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May 13, 2020
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May 14, 2020

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

By Electronic Filing

**RE: STB Docket No. NOR 42168
TWIN CITY METALS, INC. – COMPLAINT – KET, LLC**

Respondent KET, LLC (“KET”) electronically submits the accompanying Answer to Twin City Metals, Inc.’s (“TCM”) Complaint and KET’s Response to TCM’s Implied Petition to Partially Revoke Class Exemption together with the Verified Statement of Paul Didelius and Exhibits for filing in the within matter.

We thank the Board for its time and consideration.

Respectfully submitted,

/s/ James H. M. Savage

James H. M. Savage
Attorney for KET, LLC

Att.
cc: Daniel R. Elliott III (by first class mail w/att.)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. NOR 42168

TWIN CITY METALS, INC.

-- COMPLAINT --

KET, LLC

ANSWER

KET, LLC, a limited liability company of the State of Washington, having a principal place of business at 709 N. 10th Ave., Walla Walla, WA, by way of Answer to the Complaint of Twin City Metals, Inc. (“TCM”), avers as follows:

1. Admitted in part. To the best of KET’s knowledge, information and belief TCM operates a junkyard on the premises.

2. Admitted in part. KET’s main office is located at 709 N. 10th Ave., Walla Walla, WA.

3. Admitted.

4. Denied.

5. Denied.

6. KET admits TCM has one private crossing over KET’s rail line. KET denies the remaining allegations of this paragraph.

7. KET denies trespassing on TCM property; admits TCM complained of the presence of a locomotive on its property in 2013; avers KET promptly arranged for the removal of said locomotive; and denies the remaining allegations of this paragraph.

8. KET admits that on or about May 7, 2018, workers acting on KET’s behalf rehabilitated the Kennewick Rail Line along Bruneau Ave. at which time a

90-foot segment of old track and a non-functional switch originally installed by the Port of Kennewick (“POK”) and owned by KET were removed. KET lacks knowledge and leaves TCM to its proofs regarding the remaining allegations of this paragraph.

9. KET owns the POK switch and denies the remaining allegations of this paragraph.

10. KET repeats and reiterates its responses to paragraphs 8 and 9 above and otherwise leaves TCM to its proofs.

11. KET repeats and reiterates its responses to paragraphs 8 and 9 above and denies the remaining allegations of this paragraph.

12. Denied.

13. KET avers its rail rehabilitation work constitutes an open and obvious condition of the property, and denies the remaining allegations of this paragraph.

14. Denied.

15. KET admits TCM’s counsel threatened KET with litigation by letter of March 4, 2020. KET denies the allegations of said letter; and further denies all remaining allegations of this paragraph.

16. KET repeats and reiterates its responses to paragraphs 8 and 9 above and denies the remaining allegations of this paragraph.

17. KET lacks sufficient knowledge and information to form a belief as to the allegations of this paragraph and leaves TCM to its proofs.

18. Denied.

19. KET lacks sufficient knowledge and information to form a belief as to the allegations of this paragraph and leaves TCM to its proofs.

Count 1

20. KET repeats and reiterates its responses to paragraphs 1 through 19 as if set forth in full herein.

21. KET denies violating the ICCTA or any provision thereof.

22. Denied.

23. Denied and conclusory.

Count 2

24. KET repeats and reiterates its responses to paragraphs 1 through 25 above as if set forth in full herein.

25. KET denies the violating the ICCTA or any provision thereof.

26. Denied and conclusory.

27. Denied.

28. Denied and conclusory.

Count 3

29. KET repeats and reiterates its responses to paragraphs 1 through 28 above as if set forth in full herein.

30. KET denies violating the ICCTA or any provision thereof

31. Denied.

32. Denied and conclusory.

Count 4

There is no Count 4

Count 5

33. KET repeats and reiterates its responses to paragraphs 1 through 32 above as if set forth in full herein.

34. KET denies violating the ICCTA or any provision thereof.

35. Denied.

36. Denied and conclusory.

Count 6

37. KET repeats and reiterates its responses to paragraphs 1 through 36 above as if set forth in full herein.

38. KET denies knowledge or information sufficient to form a belief as to the allegations of this paragraph and leaves TCM to its proofs.

39. Denied and conclusory; additionally, KET denies violating the ICCTA or any provision thereof.

40. Denied.

41. KET denies that revocation is an available or appropriate remedy; and further denies that KET violated the ICCTA or any provision thereof.

AFFIRMATIVE DEFENSES

1. The Board lacks jurisdiction and/or regulatory authority over this dispute.

2. The Complaint fails to state a claim for which relief can be granted.

3. TCM has unclean hands and is thus not entitled to the requested relief.

4. TCM lacks standing to seek the requested relief.

5. TCM has failed to satisfy conditions precedent prior to bringing the Complaint.

6. The Complaint makes unreasonable demands for service.

7. The Complaint makes unreasonable and unlawful demands for service without offering compensation.

8. Relief is precluded by TCM's habitual and continuing trespass upon KET's right-of-way. See, The City of Chicago, Ill. – Adverse Aban. – Chicago Terminal R.R. in Chicago, Ill., AB 1036 (STB served June 15, 2010). Complainant is guilty of trespass.

9. Complainant's trespass constitutes an unlawful taking of KET's property.

10. Complainant has violated KET's 30-foot rail easement

11. The Board is deprived of jurisdiction to hear the Complaint because the traffic is subject to effective geographic competition.

12. To the extent Count 6 of the Complaint constitutes a petition to partially revoke KET's class exemption the Board should hold the proceeding in abeyance pending adjudication of the petition to revoke. 49 CFR 1111.9 (d).

13. TCM is guilty of laches.

14. TCM's claims and damages are barred or limited by its failure to mitigate damages.

16. TCM's claims are barred by the doctrine of equitable estoppel.

17. TCM's claims are barred by the doctrine of waiver.

18. KET has no legal duty to bear the financial burden of installing the costly rail infrastructure to which TCM unjustifiably claims entitlement.

19. There are less costly and economically reasonable rail service alternatives available to TCM.

20. TCM's implicit and explicit rail infrastructure construction demands are excessive, unreasonable and would amount to imposing upon KET an unconscionable and burdensome subsidy of TCM's business operations.

21. TCM's consequential damages claim fails to set forth a cause of action for which relief can be granted by STB.

22. The Board lacks subject matter jurisdiction over TCM's consequential damages claim.

WHEREFORE, for the reasons stated herein, KET respectfully requests the Board dismiss TCM's Complaint with prejudice and without costs.

Respectfully submitted,

/s/James H. M. Savage

James H. M. Savage
Attorney for KET, LLC

Dated: May 14, 2020

Certification of Service

I, James H. M. Savage, an attorney at law of the District of Columbia, hereby certify under penalty of perjury that I have this 14th day of May, 2020 served by first class mail copies of the within pleadings and supporting papers upon all parties.

/s/ James H. M. Savage

James H. M. Savage
Attorney for KET, LLC

Party of Record:

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

danelliottiii@outlook.com

Attorney for Twin City Metals, Inc.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. NOR 42168

**TWIN CITY METALS, INC.
-- COMPLAINT --
KET, LLC**

**KET, LLC'S RESPONSE TO TWIN CITY METALS, INC.'S IMPLIED
PETITION TO PARTIALLY REVOKE KET'S CLASS EXEMPTION**

KET, LLC, ("KET") by way of response to Twin City Metals, Inc.'s ("TCM's") request for partial revocation of KET's operating exemption ("Implied Petition to Revoke") avers as follows:

Statement of Facts

1. By exemption taking effect December 5, 2018, KET became Federally licensed to operate the Kennewick Rail Line, consisting of two disconnected segments totaling 1.28 miles of track in and around the City of Kennewick in Benton County WA. See, KET LLC-Operation Exemption-Lines of Railroad in Benton County, WA, Docket No. FD 36244 (STB served Nov. 21, 2018).

2. The Kennewick Rail Line has existed in its present form for nearly 70 years. As relevant hereto, pursuant to agreement with the Port of Kennewick (“POK”) dated November 6, 1953, BNSF Railway Company (“BNSF”) and Union Pacific Railroad (“UP”) and their respective predecessors have provided local freight rail service to shippers located in and about the City of Kennewick, Benton County, WA.

3. Prior to 2013, POK owned and maintained certain spur or industrial track segments (“Agreement Trackage”), associated Rights-of-Way, rail easements and rail assets located in Benton County, WA, which Agreement Trackage connects with two separate main lines of rail respectively owned and operated by UP and BNSF.

4. On or about July 23, 2013, POK conveyed its interest in the 1953 agreement as well as all of its existent rail property and rail assets to KET LLC (“KET”), a then-noncarrier.

5. POK thereafter provided BNSF and UP with notice of its intent to terminate the 1953 Agreement on March 31, 2014. KET subsequently entered into track use agreements with BNSF and UP pursuant to which both class I railroads continue providing local service to Kennewick shippers.

6. Although KET acquired the right to institute service in its own name by terminating the 2014 agreements, no operational changes have taken place. BNSF

and UP continue serving local Kennewick customers. See, May 14, 2020 Verified Statement of Paul Didelius (“Didelius V.S.”) at Paragraph 8.

7. Upon acquiring the Kennewick Rail Line (“KRL”) from POK in 2013, KET owner Paul Didelius began maintaining the line. KET received a 2018 Washington State grant to rehabilitate KRL. Pursuant to the grant, KET replaced the KET switch connecting the BNSF and UP lines to KRL. The switch had become degraded by heavy truck traffic passing over TCM’s private east driveway crossing. See, photo of POK switch annexed hereto as Exhibit E. To alleviate this problem KET closed TCM’s east driveway private crossing, removing a dormant POK-era switch and removing 90 feet of track outside TCM’s yard. TCM claims ownership of that track, while KET avers ownership of the POK-era switch. TCM’s private crossing at its west driveway remains open and accessible. See, Didelius V.S. at Paragraphs 12, 13 and 14 as well as Exhibit D, *supra*.

8. By email served March 4, 2020, TCM’s counsel requested rail service, further demanding construction of rail infrastructure to accommodate TCM. See, Exhibit F. In response to TCM, KET provided information sufficient to enable TCM to contact BNSF and UP regarding rail service. KET did not respond to the infrastructure construction demand because TCM did not offer to pay for same. See, Didelius V.S. at paragraph 16.

9. KET has recently indicated via telephone call with TCM Manager Tom London that KET would allow TCM to load initial traffic upon the existing KET line through TCM property, pending development of greater flows of traffic than has been seen in recent years. See, Didelius V.S. at paragraph 18.

Legal Argument

POINT I

(A) TCM's demand for rail service is misdirected to KET.

Under the ICC Termination Act, 49 U.S.C. § 10101 *et seq.*, it is the Rail Transportation Policy of the United States to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenue, as determined by the Board. 49 U.S.C. § 10101(3).

KET avers that the common carrier obligation of 49 U.S.C. § 11101(a) only requires that railroads provide service upon “reasonable” request and that here, no “reasonable” request was made.

TCM urges that because scrap metal is an exempt commodity under 49 C.F.R. § 1039.11, KET is obliged to arrange for transportation in whatever manner, quantity and frequency TCM dictates. To the contrary. in such instances, shippers and carriers

are free to contract for service in accord with 49 U.S.C. § 10709, and form such contracts as are neither unreasonable nor undesirable. See, Canexus Chemicals Canada L.P. v. BNSF Railway Company, NOR 42131 (STB served Feb. 8, 2012) at p. 11.

TCM's Complaint is fatally is premised on the false assumption that KET's service is "necessary" transportation. Because UP and BNSF both serve KRL,¹ KET's service is not "necessary" and TCM's complaint must be dismissed as baseless and unfounded. As it does for any shipper, KET provided TCM with information sufficient to enable TCM to contact BNSF and UP regarding service. KET even went so far as to advise BNSF of TCM's interest in rail transportation.² See, Didelius V.S. at Paragraph 14.

(B) TCM's Demands for New Infrastructure Construction are Uneconomical.

For a shipper's service request to be reasonable requires understanding and applying economic principles. One invests in capital infrastructure in proportion to one's expected return on their investment. If the return is expected to be relatively low volume in comparison with the return one might expect to generate from

¹ See UPRR System Map, <http://www.uprr.com/aboutup/maps/sysmap.shtml> (last visited Feb. 6, 2012); BNSF System Map, http://www.bnsf.com/customers/pdf/maps/carload_map.pdf (last visited Feb. 6, 2012).

² TCM was or should have been already aware of the availability of Class 1 service from its 2011 foray into rail usage.

alternative uses of the capital; one thinks twice before committing to the proposed investment. Likewise, “reasonable request” requires investigating less if not least-cost alternatives. Gold-plated solutions may be more appropriate for, say, The Emirates than for the Columbia River Basin. Here, the least costly alternative appears to be using existing on-site infrastructure (the KET spur) to get TCM’s initiative off the ground. Work-arounds should be seriously considered and perhaps tried before resorting to new build, with the concomitant time and cost (among other) impacts. KET has recently indicated via telephone call with TCM Manager Tom London that KET would allow TCM to load initial traffic upon the existing KET line through TCM property, pending development of greater flows of traffic than has been seen in recent years. See, Didelius V.S. at P. 18.

With the Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895 (1980), Congress ended the "open-routing" system. Rail carriers no longer have to establish and maintain interchanges and through routes on practically all combinations of railroad tracks between two points. Instead, carriers are free to "rationalize their route structures making maximum use of efficient routings and eliminating others." Interchange Provisions at Jacksonville, FL, SCL & SRS, 365 I.C.C. 905, 916 (1982).

In evaluating the reasonableness of TCM's service request, the Board must consider the movement in its entirety rather than in isolated segments. See, Canexus, *supra*. at p. 7.

TCM asserts a present need for rail service. See, Complaint, *passim*. However, in years leading up to 2018 TCM told KET a different story. Having last used rail service during a 2011 barge outage on the Columbia River, when asked by KET TCM denied satisfaction with that experiment, and downplayed any future interest or intent to use rail service. For this reason, KET removed the old POK switch and disconnected TCM's private spur during KET's 2018 rehabilitation of KRL. See, Didelius V.S. at Paragraph 6.

Today, TCM asserts not only a present need for rail service, but also a present need for new rail infrastructure-- a new crossing, a new switch and reconnecting TCM private spur to KRL. KET contends that more economically reasonable rail service alternatives are available to TCM, without the need for new and costly rail infrastructure.

The differential between the anticipated cost of installing expensive new rail infrastructure, and the anticipated revenue for originating a few carloads of scrap metal a month, appears prohibitive. Particularly where, as here, KET's existing rail line transverses the property, mere yards away from TCM's private spur, facilitating

a conveniently no-cost stage for loading operations. Unless, that is, TCM harbors a hope that the Board will direct KET to bear the entire infrastructure expense (or somewhere close to it), in derogation 49 U.S.C. § 10709. In fact, nowhere in its Complaint *cum* Petition does TCM even raise the issue of its liability for construction costs, wrongly assuming that to be KET's problem, which it most certainly is not. TCM bases its claim for consequential damages upon KET's removal of an approximately 90-foot segment of TCM track on May 7, 2018. KET performed the removal work in connection with KET rehabilitating KRL pursuant to a State grant. KET contends the track was a dormant segment laying outside TCM's yard of the private spur track emanating from within TCM's yard onto Bruneau Ave. TCM is aware of KET's May 8, 2018 offer to replace the track. See, TCM counsel's March 4, 2020 email annexed as Exhibit F. To date, TCM has not accepted KET's offer.

To the extent seeks Board action compelling KET to underwrite the restoration cost of TCM's connection to KRL, TCM is seeking consequential damages which are the exclusive province of a court of competent jurisdiction. This Board is vested with limited jurisdiction under the ICCTA to address matters not extending to the awarding of consequential or special damages. KET seeks to have TCM's damages claims dismissed without prejudice with leave to be refiled, if timely, in a court of competent jurisdiction.

The differential between the anticipated cost of installing new rail infrastructure, and the anticipated revenue for originating a few carloads of scrap metal a month, appears prohibitive. Particularly where, as here, KET's existing rail line transverses the property, mere yards away from TCM's private spur, facilitating a conveniently no-cost stage for loading operations. Unless, of course, TCM harbors a hope that the Board will direct KET to bear the entire infrastructure expense (or somewhere close to it), in derogation 49 U.S.C. § 10709. In fact, nowhere in its Complaint or Implied Petition does TCM even raise the issue of its liability for construction costs, wrongly assuming that to be KET's problem, which it most certainly is not. See, Didelius V. S. at Paragraph 17. To accommodate TCM, KET has offered the use of its connector spur across TCM's yard for loading purposes. See, Didelius V.S. at paragraph 18. This would avoid the expense of new rail infrastructure construction.

For the foregoing reasons, TCM's rail infrastructure construction demands are excessive, unreasonable and would amount to imposing upon KET an unconscionable and burdensome subsidy of TCM's business operations.

POINT II

REVOCATION OF KET'S CLASS EXEMPTION WOULD BE AN IMPROPER EXERCISE OF THE BOARD'S JURISDICTION

Not content with its service and infrastructure demands, TCM also asks the Board to put KET out of business by demanding the board partially revoke KET's operating exemption. As the party seeking revocation, TCM bears the burden of proof, and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and that regulation of the proposal is necessary. *I&M Rail Link LLC–Acquisitions and Operation Exemption–Certain Lines of Soo Line Railroad Company d/b/a Canadian Pacific Railway*, STB Finance Docket No. 33326 et al. (STB served Apr. 2, 1997), *aff'd sub nom. City of Ottumwa v. STB*, 153 F.3d 879 (8th Cir. 1998).

KET opposes revocation. Not only is the tangible relief TCM seeks unreasonable and would place KET in the subordinate position of subsidizing TCM's future business endeavors (by bearing the burden of design, construction and delivery to TCM of a turn-key operation featuring brand new rail infrastructure which might never be put to use, future economic conditions depending); but the intangible relief, partially revoking KET's exemption would violate KET's 5th Amendment rights to due process, and against unlawful taking.

In Progressive Rail Inc. - Continuance in Control Exemption - Montgomery Short Line LLC FD 35092 (STB served Feb. 13, 2008) and Montgomery Short Line LLC - Lease and Operation Exemption - Union Pacific Railroad Company, FD 35093 (STB served Feb. 13, 2008) a national labor organization petitioned on multifarious grounds to stay and revoke a local short line rail operator's Class exemptions. The Board found the stay petition to have been filed out of time, in violation of the deadlines set forth in the Board's exemption notices, and was accordingly moot. The revocation petition was denied on the basis of the labor organization failing to substantiate any of its claims.

Here, the revocation petition is implicit, buried deep within the Complaint. The filing includes no reference to the statutory filing fee having been submitted for payment. If that is indeed the case the Board should direct its Office of Proceedings to reject the implied petition *nunc pro tunc*.

KET also moves for a stay of the Complaint in accordance with 49 C.F.R. 1111.9(d), which states, in pertinent part, "If a complaint is filed simultaneously with a petition to revoke a class exemption, the Board will take no action on the complaint and the procedural schedule will be held in abeyance automatically until the petition to revoke is adjudicated."

Conclusion

For the foregoing reasons and based upon the above cited authority, Respondent KET, LLC respectfully requests the Board deny revocation of KET's class exemption and for such other and further relief as the interests of justice may require.

Respectfully submitted,

/s/ James H. M. Savage

James H. M. Savage
Attorney for KET, LLC

Dated: May 14, 2020

INDEX OF EXHIBITS AND ATTACHMENTS

Exhibit A	Map of Kennewick Trackage
Exhibit B	Photo of TCM junk yard
Exhibit C	Photo of TCM vehicles parked on KET Right-of-Way
Exhibit D	Site photo
Exhibit E	Photo of POK switch
Exhibit F	Daniel R. Elliott III March 4, 2020 email to Elissa Boyd
Exhibit G	David Rossmiller March 31, 2020 letter to D. R. Elliott III
Attachment	Paul Didelius May 14, 2020 Verified Statement

Certification of Service

I, James H. M. Savage, an attorney at law of the District of Columbia, hereby certify under penalty of perjury that I have this 14th day of May, 2020 served by electronic mail copies of KET, LLC's, Opposition to Petition to Partially Revoke Class Exemption and supporting exhibits and attachments in the matter bearing STB Docket Number NOR 42168 Twin City Metals, Inc. – Complaint – KET, LLC upon all parties.

/s/ James H. M. Savage

James H. M. Savage
Attorney for KET, LLC

Party of Record:

Daniel Elliott
Founding Partner
Daniel Elliott PLLC
2000 Pennsylvania Avenue NW
Suite 7000
Washington, DC 20006
danelliottiii@outlook.com
Attorney for Twin City Metals, Inc.

VERIFIED STATEMENT OF PAUL DIDEIUS

I, Paul Didelius, of full age, state the following, under penalty of perjury on this 14th day of May 2020:

1. I am the founder and owner of KET, LLC (“KET”), an existing class III common carrier railroad having its principal place of business in Walla Walla, WA.

2. I am fully familiar with the facts and circumstances of this matter and make this statement based upon my personal knowledge.

3. I submit this verified statement in in KET’s behalf in opposition to the Complaint and Implied Petition to Revoke filed by Twin City Metals, Inc. (“TCM”) in STB Docket No. 42168.

4. KET acquired the Kennewick Rail Line (“KRL”) in 2013 and became licensed to operate KRL in 2018. KET performed incidental repairs for the Port of Kennewick (“POK”) on KRL in 2011. I am aware that TCM used rail service in or about 2011, related to an outage on the inland waterway they were otherwise using for freight transportation. To the best of my knowledge, TCM did not use rail service after about 2011.

5. The portion of KRL in the City of Kennewick, WA¹ is described in KET's exemption notice² as "a main industrial spur originating at the connection with the Union Pacific Railroad Company ("UP") 'City Lead' (connecting at its west end to UP Kalan Industrial Lead) from east edge of Washington St., and running along the line of Bruneau Ave. extending in an easterly direction and terminating east of the intersection of Bruneau Ave. and Kingwood St. in Kennewick, WA. The main industrial rail spur travels a distance of 3,694 feet (0.7 miles). The main industrial rail spur also connects with the BNSF Railway ("BNSF") along Bruneau Ave. west of the intersection with N. Elm St. in Kennewick, WA[.] The total length of Kennewick industrial rail spur trackage is 5,170 feet (0.98 miles)." See rail map attached as Exhibit A.

6. TCM operates property through which the above-referenced rail connector segment passes. TCM is required to provide a 30-foot rail easement across TCM's yard for KET's use. TCM has not properly maintained the easement. Over the years of KET ownership prior to 2018, TCM had denied any present or future interest or intent to use rail service. For this reason, KET removed the old POK switch and disconnected TCM's private spur during KET's 2018 rehabilitation of KRL.

¹ A non-connected KRL segment exists south of the City at Hedges, WA and is not the subject of this dispute.

² FD36244 KET-Operation Exemption-Lines of Railroad in Benton County, Wash. (STB served Nov. 21, 2018).

7. Kennewick shippers have enjoyed uninterrupted geographic competition for their rail business since at least 1953, when POK negotiated a rail use agreement with BNSF and UP's predecessors.

8. KET succeeded to POK's rights in 2013, entering into successor rail use agreements with UP and BNSF in 2014. These agreements give KET the right to terminate Class I service and handle service directly in its own name. For business reasons, KET has not to date exercised this right; however, KET reserves its right to do so in the future.

9. KET does not presently solicit interchange business for its first or last mile service. It would be neither economical nor operationally efficient to establish an interchange under the geographic circumstances prevailing at Kennewick. KET normally refers service requests to UP and BNSF, as was done here. See Paragraph 16 below.

10. TCM appears to be operating a junk yard. Ferrous scrap is stored in piles throughout TCM's yard. See photo accurately depicting TCM's piles of scrap metal attached as Exhibit B.

11. TCM employees and visitors routinely park motor vehicles on KET's rail right-of-way, obstructing train movement. See photo accurately depicting

TCM's trespass on KET right-of-way attached as Exhibit C. KET local counsel, has advised TCM to remove the parked vehicles from the rail right-of-way. TCM has not responded to that communication and TCM trucks continue to park upon KET tracks.

12. KET obtained a State grant to rehabilitate portions of the KRL in 2018. Pursuant to that grant, KET employees replaced the KET switch connecting KRL to BNSF and UP lines. The KET switch had been severely degraded by heavy truck traffic passing over TCM's east driveway crossing. See site photo attached as Exhibit D depicting the site after rehabilitation. To prevent this new switch from becoming similarly degraded, KET removed TCM's unlicensed east driveway crossing, leaving the new switch open (vs. buried in additional roadway). When KET replaced the switch, it was not economically advantageous for KET to create a new grade crossing within/atop the new switch, especially without a crossing agreement in place. As the track is fully the property of KET, it was not required to create a grade crossing. Should TCM wish to pay for the costs of installing a new grade crossing, and enter into a crossing agreement with KET, then KET would be happy to explore this option.

13. In closing the east driveway crossing, KET removed the non-functional POK switch which had supplied connection to the unused spur leading

to TCM. See photo of the POK switch attached as Exhibit E. KET also removed a 90-foot track segment along Bruneau Ave. and outside TCM's yard. TCM complains the removed track was the lead segment of a private rail spur running southwest into its yard. KET's subsequent investigation revealed TCM's contention to be essentially correct on this point. KET offered to replace the 90-foot track segment. TCM has not accepted KET's offer.

14. TCM's unlicensed private crossing at its west driveway remains open and accessible.

15. By email served March 4, 2020, TCM's counsel requested rail service, further demanding construction of rail infrastructure to accommodate TCM. See Exhibit F. KET has no obligation to construct or maintain any non-contractual rail infrastructure. Thus, no secondary grade crossing will be installed at the location of the removed spur without an agreement in place to build a new crossing and without the remaining crossing being first brought up to an acceptable condition. Further, the remaining crossing and any new crossing must be covered by a crossing agreement.

16. In response to TCM, KET provided information sufficient to enable TCM to contact BNSF and UP regarding rail service. KET did not respond to the infrastructure construction demand because TCM did not offer to pay for same.

17. KET stands ready, willing and able to provide TCM with a loading site utilizing existing rail KRL infrastructure. See KET local counsel's March 31, 2020 response to TCM counsel's March 4, 2020 letter, attached as Exhibit G.

18. KET has recently indicated via telephone call with TCM Manager Tom London that KET would allow TCM to load initial traffic upon the existing KET line through TCM property, pending development of greater flows of traffic than has been seen in recent years.

VERIFICATION

Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: May 14, 2020

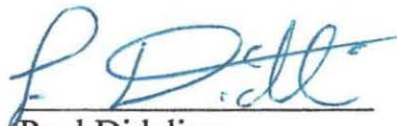
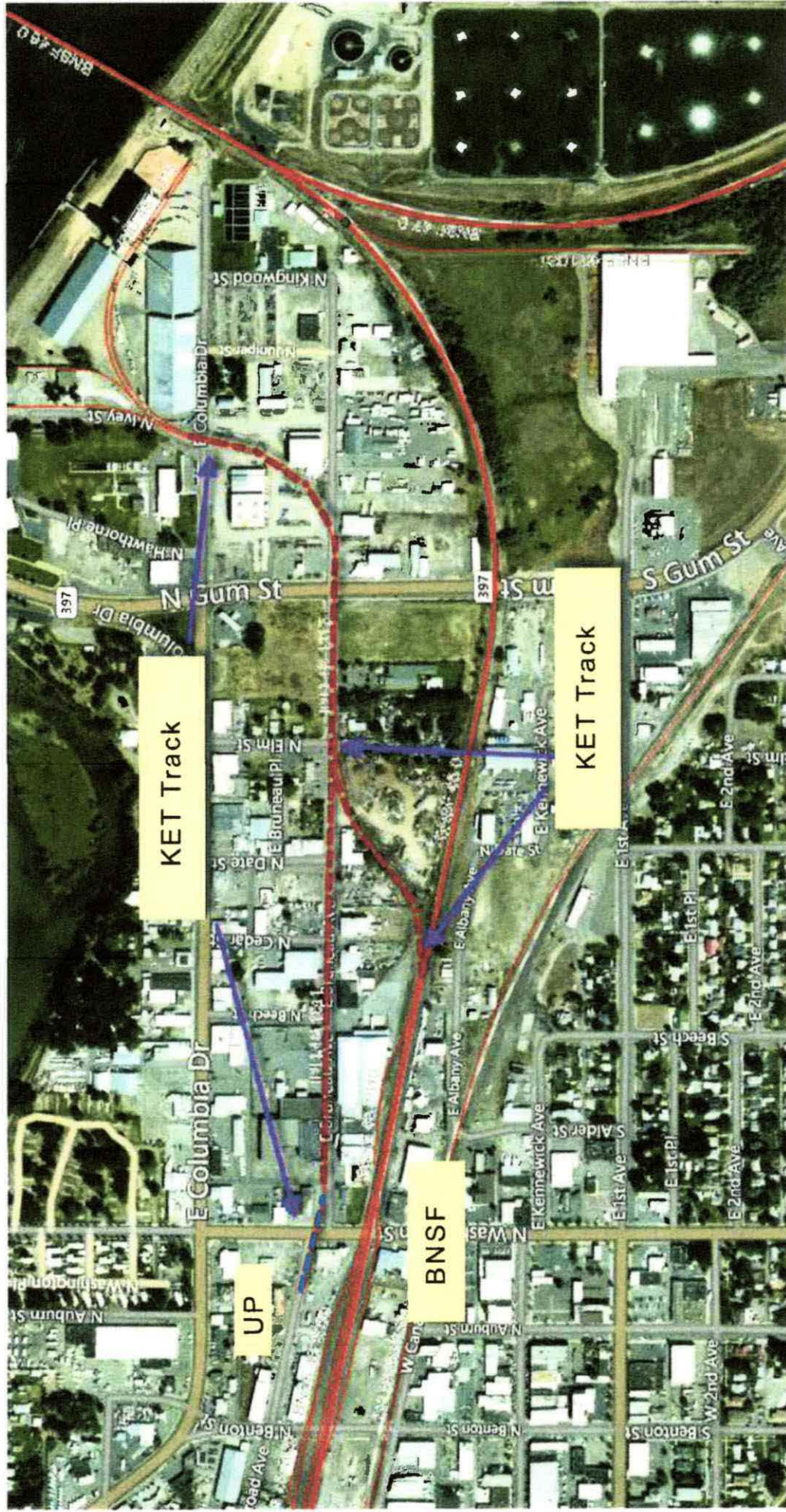

Paul Didelius

Exhibit A

Kennnewick



425 E Bruneau Ave
Kennewick, Washington

Google

Street View







KET route to line of UP

Former location of removed 2nd / TCM East driveway

Current location of KET switch between UP/BNSF connections

Current / West (un-licensed) TCM driveway

Former location of turnout to TCM spur (owned and removed by KET)

Elm St. - public ROW (subject to re-opening to TCM Elm St. gate)

KET route to line of BNSF

Location of the 90' of TCM spur track (outside of TCM fence), missing per KET error



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703-863-9670

March 4, 2020

Elissa Boyd
Betts Patterson Mines
111 SW 5th Avenue, Suite 3650
Portland, OR 97204

RE: Rail Track Dispute with Twin City Metals

Dear Ms. Boyd:

This letter is in reference to the ongoing dispute between Twin City Metals, Inc. ("TCM") and KET LLC ("KET") or Paul Didelius regarding the removal of certain spur track, a switch, and a grade crossing near 455 E. Bruneau Street in Kennewick, WA. These items were all installed and paid for by TCM. Mr. London retained me to review this situation in light of the various violations of federal law committed by KET subject to the jurisdiction of the United States Surface Transportation Board ("STB"). I served as Chairman of this agency from 2009-17.

As background, on May 7, 2018, KET removed part of TCM's private spur track. KET also removed the switch that connected the spur to KET's line on E. Bruneau Street. The removal of the track and switch eliminated TCM's ability to receive railcars arriving from the main rail line to the south via KET's rail line.

In addition, at a later date, KET performed additional work on the track along E. Bruneau St. that destroyed a grade crossing. This grade crossing had permitted vehicles to cross the KET track and access TCM's property.

On May 8, 2018, KET sent TCM a note acknowledging KET's removal of this track. KET stated that certain removed track belongs to TCM and certain track and the switch belong to KET. KET also noted that it would be willing to replace the switch and any track on KET property if TCM expressed an interest.

After careful review of the facts, KET has violated several federal statutes that are subject to the jurisdiction of the STB. First, railroads are required to provide transportation or service upon reasonable request. 49 U.S.C. § 11101(a). As a general matter, a railroad may not refuse a request for its service, so long as the request is reasonable. The STB can resolve a service dispute, such as whether a particular service request is reasonable, and can order a railroad to provide reasonable service. 49 U.S.C. §§ 11701, 11702(3). By removing TCM's switch and consequently eliminating its rail service, KET has clearly violated its common carrier obligation to provide rail service to TCM.

Moreover, a railroad's practices relating to its common carriage transportation must be reasonable. 49 U.S.C. §§ 10702(2), 10704(a). Clearly, KET's unilateral removal of TCM's switch, crossing, and spur track are unreasonable and violate this statute.

Finally, upon request, a railroad must provide a switch connection to shipper-owned track. 49 U.S.C. § 11103(a). If a rail carrier fails to install and operate a switch connection after such a request, the shipper may file a complaint with the STB under § 11701. *Id.* at (b).

Instead of litigating these clear violations of the Interstate Commerce Act before the STB, TCM asks KET to replace the switch, crossing, and spur track that it has removed. This path will benefit TCM by providing it with rail service and KET by bringing in new revenues. Please let me know how KET intends to proceed by March 20. My contact information is above.

Sincerely,

Daniel R. Elliott

David P. Rossmiller

drossmiller@bpmlaw.com

*Licensed in Oregon, Washington, Idaho,
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Elissa M. Boyd

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*Licensed in Oregon, Washington,
and Pennsylvania*

March 31, 2020

ER 408 COMMUNICATION

VIA E-MAIL

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

Re: *KET, LLC and Twin City Metals, Inc.*

Dear Mr. Elliott:

This letter responds to your correspondence of March 4, 2020. You state that Mr. London retained you to “review this situation.” Regarding your conclusions and the allegations made in your letter, KET, LLC vigorously disagrees. Although KET will not provide a point-for-point response, a few statements you made do need to be addressed.

First, historically there were two private grade crossings over KET’s track and into Twin City’s property and one remains. Therefore, Twin City Metals did not lose access to its property when KET performed necessary work on the tracks which included removing the second crossing due to engineering considerations. Additionally, Twin City Metals has already benefited from the

remaining crossing, which has to date been un-permitted, being recently rebuilt by KET with no billing to date to Twin City Metals. Further, as you know, the U.S. DOT encourages parties to eliminate crossings and there is no requirement for a railroad to maintain an unlicensed crossing like the one that was removed.

Second, your letter also states that Twin City Metals installed and paid for the switch that was removed during the straight-railing of the track. In the telephone call between our clients and the Surface Transportation Board, your client stated that they “rebuilt” the switch in 2011. However, based on the state of the switch at the time it was removed, it is more likely that the prior owner of the line required Twin City Metals to pay only for some minor repairs at that time. No matter what Twin City Metals paid for, however, KET had the right in this instance to remove a switch on its tracks. Your letter also states that the removal of the switch eliminated Twin City Metals’ “ability to receive railcars arriving from the main rail line.” Rail carriers are not required to maintain unused switches on their property just because the switch might be used at some future date. According to Twin City Metals, it shipped a handful of cars over the switch in 2012 and to KET’s knowledge, no other cars have been shipped using the switch since that time.

The above being said, as the parties have been going back and forth for some time regarding the history of the matter, it seems the path to a solution does not lie in pointing fingers, quoting statutes or discussing legal arguments but in discussing the parties’ needs/wants/options going forward. Therefore, if your email of March 20, 2020 is suggesting that the only solution acceptable to Twin City Metals is one where KET pays to install both a second crossing and a new switch, then we are at an impasse as this is a non-starter for KET.

However, based on comments by your client to Paul Didelius on the call they shared with the STB, it seems Twin City Metals’ real interest is in obtaining a second crossing over the KET rail and into the Twin City Metals property. KET has stated that it is willing to install a second crossing into Twin City Metals’ property, but that this is conditioned on (1) grade crossing agreements being entered into for both the desired new crossing and the currently existing crossing, and (2) the existing crossing being brought up to an acceptable condition by converting it into a permanent crossing. As a former STB employee, I am sure you can appreciate the necessity of these conditions. I am sure you also understand that it is the standard in the industry that crossing installation costs are borne by the applicant. However, as earlier communications have indicated, KET is willing to bear half of the cost to upgrade the existing crossing due to the inadvertent removal of the railroad ties on Twin City Metals’ property. This offer was made contingently upon (1) KET performing the installation, and (2) Twin City Metals agreeing that reinstallation of the railroad ties need not occur. However, the responsibility for the cost of installing a second crossing remains with Twin City Metals, in accordance with the industry standard.

Daniel Elliott
March 31, 2020
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Mr. Didelius of KET has visited the property in order to begin the process of pricing the work for the potential new crossing. With the uncertain times we are currently in, it has taken some time to have the cost of the work estimated. A rough estimate is that the installation of a grade crossing will be \$20,000, but KET agrees that if the cost as performed was much lower, KET would bill Twin City Metals the actual cost instead of the estimated amount. Further, due to engineering requirements, the potential new crossing would have to be placed slightly west of the location of the removed crossing. This would mean that the Twin City Metals east gate – which is currently closed because there is no crossing – would have to be moved slightly to the west to match. The new crossing would then be one crossing but of two tracks to keep the crossing out of the switch area. And of course, any cost of renewal for the crossings at a later time would also have to be borne by Twin City Metals.

Regarding the crossing agreements for the two crossings, KET will put its crossing permitting firm in touch with you in order to have the agreements drawn up regarding the two crossings.

Again, as to the straight-railing of the track switch owned by KET that took place in 2018, this was necessitated by the engineering of the rail line as it was repaired and kept in a safe condition. At the time, it was not in KET's budget to replace a switch that Twin City Metals stated, when asked at the time, was not going to be used. Of course, 49 U.S.C. § 11103(c), if it applies at all, states that the shipper must demonstrate that it "will furnish sufficient business to justify [a switch's] construction and maintenance." This condition simply is not met. If Twin City Metals *is* interested in guaranteeing rail service, as a preliminary next step, it should engage either the Union Pacific Railroad or BNSF Railway, as they currently provide the retail service and car supply at this location.

Yours very truly,

A handwritten signature in black ink that reads "David Rossmiller". The signature is written in a cursive, slightly slanted style.

David P. Rossmiller