DELVIN
BENTON COUNTY CLERK

APR 09 2020

FILED

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF BENTON

TRI-CITY RAILROAD COMPANY,
LLC, a Washington limited liability
company;

Plaintiff,

v.

PORT OF BENTON COUNTY, a
Washington State Municipal Entity;

Defendant.

NO. 20-2-00649-03

COMPLAINT

Plaintiff Tri-City Railroad Company, LLC, by and through its attorneys of record,
Piskel Yahne Kovarik, PLLC, hereby alleges as follows:

I. PARTIES, JURISDICTION, AND VENUE

1. Tri-City Railroad Company, LLC ("TCRY") is a Washington limited liability company. Its principal place of business is located in Benton County, Washington.

2. Defendant Port of Benton (the "Port") is a port district established pursuant to RCW Title 53, *et seq.*, which is situated within Benton County, Washington.

3. This matter involves transactions occurring in Benton County, Washington.

4. Jurisdiction and venue are proper in Benton County Superior Court.

COMPLAINT - 1



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II. SUMMARY OF FACTS

This case arises out of the Port's breach of TCRY's lease of railroad trackage in Benton County, Washington. For years, the Port, owner of the railroad trackage and landlord, acted pursuant to a concerted plan to remove its tenant, TCRY, from the trackage. These efforts are without valid cause and are evidenced by the Port depriving TCRY of revenue, fabricating bases for default under the lease, revoking TCRY's ability to negotiate with Class I railroads, pursuing an adverse discontinuance before the Surface Transportation Board, and most recently, serving a fabricated notice to comply or vacate on March 17, 2020. TCRY has suffered and continues to suffer extraordinary losses as a result of the Port's actions.

III. FACTS

5. In 1996, the Port commissioned Banks Traffic and Transportation Services to evaluate the feasibility of acquiring the railroad trackage at issue known as the Southern Connection of the DOE/Hanford Rail Line. Banks created a report stating that the Atomic Energy Commission (predecessor of the Department of Energy ("DOE")) "*is obligated to at all times to keep this track in good condition and repair and suitable for the business of the Railroads [referring to the predecessors of BNSF Railway Company ("BNSF") and Union Pacific Railroad Company ("UP")].*" In addition, Banks noted the

age on the majority of this rail is pre-1935 and was therefore not given the proper tempering for longevity . . . The age of this equipment will eventually obsolete itself as it becomes more difficult to find replacement parts. Upgraded and newer replacements will have to be substituted over the next 25 years. The ballast is crushed rock over round rock . . . There are 27,496 ties with 15,801 having been replaced over the last 20 years . . . The remainder of the ties have been in the ground for over 45 years and will experience

high levels of deterioration within the next 5 years. The average life span of a tie is 35 years. Again, weather, traffic and physical plant conditions serve to stretch the life of the ties.

6. The Port also commissioned an appraisal in 1998. That appraisal determined the “As Is” value, “i.e. the market value of the rail system as of date of appraisal . . . [is] \$1,000,000.”

7. On August 17, 1998, the Port sent a letter to the Surface Transportation Board (“STB”) stating that the DOE and the “Port of Benton have agreed to transfer operation and maintenance of the 16-mile Hanford Site Rail System, Southern Connection owned by the DOE, to the Port . . .” The Port also certified “that projected revenues will not exceed those that would qualify it is a Class III carrier under 49 CR, Part 1201 . . .”

8. In the late summer/early fall of 1998, the Port and the DOE executed an Indenture that became effective on October 1, 1998. That Indenture gave the Port property known as the 1100 Area and Southern Connection. The DOE’s “conveyance [was] in consideration of the assumption by [the Port] of all DOE’s maintenance obligations . . .” “All buildings, utilities, and other property conveyed [were] transferred in ‘as is’ and ‘where is’ condition as at the signing hereof, without any warranty or guarantee . . .” Most importantly, the Port agreed that “[f]or 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 . . .” (emphasis added). The Indenture also assigned the “Livingston Rebuild Center, Inc. (“LRC”) lease for

1 *equipment repair services in building 1171. . . [and] two agreements, a supplemental*
2 *agreement, and permit made among and by the [AEC]; [BNSF]; . . . [UP] governing*
3 *access to the Railroad."*

4 9. On September 30, 1998, the Port and the DOE executed an Amendment
5 to Indenture that added a new sentence regarding the funding of the railroad: "*Grantee*
6 *agrees to devote all lease payments or other sources of revenue from the Real*
7 *Property and Railroad to first cover maintenance of the Railroad; provided, however,*
8 *that any surplus lease payments or other sources of revenue shall be used at the*
9 *discretion of the Grantee."*

10 10. On October 1, 1998, the Port entered into a Contract for Operation and
11 Maintenance of Railroad ("Maintenance Contract") with Livingston Rebuild Center
12 ("LRC"), TCRY's predecessor.

13 11. TCRY was created on or about October 25, 1999.

14 12. In 1999, LRC assigned the Maintenance Contract to TCRY.

15 13. In May of 2000, BNSF and TCRY entered into an Interchange Agreement.
16 Pursuant to the express terms of the Richland Junction Interchange Agreement, BNSF
17 and TCRY agreed to interchange rail traffic at TCRY's Richland Junction siding.

18 14. On September 12, 2000, the Port sent a letter to then President of TCRY,
19 John Haakenson, stating that,

20
21 *The Port received the railroad property from the United*
22 *States. The Port is currently paying TCRC to maintain the*
23 *railroad. The contract with TCRC provides that you*
24 *will develop revenue from the operation of the*
25 *railroad and a portion of the income from*
operation will be paid to the Port to offset the cost
of the maintenance. *The Port is aware that [UP]*
continues to use the Port of Benton railroad to service its
customers in north Richland, but is not paying

1 *compensation for the use of the railroad nor is it providing*
2 *maintenance to the Port's railroad. **Therefore, the Port***
3 ***hereby directs TCRY to give written notice to [UP]***
4 ***terminating its rights to use the Port of Benton***
5 ***track.***

6 (emphasis added). The Port acknowledged it was responsible for maintaining the track
7 and that Class I Railroads, such as UP, could not use the Port of Benton Railroad
8 without paying for or providing maintenance.

9 15. On or about December 1, 2000, TCRY executed an Interchange
10 Agreement with UP. The purpose of the agreement was to interchange rail cars at
11 Richland Junction.

12 16. TCRY generated revenue by charging BNSF and UP tariffs and
13 interchange fees, and other customers demurrage, car storage, and intraplant and
14 interplant switch fees.

15 17. In addition, TCRY generated revenue by charging customers for its
16 transloading services.

17 18. Over the summer of 2002, TCRY and the Port negotiated a new contract
18 because the Port received an inquiry from the Railroad Retirement Board ("RRB"). The
19 Port did not want to be obligated to pay taxes and retirement benefits to the RRB so it
20 needed to ensure that TCRY was the operating railroad and that TCRY was responsible
21 for negotiating with the Class I railroad carriers, BNSF and UP.

22 19. While TCRY agreed to be responsible for maintaining the trackage, the
23 responsibility for capital improvements remained with the Port.

24 20. On August 1, 2002, the Port and TCRY executed the Railroad Lease
25 ("Lease").

1 21. TCRY accepted the trackage as is and the Lease subject to the restrictions
2 contained in the Indenture.

3 22. TCRY explicitly negotiated its maintenance obligation with the Port prior
4 to executing the Lease drafted by the Port's attorney, Tom Cowan.

5 23. The Lease explicitly provides that TCRY is to maintain the trackage less
6 reasonable wear and tear.

7 24. TCRY never agreed to maintain the track to an FRA "Class 3 track"
8 standard under the Lease. Instead, TCRY agreed to comply with all applicable Federal
9 Railroad Administration ("FRA") regulations and maintain the Southern Connection in
10 a "safe and serviceable condition."

11 25. The most significant changes between the Maintenance Contract and the
12 Lease include the following:

13 i. Maintenance obligation: under the Maintenance Contract, TCRY
14 was required to maintain the trackage to an FRA Class 3 track
15 standard, whereas the Lease requires TCRY to maintain the
16 trackage as a Class III railroad (an STB accounting provision) and
17 in accordance with the Indenture.

18 ii. Direct negotiations with Class I railroads: the Port desired to
19 contractually ensure it was TCRY that was responsible for directly
20 negotiating with the Class I railroads, not the Port.

21 iii. Payment: under the Maintenance Contract, the Port paid TCRY
22 \$325,000 annually to maintain the trackage, whereas under the
23 Lease, TCRY assumed full responsibility to maintain the trackage
24 and was required to pay a monthly rental amount.
25

1 iv. Profit sharing: under the Maintenance Contract, the Port and
2 TCRY shared the revenues generated from operation of the
3 railroad, whereas under the Lease, TCRY alone was entitled to the
4 revenues generated from operation of the railroad.

5 v. Reporting requirements: under the Maintenance Contract, TCRY
6 was required to provide maintenance records to the Port, whereas
7 under the Lease, TCRY was absolved of this requirement.

8 vi. Insurance: under the Maintenance Contract, the Port paid for
9 insurance to cover the railroad trackage at a cost of more than
10 \$100,000 per year, whereas under the Lease, TCRY assumed the
11 insurance cost.

12 26. On January 26, 2000 and again on April 5, 2000, then TCRY President
13 John Haakenson sent the Port letters showing that TCRY maintained the track to an
14 FRA Class 2 track standard.

15 27. In July of 2009, BNSF gave TCRY notice that it would begin operating
16 directly on the Southern Connection.

17 28. Litigation ensued and BNSF began operating directly shortly thereafter.

18 29. This caused TCRY to lose a large portion of its revenue.

19 30. On July 29, 2009, the Port sent a letter to BNSF requesting that any
20 future operating agreement should detail how BNSF would reimburse TCRY for the
21 costs of operating and maintaining the trackage.

22 31. Yet, the ultimate operating agreement did not include a requirement that
23 the Port reimburse TCRY for the cost of operating and maintaining the trackage.
24
25

1 32. On August 27, 2009, TCRY's general counsel, Paul Petit, sent a letter to
2 the Port ensuring that there was no confusion as to TCRY's position on how to interpret
3 the lease:

4 *the attorney for BNSF repeatedly asserted in a number of*
5 *cross examination questions that under paragraph 8.1 of*
6 *the Lease TCRY 'contractually obligated to maintain that*
7 *track to Class 3 standards.' That assertion is wrong . . .*
8 **TCRY's Lease obligation to operate a 'class 3**
9 **railroad' is not an obligation to maintain its track**
10 **as 'class 3 track.' The two standards have nothing**
11 **to do with each other.**

12 (emphasis added).

13 33. Then, on September 24, 2009, TCRY sent the Port copies of FRA
14 inspections from February 2008 through June 2009 showing that the track was
15 inspected to an FRA Class 2 track standard and that the speed limit was 20 MPH.

16 34. Over the years, TCRY issued a variety of timetables with speeds ranging
17 from 5 to 20 MPH.

18 35. In 2009, the Port commissioned Jerry A. Pinkepank to inspect the
19 Southern Connection. Mr. Pinkepank determined that the main line generally met
20 Track Class 3 standards.

21 36. In 2010, the Port began negotiating directly with BNSF and drafted a
22 proposed operating agreement under which BNSF would pay the Port for use of the
23 trackage.

24 37. In 2015, the Port commissioned Rick Franklin to inspect the Southern
25 Connection. Mr. Franklin's company found that for the most part, the track "*was in*
good condition" and would inspect to a Class 3 track standard. Even noting that, "[t]he

1 *inspectors were quite impressed by the condition of the railroad as short lines often do*
2 *not have track structure in this state of health."*

3 38. Beginning in early September of 2016, the Port began discussing a plan to
4 *"rid itself of TCRY" via email.*

5 39. Weeks later a Port meeting agenda item provided the Port was discussing
6 ways in which it could concoct a TCRY default under the lease.

7 40. In fact, the Port hired attorney Robert Wimbish to devise strategies the
8 Port could utilize to execute its plan to rid itself of TCRY.

9 41. At the end of September 2016, the Port, by and through its third-party
10 consultants, created a document titled the *"Southern Connections Options List."*

11 42. This List identified a number of plans and options that the Port could
12 utilize to further its goal of ridding itself of TCRY.

13 43. Those options included:

14 i. *"UP resume[s] direct service over the Southern Connection*
15 *pursuant to the 1947-48 Agreement."*

16 ii. *"Terminate 2002 Lease Agreement without TCRY's consent, and*
17 *pursue corresponding involuntary termination of TCRY's*
18 *operating rights/obligations via adverse discontinuance at the*
19 *STB."*

20 iii. *"Identify a TCRY default under the terms of the 2002 Lease and,*
21 *in accordance with the Lease terms, effect termination of TCRY's*
22 *leasehold interest."*

23 44. The Port has attempted and is currently attempting to utilize each of the
24 above strategies to rid itself of TCRY with the hope of a *"prospective future relationship*
25

1 among the Port, BNSF and UP.” Assuming that “TCRY has been, or will be, dealt with
2 by - . . . (b) successful conclusion of TCRY’s involuntary “eviction” (if possible).”

3 45. In the fall of 2017, the City of Richland, with the support of the Port,
4 forced UP to terminate its relationship with TCRY and operate directly on the Southern
5 Connection without using TCRY’s services.

6 46. This nearly eliminated TCRY’s revenue stream.

7 47. On March 16, 2018, the Port sent TCRY a notice of default based upon
8 perceived “deferred maintenance” alleging that “the track presents an unacceptable
9 safety risk.”

10 48. Yet, the Port never shut down operations due to the alleged safety risk it
11 posed to the public and train operators.

12 49. Likewise, neither Class I railroads operating over the line ever stopped
13 operating on the Southern Connection due to such “safety risk.”

14 50. The Port also claimed that the default was based upon 116 defects found
15 in an FRA inspection; yet, the FRA’s own subsequent inspection confirmed that the 116
16 defects were remedied:

17
18 *WALKING RE-INSPECTION OF FRA REPORTS #23, 27, 37,*
19 *13 & 3 DATED 2-27-18 & 3-1-18, ALL DEFECTS NOTED*
20 *IN THESE REPORTS WERE CORRECTED.*
21 *INSPECTION ACCOMPANIED BY TCRY TRACK*
22 *EMPLOYEE. WALKED FROM MP 26.04 TO THE TAIL OF*
23 *THE WYE SWITCH AND ALL TRACKES AND SWITCHES*
24 *IN THIS AREA.*

25 (emphasis added).

51. Just months earlier on December 6, 2017, Paul Gangstad, an FRA
inspector, noted that:

1 WALKING/HY-RAIL INSPECTION FROM MP 23.6 TO MP
2 29. INSEPTION WAS ACCOMPANIED BY JOSE
3 ROMERO. NOTE 1: TRACK STRUCTURE LOOKED IN
4 GREAT SHAPE FOR CLASS 1 & 2 TRACK, COULD BE
5 CLASSIFIED AS CLASS 3 TRACK; ONE OF THE BETTER
6 SHOR LINE/INDUSTRIAL LEADS THAT I HAVE LOOKED
7 AT IN A LONG TIME. NOTE 2: COULD AS ALWAYS USE
8 MORE TIES, BUT THE JOINES AND SRUFACE IS IN
9 EXCELLENT SHAPE FOR JOINT TRACK. KEEP UP THE
10 GOOD WORK.

11 52. TCRY has always promptly complied with any FRA defect notices.

12 53. Despite this, the Port sent TCRY a Notice of Termination of the Lease on
13 December 19, 2018.

14 54. To make matters worse, the Port altogether refused to approve any TCRY
15 tariffs thereby gutting TCRY's ability to generate revenue.

16 55. This was all part of the Port's concerted plan to starve TCRY of revenues
17 with the hope of driving the level maintenance down.

18 56. Yet, despite the Port's efforts, TCRY continued to maintain the trackage in
19 a safe and serviceable condition in compliance with the Lease.

20 57. On February 22, 2019, the Port filed a verified application for adverse
21 discontinuance of rail service by TCRY causing TCRY to incur extreme expense in
22 defending itself against the action.

23 58. On October 31, 2019, the Port's adverse discontinuance application was
24 granted. The STB explicitly ruled that the "*granting of the Port's application for
25 adverse discontinuance alone does not prevent Tri-City from continuing to operate;
there would have to be, for example, an adverse court judgment evicting Tri-City
from the Line . . .*"

59. On March 17, 2020, the Port served TCRY with a Notice to Comply or Vacate that states, TCRY "*is in material breach of the Lease for failure to maintain the railroad known as the Southern Connection, as required by Article 8 of the Lease.*"

60. This Notice to Comply or Vacate is an objectively baseless attempt to evict TCRY. TCRY has always complied with Article 8 of the Lease by maintaining the railroad as a Class III railroad and maintaining the Southern Connection in a safe and serviceable condition.

III. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF **(Breach of Contract)**

61. Plaintiff incorporates by reference the allegations above as if fully set forth herein.

62. TCRY and the Port entered into a valid Lease in 2002.

63. TCRY performed all of its obligations under the Lease.

64. The Port of Benton breached the Lease in many ways, including, but not limited to: 1) developing a plan and carrying out the plan to eliminate TCRY as an operating railroad thereby rendering TCRY's lease rights valueless, and 2) failing to allow direct negotiations with the Class I railroads.

65. In breaching the Lease by developing a plan to eliminate TCRY as an operating railroad, the Port developed a plan to "*rid itself of TCRY.*" That plan included filing for adverse discontinuance at the STB, refusing to approve tariffs, fabricating a default claiming that TCRY failed to meet its maintenance standards, and concocting a false notice to comply or vacate.

1 66. In breaching the Lease by failing to allow direct negotiations with the
2 Class I railroads, the Port stripped TCRY of a very valuable express contract right that
3 ultimately prevented TCRY from directing cancellation of the 1947 Agreements and
4 from obtaining significant revenue.

5 67. The Port's breach of the Lease has directly and proximately caused TCRY
6 damages in an amount to be proven at trial.

7 **SECOND CLAIM FOR RELIEF**
8 **(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

9 68. Plaintiff incorporates by reference the allegations above as if fully set
10 forth herein. TCRY and the Port entered into a valid Lease in 2002.

11 69. TCRY performed all of its obligations under the Lease.

12 70. The Port breached the implied covenant of good faith and fair dealing
13 found in the Lease by acting in bad faith as set forth herein.

14 71. The Port's breach of the implied covenant of good faith and fair dealing
15 has directly and proximately caused TCRY damages in an amount to be proven at trial.

16 **IV. PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiff Tri-City Railroad Company, LLC prays for relief against
18 the Defendant Port of Benton as follows:

19 1. For judgment in favor of Plaintiff and against Defendant in an amount to
20 be proven at the time of trial;

21 2. For pre-judgment interest on Plaintiff's damages to the fullest extent
22 allowed by law;

23 3. For post-judgment interest on any judgment entered in favor of Plaintiff
24 herein to the fullest extent of the law;
25

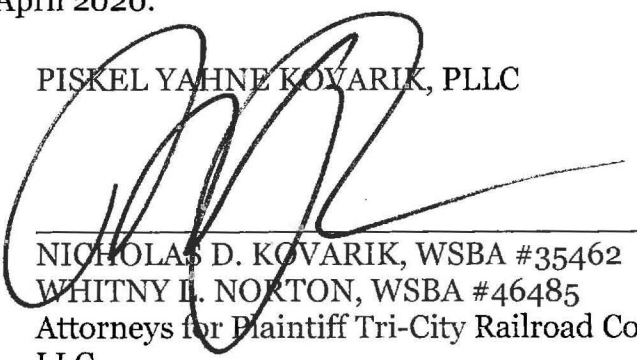
1 4. For Plaintiff's attorney fees and costs pursuant to the Lease, RCW
2 4.84.330 and all other applicable law;

3 5. For leave to amend Plaintiff's complaint as necessary; and

4 6. For other such and further relief as the Court deems just and equitable.

5 DATED this 11 day of April 2020.

6 PISKEL YAHNE KOVARIK, PLLC

7
8 
9 NICHOLAS D. KOVARIK, WSBA #35462
10 WHITNY L. NORTON, WSBA #46485
11 Attorneys for Plaintiff Tri-City Railroad Company,
12 LLC
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CERTIFICATE OF SERVICE

I certify that I have, on April 30, 2020, served copies of BNSF's Motion to Dismiss upon all parties of record in this proceeding, by electronic mail.

A handwritten signature in black ink, appearing to read 'Peter W. Denton', written over a horizontal line.

Peter W. Denton

Attorney for BNSF Railway Company