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

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

Dear Ms. Brown:

Hereby transmitted is a Reply in Opposition to Motions to Dismiss for filing with the
Board in the above referenced matter.

Very truly yours,

/s/ Thomas F. McFarland

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

TMcf:mg:1882\efSTB3

cc: All parties of record
Rydel Peterson, Esq.

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

REPLY IN OPPOSITION TO MOTIONS TO DISMISS

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DATE FILED: May 15, 2020

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

REPLY IN OPPOSITION TO MOTIONS TO DISMISS

Pursuant to 49 C.F.R. § 1104.13(a), TRI-CITY RAILROAD COMPANY, LLC (TCRY) hereby replies in opposition to Motions to Dismiss TCry's Petition filed by the Port of Benton, WA (the Port), Union Pacific Railroad Company (UP), and BNSF Railway Company (BNSF), on April 30, 2020.^{1/}

I. PREFACE

Motions to Dismiss are generally disfavored. *Olin Corporation v. Union Pacific R. Co.*, 2019 WL 4787951 at *2 (Docket No. NOR-42164, decision served September 30, 2019); *N. Am. Freight Car Ass'n v. Union Pacific R. Co.*, 2015 WL 9301409 at *2 (Docket No. NOR-42144, decision served December 21, 2015).

A Motion to Dismiss is not to be granted unless the Board finds that a Complaint or Petition does not state reasonable grounds for investigation and action. *BNSF Ry. Co. -- Terminal Trackage Rights -- Kansas City Southern Ry. Co. and Union Pacific R. Co.*, 2018 WL

^{1/} The Board has permitted TCry's rail service to be discontinued, but has not required such discontinuance. By virtue of its lease of the rail line from the Port, TCry continues to be authorized to provide rail service to shippers on the line. TCry has strenuously opposed the Port's attempt to require such discontinuance by means of termination of the lease for cause.

2045087 at *5 (Finance Docket No. 32760 (Sub-No. 46, Decision No. 4, served May 1, 2018).

When reviewing a Motion to Dismiss, the Board views the allegations in a light most favorable to the Complainant or Petitioner. *Central Valley Ag. Grinding, Inc. v. Modesto & Empire*

Traction Co., 2018 WL 3588734 at *3 (Docket No. NOR-42159, decision served July 25, 2018).

II. REPLY IN OPPOSITION TO MOTIONS TO DISMISS

A. Alleged Absence of Standing

Motions to Dismiss are even more disfavored when the alleged ground for dismissal is lack of standing, as it is here. “Because the Commission (Board) is an administrative agency and does not act in a strictly judicial capacity, Simmons is correct in stating that we do not exclude parties for lack of standing.” *Missouri Pacific R. Co. -- Abandonment -- in Douglas, Champaign, and Vermilion Counties, IL*, 1994 WL 597813 at *3 (ICC Docket No. AB-3 [Sub-No. 103], decision served November 3, 1994) (“Missouri Pacific”).

As parties seeking Board relief, the Port, UP, and BNSF have the burden to establish that the Motions should be granted for lack of standing. They have not sustained that burden. Notably, the Movants acknowledge that the Board is not bound by principles of standing developed by the Courts (“(t)he Board does not require strict judicial standing”, UP Motion at 2, *see also*, BNSF Motion at 6).

The Movants have failed to challenge the applicability of decisions cited by TCRY that support its standing. One such decision is *Missouri Pacific, supra*. The ICC there found that a representative of a railroad labor union had sufficient standing to advance the interests of shippers who might want rail service over the subject rail line in the future. *Id.*, 1994 WL 597813 at *2-3.

Another such decision is *Diana del Grosso, et al. -- Petition for Declaratory Order*, 2014 WL 6852990 (Finance Docket No. 35652, decision served December 5, 2014), where the Board found that residents located near a bulk transloading facility had sufficient standing in order to understand whether state and local or federal laws govern. (2014 WL 6852990 at *2).

Yet another such decision is *Conrail --Abandonment of Portion of the West 30th Street Secondary Track in New York City, NY*, 1988 WL 225779 at *5 (ICC Docket No. AB-167 [Sub-No. 493N], decided January 29, 1988), where the ICC found that opponents of withdrawals of an abandonment application had sufficient standing for their opposition by virtue of their extensive participation in the proceeding for several years and their interest in disposition of the rail line (1988 WL 225779 at *5).

Moreover, the decisions cited by the Movants themselves do not support dismissal of TCRY's Petition. Thus, the Motion to Dismiss was denied in *Western Coal Traffic League v. Union Pacific R. Co.*, 1999 WL 233659 (Finance Docket No. 33726, decision served April 22, 1999), cited in the BNSF Motion at 6).

Opposition to a Petition for Leave to Intervene, not a Motion to Dismiss, was involved in *North Carolina R. Co. -- Petition to Set Trackage Rights Compensation -- Norfolk Southern Ry. Co.*, 1997 WL 283654 (Finance Docket No. 33134, decision served May 29, 1997), cited in BNSF's Motion at 6. The Petitions for intervention in that case were granted over the rail carrier's opposition. *Id*, 1997 WL 283654 at *2.

State of South Dakota -- Adv. Discon. of Oper. Auth -- Napa-Platte Regional Railroad Authority, 2018 WL 3153713 (Docket No. AB-1253, decision served June 27, 2018), cited in

BNSF's Motion at 6, not only did not involve a Motion to Dismiss, it did not involve opposition to Board action of any kind.

James Riffin, d.b.a. North Central Railroad -- Acq. & Oper. Exemption -- in York County, PA, 2005 WL 420419 at *4 (Finance Docket No. 34501, decision served February 23, 2005), cited in the Port's Motion at *2, and n. 2, supports TCRY's position, not the Port's. In that case, the North Central Railroad (NCR) alleged that the State of Maryland lacked standing to allege that Riffin's Notice of Exemption contains false and misleading information. In rejecting that allegation, the Board said (at *4):

...We disagree. Administrative agencies are not bound by the strict requirements of standing that otherwise govern judicial proceedings. . .

Mexirail, Inc. v. Union Pacific R. Co., 1994 WL 643473 (Finance Docket No. 32468, decision served November 17, 1994), cited in the Port's Motion at 5, did not involve a determination that an entity lacked standing to raise an issue, but instead involved a narrow dispute over whether an entity qualified as an owner to raise issues related to an agreement that implemented a provision The Bridge Act of March 23, 1906. That decision does not bear on any issue raised in the Motions.

Based on the foregoing, the Movants have failed to sustain their burden to establish that TCRY's Petition should be dismissed based on lack of standing.

Although under Board case law TCRY is not required to affirmatively prove its standing when its opponents have failed to prove a lack of standing, TCRY demonstrated its standing at page 8 of the Petition. TCRY has standing to seek modification of the involved Trackage Rights Agreement (TRA) as lessee of the Port because TCRY is responsible for maintenance costs under its Lease Agreement with the Port. As to maintenance costs, TCRY, not the Port, is the

real party in interest with standing to undo the inequity of refusal of BNSF and UP to pay their fair share of maintenance costs.

B. Granting The Petition Would Provide The Required Relief

Currently, UP and BNSF derive all of the very substantial revenues from operating over the Southern Connection but pay nothing for use of that rail line in maintenance costs.

Conversely, TCRY does not derive any of such revenues while bearing all of the large amount of maintenance costs. That scenario is unjust and unreasonable in the extreme. BNSF and UP transported more than 11,000 carloads over the Southern Connection in 2019.

If the Petition were to be granted, the revenues for transporting traffic over the Southern Connection would be aligned with the corresponding cost of maintaining that line. BNSF and UP would be obligated to pay their fair share of costs to maintain the Southern Connection. That is well-known longtime custom and practice in the railroad industry.

TCRY would greatly benefit by no longer being obligated to bear the substantial cost of maintaining the line without an offset by corresponding revenues.

Moreover, the relief sought in the Petition would pave the way for TCRY to assess a reasonable charge payable by BNSF and UP for their use of the Southern Connection. Currently, Paragraph 7.1 of the Port-TCRY Lease Agreement authorizes TCRY to assess a reasonable charge for use of the Southern Connection if:

- (1) the Port agrees that the charge is reasonable; and
- (2) the charge would not be inconsistent with any agreement between the Port and UP-BNSF.

The Port has agreed that a charge of \$95 per car proposed for use of the Southern Connection would be reasonable. Heretofore, that charge was deemed to be inconsistent with provisions in Paragraph 7.4 of the Lease Agreement that provides that TCRY will not take any action that would amend, modify, terminate, or invalidate any existing agreement between the Port and UP-BNSF. The provision in the TRA that UP-BNSF would not be charged for their use of the rail line is such a provision. A grant of TCRY's Petition would end free use of the line by UP-BNSF in the TRA, thereby enabling TCRY to assess a reasonable use charge.

C. Miscellaneous Contentions

Issues raised by the Port at pages 6 and 7 of its Motion are easily refuted. Modification of a TRA that was initially authorized by the Board is a matter squarely within the jurisdiction of the STB (*see* the numerous authorities in support of that proposition at page 7 of TCRY's Petition). That matter is not pending before any State Court. The issues raised by TCRY's Petition relate to Modification of the TRA, not TCRY's maintenance obligations under the Lease Agreement, as alleged by the Port at page 7 of its Motion.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated in this Reply and in TCRY's Petition, the Board should modify the TRA in the following respects:

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

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

Respectfully submitted,

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DATE FILED: May 15, 2020

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2020, I served the foregoing Reply in Opposition To

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